



# Russian Federation v. Server Mustafayev and Others

April 2021

**TRIALWATCH FAIRNESS REPORT**  
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## ABOUT THE AUTHOR:

**Human Rights Embassy** is an international human rights nongovernmental organization based in Moldova and operating throughout the countries of the former Soviet Union and Europe. The organization's mission is to contribute to the promotion of and respect for human rights worldwide. To achieve this goal, Human Rights Embassy undertakes professional development trainings of judges, prosecutors, lawyers, and police officers; human rights trainings for NGOs and mass-media; trial monitoring; strategic litigation; solidarity campaigns for the protection of human rights lawyers/defenders; awareness raising campaigns; and advocacy.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** is focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

# EXECUTIVE SUMMARY



From November 15, 2019 to September 16, 2020, Human Rights Embassy – an international human rights NGO – monitored the joint trial of Server Rustemovich Mustafayev, Ernes Seyarovich Ametov, Marlen Rifatovich Asanov, Memet Reshatovich Belyalov, Server Zekievich Zekiryayev, Timur Izetovich Ibragimov, Seyran Alimovich Saliev, and Edem Nazimovich Smailov before the Southern District Military Court in the Russian Federation as part of the Clooney Foundation for Justice’s TrialWatch initiative. Mustafayev is a well-known activist and the coordinator of Crimean Solidarity, a civil society group that supports individuals arrested and otherwise targeted by the Russian authorities in the Crimean peninsula. The proceedings against the men violated their fair trial rights and other human rights, including the right to be presumed innocent, the right to participate in the proceedings and to defend themselves, the right to call and examine witnesses, and the right to be free from unlawful and arbitrary detention. The Military Court of Appeal of Vlasikha should overturn their conviction on the basis of these violations and order that the men be released immediately.

All eight of the defendants are Crimean Tatars, practicing Muslims, and human rights activists. Mustafayev and Smailov were arrested during raids on their homes in Crimea on May 21, 2018, while the other six men were arrested in similar raids on October 11, 2017.<sup>1</sup> Following their arrests, the Kiev District Court of Simferopol imposed pretrial detention.<sup>2</sup> Subsequently, the Southern District Military Court in Rostov-on-Don ordered the transfer of the men from Crimea to the territory of the Russian Federation.<sup>3</sup>

The prosecution charged each man with two offenses under the Russian Criminal Code – “preparation for a forcible seizure of power or forcible retention of power”<sup>4</sup> and “organising”<sup>5</sup> or “participating”<sup>6</sup> in the activities of a terrorist organization, each carrying a prison sentence of up to 20 years. Various courts granted repeated prosecution requests for extensions of pre-trial detention for all eight defendants, who remained in custody from the time of their arrests through the conclusion of the first instance trial in September 2020.

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<sup>1</sup> Human Rights Center MEMORIAL, “Bakhchisarai case of the eight on membership in the banned ‘Hizb ut-Tahrir.’” Available at <https://memohrc.org/ru/special-projects/bahchisarayskoe-delo-vosmeryh-ochlenstve-v-zapreshchyonnoy-hizb-ut-tahrir?page=2>.

<sup>2</sup> See id.

<sup>3</sup> See id.

<sup>4</sup> Criminal Code of the Russian Federation, Article 278, in conjunction with Article 30(1) (“preparation” mode of liability).

<sup>5</sup> Criminal Code of the Russian Federation, Article 205.5(1) (Organization). Asanov, Belyalov, and Ibragimov were charged under this sub-article.

<sup>6</sup> Criminal Code of the Russian Federation Article 205.5(2) (Participation). Mustafayev, Ametov, Zekiryayev, Saliev, and Smailov were charged under this sub-article.

On November 15, 2019, the proceedings against Mustafayev and his co-defendants commenced before the Southern District Military Court in Rostov-on-Don.<sup>7</sup> A three-member judicial panel heard the case, presided over by Judge Rizvan Abdullaevich Zubairov.<sup>8</sup>

The prosecutor, Colonel Evgeny Sergeevich Kolpikov, based the charges on allegations that the defendants belonged to Hizb-ut-Tahrir (HuT), an Islamic political party that is considered a terrorist organization in the Russian Federation and banned by virtue of a 2003 Supreme Court decision.<sup>9</sup> Neither Ukraine nor the United States consider HuT a terrorist organization: indeed, HuT is committed to non-violence.<sup>10</sup>

In support of its case, the prosecution presented evidence of HuT publications banned by the Russian authorities that were allegedly seized at the defendants' homes during the raids;<sup>11</sup> secretly taped audio recordings of the men speaking at a mosque they attended, which according to a prosecution "expert" report demonstrated that the men were conducting furtive HuT meetings; and testimony from two anonymous witnesses who claimed to have participated in these secret HuT meetings with the defendants.<sup>12</sup> At no point during the trial did the prosecution or its witnesses provide evidence that any of the eight defendants had planned or carried out specific acts of violence or that any of the defendants possessed or were attempting to acquire weapons.

Mustafayev and the other seven men pled not guilty to the charges, pointing to the prosecution's lack of relevant evidence with respect to the acts charged, highlighting the incoherence of the 1500-page indictment, and arguing that the charges were brought in order to punish and silence them for their activist work.<sup>13</sup> The trial proceedings took place

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<sup>7</sup> Monitor's Notes, November 15, 2019.

<sup>8</sup> *Id.*

<sup>9</sup> See Russian Federation National Antiterrorism Committee, Unified Federal List of Organizations, Including Foreign and International, Designated as Terrorist by the Courts of the Russian Federation. Available at <http://en.nac.gov.ru/node/950.html>. The Supreme Court decision has faced criticism for outlawing many organizations without adequate justification as to the nature of their activities. For example, in 2016, four prominent Russian human rights groups issued a joint statement that criticized the Supreme Court decision with respect to Hizb-ut-Tahrir as "unlawful," since in their view neither the organization's literature nor its practice or activities provided any suggestion as to its involvement in terrorism. See Memorial Human Rights Center, Civic Assistance Committee, SOVA Center for Information and Analysis, and Institute of Human Rights, "On the Persecution of Rustem Latypov", February 16, 2016. Available at <https://refugee.ru/news/o-presledovanii-rustema-latypova/>.

<sup>10</sup> See The Brookings Project on U.S. Policy Towards the Islamic World, "The U.S., Hizb-ut-Tahrir, and Religious Extremism in Central Asia", 2016. Available at <https://www.brookings.edu/wp-content/uploads/2016/06/khamidov20030701.pdf>.

<sup>11</sup> Monitor's Notes, January 28, 2020; Monitor's Notes, February 7, 2020; Monitor's Notes, February 10, 2020; Monitor's Notes, February 18, 2020; Monitor's Notes, May 18, 2020; Monitor's Notes, May 19, 2020.

<sup>12</sup> Monitor's Notes, February 25, 2020; Monitor's Notes, February 26, 2020; Monitor's Notes, February 27, 2020; Monitor's Notes, February 28, 2020; Monitor's Notes, March 2, 2020; Monitor's Notes, March 3, 2020; Monitor's Notes, March 4, 2020 (anonymous witness "Ismailov"); Monitor's Notes, June 9, 2020; Monitor's Notes, June 10, 2020; Monitor's Notes, June 11, 2020; Monitor's Notes, June 15, 2020; Monitor's Notes, June 16, 2020 (anonymous witness "Bekirov").

<sup>13</sup> Monitor's Notes, November 19, 2019.

over a total of 72 hearings between November 2019 and September 2020. On September 16, 2020, the Southern District Military Court pronounced Mustafayev and six of his co-defendants guilty of the charged crimes, sentencing them to cumulative terms between 13 and 19 years in a strict regime correctional colony, with additional probation periods between one and one and a half years.<sup>14</sup> One man was acquitted, with the court finding that he had been a member of HuT along with the other defendants but “voluntarily withdrew” from the organization’s activities in August 2017.<sup>15</sup>

The trial entailed severe rights violations at both the pretrial and trial stages. The proceedings against the men were unlawful from the outset: they were brought in violation of international humanitarian law, with the authorities applying Russian criminal law in occupied Crimea and transferring Ukrainian citizens to Russian territory for detention and trial. In addition, the detention of all eight defendants, with most having been deprived of liberty for three years at the time of conviction, was both unlawful and arbitrary. Finally, the trial itself was characterized by repeated abuse of the defendants’ fair trial rights, such as the use of anonymous witnesses without objective justification or counterbalancing procedural safeguards; denial of the defense’s right to cross-examine prosecution witnesses and call its own witnesses; and violation of the defendants’ right to be presumed innocent – namely, an inadequately reasoned convicting verdict based on little to no relevant evidence.

The following analysis is based upon the requirements of binding international treaties to which the Russian Federation is party, including the Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). In order to fulfill its obligations under the above treaties, the Russian Federation must overturn the men’s convictions and ensure their immediate release. In addition, the Russian authorities must cease to apply Russian criminal law in occupied Crimea and stop the illegal transfer of Ukrainian citizens to Russian territory.

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<sup>14</sup> Monitor’s Notes, September 16, 2020. See also Southern District Military Court, First Instance Judgment, September 16, 2020, pgs. 40–41 (unofficial English translation).

<sup>15</sup> Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 35 (unofficial English translation).





## A. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND PUNISHMENT WITHOUT LAW

From the outset, the criminal charges against Mustafayev and his co-defendants violated fundamental provisions of international humanitarian law (the laws of war). Specifically, Russia's application of its own criminal legislation in occupied territory constitutes a violation of Article 64 of the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), which expressly provides that "[t]he 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."<sup>16</sup>

Notwithstanding the Russian Federation's claims to the contrary, the Crimean Peninsula legally remains Ukrainian territory under Russian occupation, as recognized by an overwhelming majority in the UN General Assembly and by many other international bodies.<sup>17</sup> Indeed, Russia has been subject to international sanctions as a result of the occupation, with, among others, the European Parliament and NATO calling on the Russian authorities to restore complete territorial integrity to Ukraine.<sup>18</sup> Meanwhile, authoritative sources have exhaustively documented systematic rights violations against Crimean residents by the occupying Russian authorities.<sup>19</sup> Four inter-state cases lodged

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<sup>16</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 64. The two exceptions to this requirement – the cancelation of laws that “concern[] recruiting or urging the population to resist the enemy” and “any discriminatory measures incompatible with humane requirements” – plainly do not apply in this case. As noted in the 1958 commentary to the Convention, “These two exceptions are of a strictly limitative nature. The occupation authorities cannot abrogate or suspend the penal laws for any other reason -- and not, in particular, merely to make it accord with their own legal conceptions.” International Committee of the Red Cross, Commentary to the IV Geneva Convention Relative to the Protection of Civilians in Time of War, 1958, pgs. 335–336. Available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf).

<sup>17</sup> See, e.g., United Nations General Assembly, Resolution 68/262: Territorial integrity of Ukraine, U.N. Doc. A/RES/68/262, April 1, 2014. See also, e.g., European Parliament, European Parliament resolution of 18 July 2019 on Russia, notably the situation of environmental activists and Ukrainian political prisoners, 2019/2734(RSP), July 18, 2019. Available at [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0006\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0006_EN.html); European Union External Action Service, Statement by the Spokesperson on human rights violations against and the illegal detention of Crimean Tatars by the Russian Federation, March 30, 2019. Available at [https://eeas.europa.eu/headquarters/headquarters-homepage/60408/statement-spokesperson-human-rights-violations-against-and-illegal-detention-crimean-tatars\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/60408/statement-spokesperson-human-rights-violations-against-and-illegal-detention-crimean-tatars_en); North Atlantic Treaty Organization, Statement by the North Atlantic Council on Crimea, Press Release (2019) 039, March 18, 2019, Available at [https://www.nato.int/cps/en/natohq/news\\_164656.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/news_164656.htm?selectedLocale=en).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Office of the United Nations High Commissioner for Human Rights, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), 2017. Available at [https://www.ohchr.org/Documents/Countries/UA/Crimea2014\\_2017\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf); UN Human Rights Council, Report on the human rights situation in Ukraine 16 February to 15 May 2019, U.N. Doc A/HRC/41/CRP.2, June 25, 2019. Available at [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A\\_HRC\\_41\\_CRP.2.d](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_CRP.2.d)

by Ukraine against Russia relating to human rights abuses in occupied Crimea and eastern Ukraine are currently pending before the European Court of Human Rights, in addition to thousands of related individual applications.<sup>20</sup> One pending inter-state case specifically concerns politically motivated prosecutions and related rights violations carried out by the Russian authorities against Ukrainian citizens in occupied territory.<sup>21</sup>

Consistent with its broader pattern of rights violations in Crimea, the Russian authorities violated the Fourth Geneva Convention by charging Mustafayev and his co-defendants under the Russian Criminal Code and subjecting them to trial in a Russian court. Under Article 64 of the Fourth Geneva Convention, the authorities were obligated to apply Ukrainian law to the accused and to try the accused in Ukrainian courts. As noted above, HuT is not banned in Ukraine. This fact was raised repeatedly by the defendants throughout the trial and was consistently rejected by the court, including in its verdict.<sup>22</sup>

The illegality of the prosecution was also evident in the authorities' forcible transfer of the defendants, Ukrainian citizens, from occupied territory into Russian Federation territory, which is prohibited by Article 49 of the Fourth Geneva Convention. Article 49 states: "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,

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ocx; US Department of State, 2019 Country Reports on Human Rights Practices: Ukraine – Crimea, March 2020. Available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ukraine/crimea/>.

<sup>20</sup> As of December 2020, there were four inter-state cases brought by Ukraine against Russia pending before the European Court, in addition to over 7,000 individual applications in connection with these cases. See European Court of Human Rights Press Unit, "Q&A on Inter-State Cases", December 2020, pg. 3. Available at [https://echr.coe.int/Documents/Press\\_Q\\_A\\_Inter-State\\_cases\\_ENG.pdf](https://echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf).

<sup>21</sup> See European Court of Human Rights, Press Release, "New inter-State application brought by Ukraine against Russia", August 27, 2018. Available at [https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6172867-7998333&filename=New%20inter-](https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6172867-7998333&filename=New%20inter-state%20application%20brought%20by%20Ukraine%20against%20Russia.pdf)

[state%20application%20brought%20by%20Ukraine%20against%20Russia.pdf](https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6172867-7998333&filename=New%20inter-state%20application%20brought%20by%20Ukraine%20against%20Russia.pdf). ("The application concerns Ukrainian nationals arrested and prosecuted, and in some cases convicted, by the Russian Federation on charges of membership of organisations banned by Russian law, incitement to hatred or violence, war crimes, espionage and terrorism. The Ukrainian Government alleges violations of Articles 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights) of the Convention. According to them, the Russian Federation has adopted an administrative practice of suppressing the expression by Ukrainian nationals of political views favouring a return to the pre-2014 borders and penalising Ukrainian nationals' membership of certain organisations that are legal in Ukraine.") Id. at pg. 1.

<sup>22</sup> E.g., Monitor's Notes of January 14, 2020. In its convicting verdict, the court stated: "The argument of the defense about the extension of the provisions of the IV Geneva Convention for the Protection of Civilian Population in Time of War of August 12, 1949 to the defendants is unfounded, since the defendants are citizens of the Russian Federation, on the territory of which they committed the alleged crimes. For the same reasons, the assessment of the activities of the Hizb ut-Tahrir organization in Ukraine has no legal significance." Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 25 (unofficial English translation).

occupied or not, are prohibited, regardless of their motive.”<sup>23</sup> The European Union has voiced its objection to such transfers in the context of Russia’s actions in Crimea, including in the present case, emphasizing that the EU “does not recognise the enforcement of Russian legislation in Crimea and the city of Sevastopol as it is illegal under international law, nor the transfer of Ukrainian citizens from Crimea to courts in Russia.”<sup>24</sup>

In light of the above, the Russian authorities’ actions in transferring the accused from occupied Crimean territory to Russia and trying them under Russian law before a Russian tribunal violated Articles 49 and 64 of the Fourth Geneva Convention.

Given the unlawful application of Russian penal law, the men’s conviction under that legislation also constituted punishment without law. Article 15(1) of the ICCPR provides that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 7(1) of the ECHR contains identical wording. The basis of the terrorism and coup charges against the men was their alleged membership in the Hizb-ut-Tahrir party, which – again – is not illegal in Ukraine. Even assuming their membership in the organization had been established by the prosecution – which, as described below, is highly questionable – the men’s prosecution on the basis of belonging to a group that was legal in the jurisdiction where they were located is a plain violation of the ICCPR and ECHR.

## **B. UNLAWFUL AND ARBITRARY DEPRIVATION OF LIBERTY**

The ICCPR and ECHR both prohibit deprivation of liberty that is unlawful or arbitrary.<sup>25</sup> “Unlawful” detention is detention that is not in accordance with procedure established by domestic and relevant international law.<sup>26</sup> An assessment of arbitrariness, by contrast, incorporates “elements of inappropriateness, injustice, lack of predictability and due

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<sup>23</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 49. See also Human Rights Council, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), U.N. Doc. A/HRC/36/CRP.3, September 25, 2017, paras. 14, 117–118.

<sup>24</sup> See European Union External Action Service, Spokesperson statement on the sentencing of Crimean Tatars by a Russian court, September 18, 2020. Available at [https://eeas.europa.eu/headquarters/headquarters-homepage/85347/ukraine-spokesperson-statement-sentencing-crimean-tatars-russian-court\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/85347/ukraine-spokesperson-statement-sentencing-crimean-tatars-russian-court_en).

<sup>25</sup> ICCPR, Article 9(1); ECHR, Article 5(1).

<sup>26</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 44. See also European Court of Human Rights (Grand Chamber), Hassan v. the United Kingdom, App. No. 29750/09, September 16, 2014, paras. 104–105 (finding that “lawfulness” in the meaning of ECHR Article 5 must be interpreted in the light of applicable international obligations, including international humanitarian law.)



process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>27</sup> In this regard, pretrial detention “must be reasonable and necessary in all the circumstances.”<sup>28</sup> Because pretrial detention must be an individualized decision based on review of the reasonableness and necessity of detention pending trial, overly broad, vague, and expansive references such as the severity of the charges and “public security” are insufficient justification for detention.<sup>29</sup> Correspondingly, that a defendant is a foreigner is not sufficient to establish likelihood of flight.<sup>30</sup> As the Human Rights Committee has explained, “the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.”<sup>31</sup> A State must substantiate any concern of flight and explain “why it could not be addressed by setting an appropriate sum of bail.”<sup>32</sup>

The European Court’s jurisprudence makes clear that pretrial detention must be fully justified in the reasoning of the remanding court’s order; ongoing detention is considered justified “only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.”<sup>33</sup> The European Court has recognized four permissible justifications for imposing pretrial detention: to ensure that the accused appears at trial, to prevent attempts to influence the investigation or trial, to prevent further crimes, and to prevent public disorder.<sup>34</sup> However, in order to impose pretrial detention on any of these grounds, the domestic authorities are obliged to “establish and to demonstrate convincingly the existence of concrete facts relevant to the grounds for continued detention.”<sup>35</sup> The European Court has “frequently” found the Russian authorities in violation of Article 5 for “relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures.”<sup>36</sup> It has also

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<sup>27</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 12 (citing Human Rights Committee, *Gorji-Dinka v. Cameroon*, App. No. 1134/2002, para. 5.1); Human Rights Committee, *Van Alphen v. Netherlands*, App. No. 305/1988, para. 5.8).

<sup>28</sup> *Id.*

<sup>29</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, *M. and B. Hill v. Spain*, April 2, 1997, U.N. Doc. CCPR/C/59/D/526/1993, para. 12.3; *Torobekov v. Kyrgyzstan*, U.N. Doc. CCPR/C/103/D/1547/2007, November 21, 2011, para. 6.3; Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

<sup>30</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, *M. and B. Hill v. Spain*, April 2, 1997, U.N. Doc. CCPR/C/59/D/526/1993, para. 12.3.

<sup>31</sup> Human Rights Committee, *M. and B. Hill v. Spain*, April 2, 1997, U.N. Doc. CCPR/C/59/D/526/1993, para. 12.3.

<sup>32</sup> *Id.*

<sup>33</sup> European Court of Human Rights, *Dolgova v. Russia*, App. No. 11886/05, March 2, 2006, para. 44.

<sup>34</sup> European Court of Human Rights, *Khudobin v. Russia*, App. No. 59696/00, October 26, 2006, para. 104.

<sup>35</sup> European Court of Human Rights, *Dolgova v. Russia*, App. No. 11886/05, March 2, 2006, para. 45.

<sup>36</sup> See European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, para. 141.

found that collective extension of detention for multiple co-defendants, without individualized reasoning for each, constitutes an Article 5 violation.<sup>37</sup>

The pretrial detention of Mustafayev and his co-defendants was both unlawful and arbitrary. As described above, the charges against the accused had no basis in applicable domestic law. Therefore, their detention pursuant to those charges did not comply with a legislatively prescribed procedure, rendering it unlawful within the meaning of both the ICCPR and the ECHR.

The circumstances surrounding the lengthy pretrial detention of Mustafayev and his co-defendants also rendered it arbitrary. Since the initial arrests of Mustafayev and his co-defendants, neither the prosecution nor the courts issuing, extending, or upholding detention orders have provided “concrete facts” particular to each individual accused that would justify detention. The Kiev District Court of Simferopol based its initial detention order with respect to Mustafayev, for example, on factors such as the severity of the charges and his dual citizenship in Russia and Ukraine, failing to cite any specific indicators that he would interfere with the proceedings, flee, commit crime, or otherwise disturb public order, and pulling text directly from the Russian Code of Criminal Procedure:<sup>38</sup> the “stereotyped formulae” condemned by the European Court. Subsequently, in one of its requests for extension of detention during the trial, the prosecution offered no more justification for the measure than that the “circumstances ha[d] not changed” since the men’s initial remand.<sup>39</sup> Over the objections of the defense – which presented numerous arguments as to why continued detention was unwarranted – the court collectively extended the accused’s detention on the basis of the prosecution’s statement, absent any individualized analysis.<sup>40</sup>

Meanwhile, the appeals court repeatedly upheld the detention imposed by the trial court without providing concrete justification for its rulings:<sup>41</sup> “the judicial board of the military

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<sup>37</sup> See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, para. 137.

<sup>38</sup> See Supreme Court of the Republic of Crimea, *Appeal Ruling on Detention of S.R. Mustafayev*, June 14, 2018 (discussing the Kiev Court’s reasoning therein); Supreme Court of the Republic of Crimea, *Appeal Ruling on Detention of S.R. Mustafayev*, June 24, 2019 (discussing the Kiev Court’s reasoning therein).

<sup>39</sup> See, e.g., Monitor’s Notes, February 6, 2020 (saying, “The prosecutor submits a motion under Section 3 of article 255 of the Code of Criminal Procedure on the extension of custody. Earlier, the measure of restraint of custody was extended for three months. The deadline expires on February 13. He considers that the grounds for keeping the defendants in custody have not changed and have not gone away, there are no obstacles. Offers to extend the period for three months until May 13th.”); Monitor’s Notes, August 4, 2020 (the prosecutor asked for an extension with a similarly unsubstantiated request, which was granted).

<sup>40</sup> Monitor’s Notes, February 6, 2020.

<sup>41</sup> Monitor’s Notes, March 19, 2020; Monitor’s Notes, March 23, 2020 (appeal against detention order hearings); Monitor’s Notes, June 5, 2020; Monitor’s Notes, June 8, 2020 (appeal against detention order hearings) (From June 8 Monitor’s Notes: “Guided by Articles 389.13, 389.12, 389.28, 389.33 of the Code of Criminal Procedure of the Russian Federation, the judicial board of the military court of appeal has determined: to leave unchanged the ruling of the Southern District Military Court of 12 April 2020 in which the period of detention of the defendants (lists, without Ibragimov) was extended for 3 months, i.e. until 12

court of appeal has determined: the ruling of the Southern District Military Court of 12 April 2020 in which the period of detention of the defendants . . . was extended . . . to leave unchanged.”<sup>42</sup> By the end of the first instance trial, six of the defendants had been in detention for just under three years, and the remaining two in detention for two years and four months.

The absence of individualized, substantiated reasons given by the court in collectively remanding the defendants to detention, and the repeated extensions of detention without justification, rendered the detention arbitrary, in violation of the ICCPR and ECHR.

## **C. RIGHT TO BE PRESUMED INNOCENT**

The presumption of innocence is a cornerstone of the right to a fair trial. It requires that anyone accused of a crime be considered innocent until proven guilty in line with a prescribed procedure set forth by domestic law and in accordance with international law.<sup>43</sup> As stated by the United Nations Human Rights Committee, the presumption “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.”<sup>44</sup> The presumption of innocence encompasses the *in dubio pro reo* principle, under which a court must resolve remaining uncertainties at the conclusion of the presentation of evidence in the defendant’s favor.<sup>45</sup> The European Court has thereby held that “dismissing all evidence in the defendant’s favor without justification” violates the presumption of innocence, imposing “an extreme and unattainable burden of proof.”<sup>46</sup>

Correspondingly, a convicting verdict that is not sufficiently reasoned as to discrepancies and contradictions in the evidentiary record may contravene the presumption of innocence.<sup>47</sup> The European Court has held that “judgments of courts and tribunals should

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August 2020 inclusive.”); Monitor’s Notes, June 9, 2020 (extension appeal for Ibragimov confirmed as well, with no reasoning provided).

<sup>42</sup> Monitor’s Notes, June 8, 2020.

<sup>43</sup> ICCPR, Article 14(2) provides “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” ECHR, Article 6(2) provides the same. See also Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

<sup>44</sup> Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30. See also Human Rights Committee, Saidov v. Tajikistan, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4.

<sup>45</sup> See European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. Nos. 29580/12 & others, November 15, 2018, paras. 83–4 (quoting approvingly from relevant Chamber Judgment).

<sup>46</sup> See id (citing to its case law with similar findings).

<sup>47</sup> See, e.g., European Court of Human Rights, Ajdarić v. Croatia, App. No. 20883/09, December 13, 2011, paras. 46–52.

adequately state the reasons on which they are based,”<sup>48</sup> which includes an assessment of the reliability and accuracy of relevant evidence. In *Nechiporuk and Yonkalo*, for example, the European Court examined a case where the convicting court did not adequately address the defendant’s arguments that a key prosecution witness may have been coerced into his testimony.<sup>49</sup> In convicting the defendant on the basis of that testimony without explaining why it was credible and “ignoring a specific, pertinent, and important point” raised by the defense,<sup>50</sup> the court violated the presumption of innocence and, more broadly, the accused’s right to a fair trial.

In light of these standards, the conviction of Mustafayev and six of his co-defendants grossly violated their right to be presumed innocent. In its conclusory 40-page verdict, the Southern District Military Court failed to provide adequate reasoning for the finding of guilt, ignoring the absence of reliable inculpatory evidence; key contradictions in the testimonies of the prosecution’s witnesses; and specific and compelling complaints raised by the defense relating to, among other things, procedural irregularities during the searches of defendants’ homes.<sup>51</sup>

#### *Lack of Evidence*

The court convicted seven of the eight defendants notwithstanding the lack of evidence presented by the prosecution. With respect to the HuT charges, the court based its conclusion that the men were active participants in the organization primarily on the accounts of three prosecution witnesses: Federal Security Service (FSB)<sup>52</sup> officer Nikolai Artykbaev and two anonymous witnesses, code named “Ismailov” and “Bekirov.” None of these witnesses provided specific, reliable evidence as to the accused’s HuT membership and their testimony was rife with discrepancies.

The first prosecution witness, Nikolai Artykbaev, testified about the operations of HuT in Crimea and his wiretapping of conversations between the defendants in the local mosque, which he asserted demonstrated that they were members of HuT. Artykbaev, however, answered “I don’t know” to hundreds of defense questions on cross-examination, failing to substantiate his claims that the defendants belonged to HuT. Artykbaev, for example, refused to provide details as to his sources, referring repeatedly to “state secrets” and

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<sup>48</sup> See European Court of Human Rights, *Nechiporuk and Yonkalo v. Ukraine*, App. No. 42310/04, April 21, 2011, para. 272.

<sup>49</sup> See *id.*, paras. 277–281.

<sup>50</sup> See *id.*, para. 280; see also European Court of Human Rights, *Rostomashvili v. Georgia*, App. No. 13185/07, November 8, 2018, paras. 59–60.

<sup>51</sup> The defense raised all of these issues and many others during closing arguments. See Monitor’s Notes, September 1, 2020; Monitor’s Notes, September 3, 2020; Monitor’s Notes, September 7, 2020; Monitor’s Notes, September 8, 2020; Monitor’s Notes, September 9, 2020; Monitor’s Notes, September 10, 2020.

<sup>52</sup> The FSB is responsible for internal security of the Russian Federation, counterintelligence, and the fight against organized crime, terrorism, and drug smuggling.

citing vague security concerns.<sup>53</sup> He likewise refused to answer defense questions on the particular circumstances of the defendants' alleged activities, continuously stating: "all the information is in the case file."<sup>54</sup>

Nonetheless, Artykbaev's testimony formed an important part of the court's convicting verdict. According to the court, Artykbaev helped establish that a HuT cell existed in the relevant community at the time of the alleged offenses and that all eight defendants were members:

Witness Artykbaev, an officer of the FSB of Russia in Sevastopol, Republic of Crimea, testified in court that in 2016, in Bakhchisaray, Republic of Crimea, the activities of the Hizb ut-Tahrir cell were proven and that that the cell consisted of its leaders Asanov, Belyalov and Ibragimov, as well as its participants Ametov, Zekiryaev, Mustafayev, Saliev and Smailov. As part of the operational-search activities (hereinafter - OSA), using audio recording devices, secret classes ("sukhbets") of the named terrorist organization, held in the premises of the mosque located in the 6th microdistrict of Bakhchisaray, were documented in which the listed persons took part.<sup>55</sup>

The testimony of the anonymous witnesses raised similar concerns regarding their knowledge and credibility. Although both Ismailov and Bekirov attested that they were present for multiple HuT meetings along with the defendants, they responded "I don't know" and "I don't remember" numerous times to defense questions aimed at ascertaining details of the meetings, when and where they took place, who spoke about what, and other basic details.<sup>56</sup>

Bekirov's credibility was further undermined when, notwithstanding his claims to have been an active member of Hizb-ut-Tahrir – which was the basis of his alleged knowledge about the defendants' activities in the organization – he could not answer fundamental questions about the party's goals, leadership, and procedures. For example, Bekirov was unable to recall the full name of HuT or how it is translated;<sup>57</sup> was unable to clearly explain how one becomes a member of HuT, stating vaguely that "certain people work with you

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<sup>53</sup> E.g., Monitor's Notes, December 16, 2019.

<sup>54</sup> E.g., Monitor's Notes, December 23, 2019; Monitor's Notes, December 24, 2019; Monitor's Notes, January 14, 2020; Monitor's Notes, January 15, 2020; Monitor's Notes, January 20, 2020; Monitor's Notes, January 27, 2020.

<sup>55</sup> Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 5 (unofficial English translation).

<sup>56</sup> See, e.g. Monitor's Notes, February 25, 2020; Monitor's Notes, February 26, 2020; Monitor's Notes, February 27, 2020; Monitor's Notes, February 28, 2020; Monitor's Notes, March 2, 2020; Monitor's Notes, March 3, 2020; Monitor's Notes, March 4, 2020 (cross-examination of Ismailov); Monitor's Notes, June 11, 2020; Monitor's Notes, June 15, 2020; Monitor's Notes, June 16, 2020 (cross-examination of Bekirov).

<sup>57</sup> Monitor's Notes, June 11, 2020.



until you are a member” and “after studying . . . [unspecified] books”;<sup>58</sup> was unable to respond to the question “after a person becomes a member of Hizb-ut-Tahrir, what document is issued to him?”;<sup>59</sup> was unable to name the leader of HuT<sup>60</sup> or define key classifications in the HuT hierarchy;<sup>61</sup> and was unable to recall the topics or number of books he studied during his years as a purported member of HuT.<sup>62</sup>

As raised by the defense, the testimony of Ismailov and Bekirov gave rise to doubts as to whether they were personally familiar with the individual defendants at all. Both protected witnesses confused the names of defendants during their testimony,<sup>63</sup> although they claimed to have spent a substantial amount of time with all of them. They also struggled to describe the men. For example, Bekirov claimed to have spent “every Saturday and Sunday” with the defendant Belyalov. When asked what Belyalov looked like, Bekirov first said “single,” then responded “I do not remember,” and finally stated “like an ordinary person.” He subsequently answered “I don’t remember” to 12 consecutive questions on basic aspects of Belyalov’s appearance, such as whether he was dark or light skinned, whether he wore glasses, and whether he had a beard.<sup>64</sup>

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<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Monitor’s Notes, June 15, 2020.

<sup>62</sup> Id.

<sup>63</sup> Monitor’s Notes, February 25, 2020 (“Ismailov” repeatedly refers to the defendant Belyalov as “Belyaev”); Monitor’s Notes, June 10, 2020 (When listing the defendants he claimed to have seen at a HuT meeting, “Bekirov” refers to Seyran Saliev first as “Ernest”; after the prosecutor pointed out the error, the witness corrected to “Edem”, which was also incorrect.).

<sup>64</sup> Monitor’s Notes, June 11, 2020.

(“Defense attorney (S): What does Belyalov look like?

Bekirov (B): I do not remember

S: And the first meeting?

B: I do not remember

S: Did he have a beard?

B: Don’t remember

S: Did he wear glasses?

B: I do not remember

S: Does he speak Russian?

B: I don’t remember

S: Is he married or not?

B: I do not remember

S: Does or did he have children?

B: I do not remember

S: Did he have birthmarks?

B: I do not remember

S: Is he dark or light-skinned?

B: I do not remember

S: Does he have all the fingers on his right hand?

B: I do not remember

S: Did you shake hands?

B: Yes

S: Were there rings on his fingers?

B: I do not remember

S: Were there rings on the right hand?

Further, on cross-examination Bekirov contradicted previous statements made during direct examination. Although he testified that he had participated in HuT meetings with the defendants in 2016–2017,<sup>65</sup> on cross examination he claimed he did not remember whether he had visited mosques in 2016 or even whether he lived in Crimea from 2016 to 2017.<sup>66</sup> Correspondingly, Ismailov and Bekirov contradicted each other with respect to a central facet of the prosecution’s case: whether the defendants held secret HuT meetings in the local mosque. Ismailov testified that the meetings (called “sukhbets”) were closed to non-HuT members and conducted secretly,<sup>67</sup> with a limited number of individuals in attendance, while Bekirov furnished a diametrically opposed account – that the HuT sukhbets were open and anyone could attend, but that the HuT members disguised their references to the organization during meetings.<sup>68</sup>

Notwithstanding the gaps and contradictions in the accounts of the anonymous witness, the court unquestioningly accepted them as probative in convicting seven of the eight defendants. The court, for example, found that Bekirov’s testimony conclusively established that:

Since 2016 in the mosque of the 6th microdistrict of Bakhchisaray, and in 2017 in the mosque located in the village Novenkoye, in [Bekirov’s] presence, classes (‘sukhbet’) of the Hizb ut-Tahrir organization were held which were attended by about 60 people, including Asanov, Ametov, Belyalov, Zekiryaev, Ibragimov, Saliev, Smailov and Mustafayev. At those classes (‘sukhbets’), the issues of creating the Caliphate were discussed, and Asanov initiated talks about the destruction of Russia for this purpose, explaining the procedure for ‘changing power.’<sup>69</sup>

The court found Ismailov similarly credible; in its verdict, it indicated that his testimony had established that:

Classes (‘sukhbet’) were held alternately by Asanov, Zekiryaev, Belyalov and Ibragimov (teachers - the most trained members of the organization) in the mosque located in the 6th microdistrict of Bakhchisaray, on Fridays, using the Hizb ut-Tahrir literature (‘The economic system of Islam’, ‘Fundamentals of Islamic Nafsia’, ‘The System of Islam’) in the form of separate text sheets, and were aimed at studying the ideology, the rules of that organization, discussing socio-

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B: I do not remember.”)

<sup>65</sup> Monitor’s Notes, June 10, 2020.

<sup>66</sup> Monitor’s Notes, June 15, 2020.

<sup>67</sup> Monitor’s Notes, February 25, 2020; Monitor’s Notes, March 2, 2020; Monitor’s Notes, March 3, 2020.

<sup>68</sup> Monitor’s Notes, June 11, 2020.

<sup>69</sup> Southern District Military Court, First Instance Judgment, September 16, 2020, pgs. 6-7 (unofficial English translation).

political issues and finding new supporters. In addition, in the classroom, they talked about the need to change the constitutional system in Russia by looking for like-minded persons of Hizb ut-Tahrir who would be ready to fight for that deed. They ('sukhbets') were of a secret nature, outsiders (those who were not invited) were not allowed to attend, the time of the event was periodically changed for conspiracy purposes, and it was forbidden to use phones.<sup>70</sup>

In assessing the value of the evidence in the judgement, the court characterized Bekirov's testimony as "detailed, consistent, logical and clear" and dismissed "[c]ertain inaccuracies" and Bekirov's lack of detailed knowledge regarding interactions with the defendants as "insignificant."<sup>71</sup> Along the same lines, the court summed up Ismailov's credibility with a single sentence: "[t]he testimony of witness Ismailov (pseudonym) meets the same criteria [as that of Bekirov]."<sup>72</sup> The court added that the two witness accounts "compl[ie]d with each other, both in general terms and details."<sup>73</sup> The defective nature of this assessment was reflected in the fact that the court itself reproduced the fundamental contradiction between the two anonymous witnesses (whether the HuT "sukhbet" meetings were secret or not) in its convicting verdict, apparently without noticing the discrepancy.<sup>74</sup>

With respect to the charges of "preparation for a violent seizure of power or forcible retention of power," the prosecution witnesses gave similarly unreliable testimony. For example, in response to the prosecutor's question "Did [defendant] Asanov tell you that he is preparing a seizure of power, a violent change in the constitutional system in the Russian Federation?", Bekirov answered "Yes." But when asked "when, where, and with what methods" Asanov did so, Bekirov could not answer, mumbling incomprehensibly before finally saying: "the issue of seizing power was raised repeatedly by Marlen Asanov."<sup>75</sup> Bekirov's responses during cross-examination by Mustafayev later in the

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<sup>70</sup> Id., pg. 9.

<sup>71</sup> Id., pgs. 18-19.

<sup>72</sup> Id., pg. 19.

<sup>73</sup> Id.

<sup>74</sup> With respect to Bekirov's account, the court found that "While attending these events, [Bekirov] learned that the classes held by Hizb ut-Tahrir participants in households are called "khalakats", and those held in mosques, including the one in the 6th microdistrict of Bakhchisaray, are called "sukhbets". During the "khalakats," the affiliation of the participants to the organization is not being hidden, but **it is hidden during the "sukhbets", while the ideology of Hizb ut-Tahrir is discussed in a very veiled form and it is forbidden to mention the name of the organization.**" Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 7 (unofficial English translation) (emphasis added). Two pages later, when summarizing the facts established by Ismailov's testimony, the court found that "Classes ('sukhbet') were held alternately by Asanov, Zekiryayev, Belyalov and Ibragimov (teachers - the most trained members of the organization) in the mosque located in the 6th microdistrict of Bakhchisaray, on Fridays, using the Hizb ut-Tahrir literature ('The economic system of Islam', 'Fundamentals of Islamic Nafsia', 'The System of Islam') ... **They ('sukhbets') were of a secret nature, outsiders (those who were not invited) were not allowed to attend, the time of the event was periodically changed for conspiracy purposes, and it was forbidden to use phones.**" Id., pg. 9 (emphasis added).

<sup>75</sup> Monitor's Notes, June 11, 2020.

hearing further illustrated his lack of reliable knowledge about the defendants' allegedly criminal conduct:

Mustafayev (M): Did one of the accused inform you of the official position on establishing a caliphate in the Crimea or in Russia?

Bekirov (B): Yes.

M: Who?

B: Those who are in the courtroom.

M: Everyone?

B: Yes.

M: Where and under what circumstances?

B: (not clear)

M: What did he answer?

Prosecutor: In the lessons of Hizb ut-Tahrir. . .

M: You did not answer where.

B: In Crimea, I don't know the place.<sup>76</sup>

Notably, at no point during the trial did the prosecution or any witnesses allege that any of the eight defendants had planned or carried out specific acts of violence or that they possessed or were attempting to acquire weapons or explosives. There was likewise no physical evidence found that indicated plans to violently seize power: no weapons, explosives, financial trail, or documents reflecting a conspiracy. Nonetheless, seven of the eight defendants were convicted of this crime.

The convicting verdict likewise ignored the conspicuous absence of key physical evidence regarding membership in HuT – a fact that the court was obliged to interpret in the defendants' favor. Specifically, the prosecution alleged that the defendants, for “conspiracy” purposes, had used specially altered mobile phones that did not connect to a network but allowed the defendants to transfer banned HuT literature to each other over Bluetooth.<sup>77</sup> The prosecution, however, did not discover such a device in a single defendant's home or in the store where one defendant allegedly sold the devices to other HuT members.<sup>78</sup> The anonymous witness Bekirov, who had testified as to the existence of these special phones and claimed to have received a phone from one of the defendants, did not submit it as evidence.<sup>79</sup> Nevertheless, the court's verdict found that

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<sup>76</sup> Monitor's Notes, June 16, 2020.

<sup>77</sup> E.g., Monitor's Notes, December 24, 2019; Monitor's Notes, June 10, 2020; Monitor's Notes, June 16, 2020.

<sup>78</sup> The defense called attention to this issue more than once. E.g., Monitor's Notes, January 27, 2020; Monitor's Notes, September 8, 2020. Indeed, the prosecution submitted no such evidence at trial and the convicting verdict does not reference them in summarizing the relevant materials seized during the searches.

<sup>79</sup> The defense pointed this out during closing arguments. Monitor's Notes, September 8, 2020.

the defendants indeed possessed and used these special devices for their secretive HuT meetings.<sup>80</sup>

With respect to the scant physical evidence that was introduced, the verdict, while noting defense allegations that such evidence was obtained through illegal searches, failed to substantively address these arguments. To demonstrate the defendants' membership in HuT, the prosecutor submitted certain HuT literature, including pamphlets and books, that are banned in the Russian Federation and which were allegedly seized during searches of the defendants' homes.<sup>81</sup> At trial, however, the defense pointed to significant procedural flaws in the searches, such as the alleged denial of the defendants' legally required access to an attorney during the searches<sup>82</sup> and irregularities in the search protocols drawn up by investigators – suggesting that they may have been falsified.<sup>83</sup> If true, these allegations would have significantly undermined the validity of the evidence or rendered it outright inadmissible under applicable Russian law.<sup>84</sup>

The court, however, made no attempt to verify the defense's allegations, and its verdict confirmed that it considered all of the evidence at issue fully admissible and probative in finding the defendants belonged to HuT and thus had participated in the activities of a terrorist organization.<sup>85</sup> With respect to a defense request that three of the search reports be declared inadmissible for procedural violations,<sup>86</sup> for example, the court dismissed such concerns without considering their substance, stating only that the police reports indicated that the searches were carried out in full compliance with the applicable provisions of the Criminal Procedure Code, by authorized officials with the participation of two witnesses and a specialist, and that there were no statements in the protocols showing that the accused had alleged violations during the searches.<sup>87</sup> Reference solely to reports alleged to be false cannot constitute an objective assessment of the credibility of defense claims.

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<sup>80</sup> See Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 6 (describing how the defendant Belyalov sold one of the special phones to the anonymous witness Bekirov and how Bekirov saw that the defendants transferred banned HuT literature to the devices over Bluetooth during the meetings), pg. 8 (describing how Bekirov and the defendants used the specialized devices as a “conspiracy measure” at the meetings) (unofficial English translation).

<sup>81</sup> Monitor's Notes, January 27, 2020; Monitor's Notes, January 28, 2020; Monitor's Notes, February 6, 2020; Monitor's Notes, February 7, 2020.

<sup>82</sup> E.g., Monitor's Notes, November 27, 2019; Monitor's Notes, August 10, 2020; Monitor's Notes, September 1, 2020.

<sup>83</sup> E.g., Monitor's Notes, November 19, 2019; Monitor's Notes, January 27, 2020; Monitor's Notes, January 28, 2020; Monitor's Notes, September 8, 2020.

<sup>84</sup> Article 50(2) of the Russian Federation Constitution prohibits the use of illegally obtained evidence in court. Article 75(1) of the Russian Federation Criminal Procedure Code provides that evidence obtained in violation of the CPC is inadmissible.

<sup>85</sup> In support of its finding that the defendants belonged to HuT, the court in its verdict lists all of the HuT materials allegedly seized at the defendant's homes and makes no mention of any irregularities in the searches. See Southern District Military Court, First Instance Judgment, September 16, 2020, pgs. 13–15 (unofficial English translation).

<sup>86</sup> *Id.*, pgs. 27–28.

<sup>87</sup> *Id.*, pgs. 31–32.



In sum, the court's reliance on the vague, generalized, and contradictory accounts of the prosecution's witnesses to convict seven of the eight defendants, particularly absent reliable corroborating physical evidence, placed "an extreme and unattainable burden of proof"<sup>88</sup> on the accused to prove their innocence –rather than the prosecution the accused's guilt. All doubts were resolved in favor of the prosecution, not the accused. Furthermore, as in *Nechiporuk and Yonkalo*, the Southern District Military Court's verdict ignored key defense arguments, such as the limited credibility of prosecution witnesses (discussed more below) and alleged procedural violations. As such, the court turned the presumption of innocence on its head, in violation of the defendants' fundamental rights.

## **D. RIGHT TO EFFECTIVE PARTICIPATION AND RIGHT TO DEFENSE: SEQUESTRATION IN THE AQUARIUM**

Article 14 of the ICCPR and Article 6 of the ECHR guarantee minimum rights to persons accused of a criminal offense, including the right to effective participation and right to defend oneself. As the European Court has held, "Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings."<sup>89</sup> Article 6 further provides for the inter-related right to defend oneself in person or through legal counsel.<sup>90</sup> The right to defense entails the defendant's ability to communicate confidentially with defense counsel in real time throughout the proceedings. The European Court has stated that "an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness."<sup>91</sup>

In *Yaroslav Belousov*, the European Court considered a case in which the Russian authorities confined the applicant and his co-defendants in a small glass cabin throughout their trial.<sup>92</sup> The European Court noted that the glass enclosure "reduced . . . direct involvement in the hearing", "made it impossible for the applicant to have confidential exchanges with his legal counsel" out of earshot of the guards, and prevented the defendant from taking notes or receiving documents, undermining his rights to participate effectively in the proceedings and to receive practical and effective legal assistance.<sup>93</sup>

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<sup>88</sup> See European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. Nos. 29580/12 & others, November 15, 2018, para. 83 (quoting and endorsing the lower Chamber's judgment).

<sup>89</sup> European Court of Human Rights (Grand Chamber), *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 91.

<sup>90</sup> See ECHR, Article 6(3)(c).

<sup>91</sup> European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, para. 149; see also European Court of Human Rights (Grand Chamber), *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 97.

<sup>92</sup> See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, para. 74.

<sup>93</sup> *Id.*, paras. 151–153.

Given that the trial court took no steps to mitigate these limitations, the European Court found that keeping the defendant in the glass cabin constituted a violation of his fair trial rights, including the right to defense, under the Convention.<sup>94</sup>

As in *Yaroslav Belousov*, the trial court confined Mustafayev and his co-defendants for the length of the trial to the so-called “aquarium,” an enclosed glass cabin on the side of the courtroom in the Southern District Military Court. Due to the barrier, the men frequently struggled to hear the proceedings, including witness testimony and the allegedly incriminating audio recordings of their conversations in the mosque.<sup>95</sup> When the defendants and their attorneys complained that they were unable to hear and asked the court to make adjustments, they were harshly admonished by presiding Judge Zubairov, who refused to take remedial action. From the monitors’ notes:

[The prosecution presents the] recording of December 2016. The recordings were turned on, but nothing was heard — the persons in Crimea [defense attorneys participating over video link] also said that they could not hear the video link. The clerk raises the volume, but only fragments of phrases are heard. Attendees are perplexed. It is not clear why they are listening to an unintelligible audio recording. The attorneys inform the court that they can’t hear anything.

[Defense attorney] Legostov: The glass [of the defendants’ cabin] does not let the sound pass.

[Defense attorney] Gemeji: Can we exchange places with the accused?

Voice from the ‘aquarium’: You can conduct a judicial investigation without us at all.

The court: That is not within the framework of the rules. It will be recorded in the protocol. And this is not the first time you are getting a warning; get a hold of yourself.

*Judge Zubairov screams. Attorneys Gemeji and Ladin argue with him.*

[Defense attorney] Gemeji: . . . who can listen to the recording?

The court: The 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.

*Gemeji stated an objection in connection with the violation of the rights of her client, and the impossibility of high-quality participation in the judicial investigation.*

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<sup>94</sup> Id., paras. 152–153 (finding a violation of Articles 6(1) and 6(3)(b) and 6(3)(c) of the Convention).

<sup>95</sup> E.g., Monitor’s Notes, February 19, 2020.

The court: Stop saying that. Do not force us to declare a break because you're disrespecting the presiding judge. Sit down!<sup>96</sup>

In addition, the lighting in half of the glass enclosure was broken, making it too dark for the defendants to effectively take notes or read documents throughout the trial.<sup>97</sup> This situation, in combination with the obstruction of the sound by the glass barrier, severely compromised the defendants' ability to meaningfully participate in the proceedings.

Due to the fact that they were sequestered in the aquarium across the room from their lawyers, the men had no opportunity to privately confer with counsel during the proceedings. Nonetheless the court refused repeated requests to remove the men from the enclosure and place them next to their attorneys in the open courtroom to allow for private communication.<sup>98</sup> On other occasions, the court rejected defense attorneys' requests for short breaks in the proceedings to consult with their clients.<sup>99</sup>

In one particularly egregious example, the court bailiffs threatened two of Mustafayev's defense attorneys with administrative charges because they remained in the courtroom during a break to confer with him. On that occasion, after Mustafayev objected to a court ruling, the presiding judge ordered that Mustafayev be removed from the courtroom not just for the hearing but for the remainder of the entire criminal trial,<sup>100</sup> a severe violation of his right to be present and defend himself in person (in total Mustafayev was excluded from hearings on 9 separate occasions).<sup>101</sup> After pronouncing its decision, the court announced a 5-minute break. Mustafayev's two attorneys remained in the courtroom to consult with him. The court bailiffs asked the attorneys to leave, to which they protested that they were consulting with their client. The bailiffs proceeded to draw up administrative offense citations for both attorneys under Art. 17.3 of the Administrative Code (failure to comply with the order of a judge or bailiff to ensure the established procedure for the activities of courts).<sup>102</sup> While the bailiffs ultimately departed without signing the citations,

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<sup>96</sup> Id.

<sup>97</sup> Monitor's Notes, May 27, 2020; Monitor's Notes, August 17, 2020; Monitor's Notes, September 7, 2020.

<sup>98</sup> E.g., Monitor's Notes, November 27, 2019; Monitor's Notes, February 19, 2020. (At the November hearing, Mustafayev petitioned the court to be removed from the aquarium, saying: "We, not yet sentenced, are kept in a cell. I motion that, in accordance with international regulations, we can sit with our attorneys, not in a cell." After conferring in the courtroom, the court refused the request to place the defendants next to their attorneys, with the justification that Mustafayev's motion "does not indicate contradictions to the law" and that the barrier in fact did allow defense attorneys to communicate with their clients. The court ignored the defendants' right to consult privately with their counsel.)

<sup>99</sup> E.g., Monitor's Notes, May 20, 2020.

<sup>100</sup> Monitor's Notes, August 11, 2020.

<sup>101</sup> December 24, 2019; May 20, 2020; June 16, 2020; August 11, 2020; August 12, 2020; August 17, 2020; August 18, 2020; August 20, 2020; August 24, 2020. Although the court suggested that Mustafayev could obtain audio recordings, he explained that it was logistically impossible to do so due to limitations in the pretrial detention facility. Monitor's Notes, June 5, 2020.

<sup>102</sup> Id.

this incident highlighted the court's willingness to restrict the defendants' access to their attorneys without due justification.<sup>103</sup>

The trial court's failure to remedy the issues caused by the defendants' confinement in the aquarium, particularly the accused's struggles in hearing the proceedings and conferring with counsel, gravely restricted the men's ability to effectively participate in the trial and defend themselves, in violation of their rights under the ICCPR and ECHR.

The above circumstances were exacerbated by the presiding judge's insistence on a trial schedule that did not allow adequate time between hearings for the accused to consult with their attorneys and effectively prepare their defense.<sup>104</sup> The ICCPR and ECHR provide for the right to adequate time and facilities for one's defense.<sup>105</sup> Over the defense's objections, the court scheduled many hearing days back-to-back, sometimes holding trial sessions from morning until after 6 p.m. (on occasion even until 8 or 9 p.m.),<sup>106</sup> with the result that the accused did not arrive at the detention center until 9 or 10 p.m.<sup>107</sup> Under these circumstances the defendants were unable to review their notes and prepare for the following day's hearing, let alone consult with their attorneys. Given the defendants' confinement to the aquarium and corresponding inability to effectively participate in and privately confer with counsel during trial, their lack of ability to prepare for the proceedings and meet with counsel outside of trial was all the more concerning.

Further, on those occasions that counsel was able to meet with the defendants at their pretrial detention facility, the court refused requests that they be allowed to convene in private (without a guard present), at one hearing referencing an unrelated terrorist attack on FSB headquarters in Moscow to justify this decision.<sup>108</sup>

## **E. RIGHT TO OBTAIN THE ATTENDANCE AND EXAMINATION OF WITNESSES**

The right to call and examine witnesses is a fundamental component of a fair trial and is explicitly provided for by the ICCPR and ECHR.<sup>109</sup> This right extends both to the defense's ability to call its own witnesses and its right to effectively cross-examine the prosecution's witnesses. The principle of equality of arms embodied in both treaties requires that the

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<sup>103</sup> This incident contributed to Mr. Mustafayev's counsel being subject to a contempt ruling for non-compliance with court orders.

<sup>104</sup> E.g., Monitor's Notes, February 21, 2020; Monitor's Notes, February 28, 2020.

<sup>105</sup> See ICCPR, Article 14(3)(b); ECHR, Article 6(3)(b).

<sup>106</sup> Monitor's Notes, January 14, 2020; Monitor's Notes, March 4, 2020; Monitor's Notes, March 17, 2020; Monitor's Notes, August 20, 2020.

<sup>107</sup> This circumstance was raised during the defense's closing arguments in illustration of the defendants' denial of a right to effective defense. Monitor's Notes, September 7, 2020.

<sup>108</sup> See Monitor's Notes, February 19, 2020.

<sup>109</sup> See ICCPR, Article 14(3)(e); ECHR, Article 6(3)(d).

defense be able to confront incriminating evidence and present its evidence on the same terms as the prosecution.<sup>110</sup>

Although the right to call defense witnesses is not absolute, the UN Human Rights Committee has stated that the defense is entitled to call witnesses who are relevant,<sup>111</sup> if proposed in a timely manner in compliance with procedural requirements.<sup>112</sup> The European Court has likewise ruled that the defense is entitled to call witnesses where the request is not “vexatious,” where the request is “sufficiently reasoned [and] relevant to the subject-matter of the accusation,” and where the witnesses’ testimony could have strengthened the defense’s case.<sup>113</sup> With respect to cross-examination, the European Court has made clear that “the accused should be given an adequate and proper opportunity to challenge and question a witness against him.”<sup>114</sup>

Restrictions on defense questions can thus violate the right to call and examine witnesses. The UN Human Rights Committee has found that a court’s excessive interference with the defense’s cross-examination of a key prosecution witnesses, combined with a refusal to call several defense witnesses, represented a violation of this right.<sup>115</sup> In *Pichugin*, the European Court ruled that a defendant’s fair trial rights were violated where the presiding judge repeatedly struck defense questions aimed at interrogating a key prosecution witness’s credibility and reliability, and allowed the witness to refuse to answer a question by the defense pertaining to the circumstances of the case.<sup>116</sup> The European Court found that by giving the witness “gratuitous permission” to refuse to answer relevant questions and by failing to warn him of his statutory duty to answer questions, the presiding judge had undermined the defendant’s right to examine witnesses.<sup>117</sup> Furthermore, the Court found that the judge’s removal of defense questions pertaining to the witness’s credibility, including those pertaining to his criminal record, his reasons for not giving incriminatory statements about the defendant until his second interview on the matter, and possible pressure exerted on him by the prosecuting

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<sup>110</sup> See European Court of Human Rights, *Rowe and Davis v. the United Kingdom*, App. No. 28901/95, February 16, 2000, para. 60.

<sup>111</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

<sup>112</sup> Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

<sup>113</sup> See European Court of Human Rights, *Polyakov v. Russia*, App. No. 77018/01, para. 34, January 29, 2009.

<sup>114</sup> See European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, para. 195.

<sup>115</sup> See Human Rights Committee, *Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

<sup>116</sup> See European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, paras. 53–56, 172, 210–212.

<sup>117</sup> *Id.*, paras. 204–205 (“The Court finds peculiar the reaction of the presiding judge to such an unmotivated refusal by a witness to reply to questions. Being the ultimate guardian of the fairness of the proceedings, she was required under domestic law to take all necessary measures to ensure observance of the principles of adversarial proceedings and equality of arms.” *Id.*, para. 204).



authorities, made it impossible for the jury to determine how much weight to attach to the witness's statements.<sup>118</sup> According to the Court, the defense should have been permitted to "test [the witness's] reliability and credibility" in the jury's presence.<sup>119</sup> As a result of the judge allowing the witness to refuse to answer key questions and restricting the testing of his credibility, the Court found a violation of the defendant's right to a fair trial and right to call and examine witnesses.<sup>120</sup>

In the present case, Mustafayev and his co-defendants faced circumstances analogous to those in *Pichugin*, which collectively violated their right to call and examine witnesses.

First, the presiding judge struck hundreds of relevant defense questions to key prosecution witnesses on cross-examination.

One such witness was FSB officer Nikolai Artykbaev, who participated in the investigation against the defendants and who testified as to several critical facts – many of which he had gleaned from secret sources – including: that HuT operated in Bakhchisaray district; that the defendants' involvement with the organization was established on the basis of testimonies of the mosque's parishioners; and that "information was received" that the defendants, as members of HuT, conducted their classes in mosques, recruited and worked with new members, and distributed banned literature.<sup>121</sup> The defense pointed out that much of the knowledge asserted by Artykbaev with regard to the defendants was based on hearsay,<sup>122</sup> which is inadmissible evidence under Russian law,<sup>123</sup> and that the evidence was even less credible given that the sources of the hearsay were secret. For this reason, it was essential for the defense to be able to adequately challenge and assess Artykbaev's claimed knowledge. In addition, the defense alleged that many investigative actions in the case against the men were carried out in violation of the procedures prescribed in Russian law, which would have rendered inadmissible the evidence obtained through those actions.<sup>124</sup> Therefore it was critical for the defense to be able to question Artykbaev about whether the investigative actions he took complied with relevant requirements of the Russian Criminal Procedure Code.

Nonetheless, during Artykbaev's cross-examination, the presiding judge continuously struck defense questions aimed at establishing details of the alleged offenses, the source of the witness's knowledge, and his methods of conducting the investigation. Judge Zubairov also barred questions that attempted to clarify contradictions in Artykbaev's

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<sup>118</sup> *Id.*, para. 210.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, paras. 212–213.

<sup>121</sup> Monitor's Notes, November 27, 2019.

<sup>122</sup> See e.g. Monitor's Notes, January 14, 2020; Monitor's Notes, September 8, 2020.

<sup>123</sup> Article 75(2)(2) of the Russian Federation Criminal Procedure Code.

<sup>124</sup> Article 50(2) of the Russian Federation Constitution prohibits the use of illegally obtained evidence in court. Article 75(1) of the Russian Federation Criminal Procedure Code provides that evidence obtained in violation of the CPC is inadmissible.

account. For example, the judge struck lines of questioning on how the regular HuT meetings could have secretly taken place in the mosque – as Artykbaev testified – when the mosque was open to the public the whole day<sup>125</sup> and the reasons for the “conflict” between the mosque’s leadership and the defendants, which Artykbaev partially attributed to the defendants’ smoking habits even though none of the defendants smoked.<sup>126</sup> With respect to the source of Artykbaev’s knowledge, he testified that over the course of his investigation he had learned from secret sources that HuT, as an organization, was planning the overthrow of the Russian state in three stages<sup>127</sup> and that the defendants were members of HuT.<sup>128</sup> Yet when asked for more details about the sources of his information, he frequently referred to “operational data” (i.e. information gained through operational investigative work) or “state secrets.”<sup>129</sup> When Artykbaev was pressed on cross-examination, the court often struck clarifying questions. For example, Mustafayev cross-examined Artykbaev about his knowledge of secret witnesses who had testified that the defendants were members of HuT:

Mustafayev (M): How long have the [undisclosed] witnesses been in the ranks of Hizb ut-Tahrir?

Court: The question is overruled because it can disclose witness data.

*Objection by Mustafayev.*

M: What is the level of knowledge about Hizb ut-Tahrir of the witnesses?

Artykbaev (A): It is difficult to answer.

M: Have you checked for competency?

A: Yes.

M: How?

Court: The question is overruled.

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<sup>125</sup> Monitor’s Notes, December 16, 2019.

<sup>126</sup> Monitor’s Notes, December 24, 2019; Monitor’s Notes, January 14, 2020. In his testimony, Artykbaev claimed: “Several times in the mosque 6 of the Bakhchisaray microdistrict, there were conflicts between [the HuT and the mosque parishioners]. The district imam warned members of Hizb ut-Tahrir and forbade meetings at the mosque. Until the detention in 2015, there have been similar conflicts several times. There have also been conflicts between Hizb ut-Tahrir and mosque Muslim elders. It was said that Muslims cannot smoke near the mosque, and members of Hizb ut-Tahrir smoked near the mosque.” Monitor’s Notes, December 3, 2019. During cross-examination, the defense attempted to question Artykbaev on how this could be when none of the defendants smoke. The judge struck the question first on the basis of irrelevance and then on the basis of repetition.

<sup>127</sup> During direct examination by the prosecutor, the witness testified that during his work it was established that Hizb ut-Tahrir was founded in 1953 in Syria; its main tasks are to build a caliphate, an Islamic state headed by a caliph, in whose hands political and spiritual power is concentrated; and that the organization’s methods included the selection of new members in the first stage, the open selection of new activists in the second stage, and the coup, the construction of the caliphate, and the change of power and political regime in the third stage. Monitor’s Notes, November 27, 2019.

<sup>128</sup> Monitor’s Notes, November 27, 2019; Monitor’s Notes, December 3, 2019.

<sup>129</sup> For example, when asked how he knew which voices on the audio recordings belonged to each defendant, and specifically whether he had samples of the defendants’ voices, he responded, “I conducted unspoken operational-search measures, which I cannot disclose.” Monitor’s Notes, December 3, 2019.

*Objection by Mustafayev.*

...

M: Do you have medical certificates to prove the sanity of witnesses?

A: It has been established that they are competent.

M: How was it established?

Court: Overruled.

M: Did the witnesses you interrogated have head injuries?

Court: Do not distort the question.

A: I did not interrogate them.

M: Then, what do you rely on?

A: As part of the operational search activities, people were interrogated . . .

M: Was it an “investigation” or an “interrogation”?

Court: The question is overruled.

*Gemedzhi and Mustafayev object, noting that an investigation does not require a warning about the responsibility for giving false testimony [as required in a formal “interrogation”], and therefore the issue is important for the defense, since the witness relies on the results of the investigation as reliably known facts.<sup>130</sup>*

As stated by the defense, under Russian law a witness giving an official statement in an “interrogation” – which has greater probative value – must be warned as to his responsibilities and the need to be truthful in his statements.<sup>131</sup> Yet the court, striking questions about whether the witnesses were formally interrogated or interviewed as part of an investigation, dismissed the defense’s repeated objections, saying that it would evaluate all the evidence.<sup>132</sup>

The defense’s inability to challenge Artykbaev’s knowledge and the procedures he followed was especially problematic because his competence in conducting the investigation was at issue. For example, Artykbaev testified that the defendants’ conversations secretly recorded in the mosque demonstrated their membership in HuT, since that could be established “by worship and by the topics they discuss in mosques.” In reaching this determination, Artykbaev said that he listened to the mosque audio recordings, made official transcripts, and conducted his own analysis.<sup>133</sup> However, it emerged at trial that he had no specialized training in Islam and spoke neither Crimean Tatar nor Arabic,<sup>134</sup> both of which featured heavily in the audio files; the defense therefore

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<sup>130</sup> Monitor’s Notes, December 16, 2019.

<sup>131</sup> Id.

<sup>132</sup> E.g., Monitor’s Notes, January 20, 2020.

<sup>133</sup> Monitor’s Notes, November 27, 2019.

<sup>134</sup> Monitor’s Notes, December 4, 2019.

questioned his ability to make determinations as to the criminal intentions of the defendants on the basis of the audio files.<sup>135</sup>

As in *Pichugin*, the defense's questions were key to shedding light on the source of the witness's information and his credibility and reliability.<sup>136</sup> Also similarly to *Pichugin*, the witness's testimony was central to the prosecution's case and, subsequently, central to the court's convicting verdict.<sup>137</sup> By disallowing defense questions – effectively aiding the witness in evading questions that could harm the prosecution's case – the court violated the defendants' right to call and examine witnesses and also seriously called into question its impartiality. In stark contrast, the prosecution was permitted to freely ask almost any question of defense witnesses without the court's intervention, contravening the equality of arms principle.<sup>138</sup>

Later, the court severely restricted the defense's cross-examination of two anonymous witnesses, particularly with respect to their credibility and their knowledge of details regarding the defendants' alleged offenses, further violating the defendants' right to meaningfully confront evidence against them. This relates to other overarching fair trial concerns raised by the use of anonymous witnesses in the proceedings, which are discussed below.

In a further violation of the defendants' rights, the court arbitrarily stopped the calling of defense witnesses partway through the defense presentation, rejecting requests to call 16 different people<sup>139</sup> before stating outright that “the testimonies of the previously questioned witnesses were sufficient.”<sup>140</sup> The 52 defense witnesses until that point had testified as to the character and routines of the defendants, aimed at demonstrating that they were not, and could not have been, involved in terrorism related activities; many of the witnesses also testified as to the procedures at the mosque where the prosecution alleged the defendants held secret HuT meetings, in order to demonstrate that it would have been impossible to hold closed meetings in that location.<sup>141</sup>

While the defense's right to call witnesses is not absolute, the defendants had presented compelling reasons for calling at least some of these witnesses: for example, to verify the

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<sup>135</sup> E.g., Monitor's Notes, December 4, 2019; Monitor's Notes, January 14, 2020; Monitor's Notes, February 19, 2020.

<sup>136</sup> Although in this case, the evidence was not being assessed by a jury, the defense was still entitled to test the witness's credibility for the judicial panel to assess.

<sup>137</sup> See the Presumption of Innocence section above for more details on Artykbaev's testimony in the convicting verdict.

<sup>138</sup> See Monitor's Notes, August 4, 2020; Monitor's Notes, August 5, 2020.

<sup>139</sup> Monitor's Notes, August 10, 2020 (Six defense witnesses rejected because “the court considered their testimony unnecessary and an abuse of rights”; another two defense witnesses rejected for irrelevance); Monitor's Notes, August 11, 2020 (four defense witnesses rejected); Monitor's Notes, August 17, 2020 (two defense witnesses rejected); Monitor's Notes, August 18, 2020 (four defense witnesses rejected).

<sup>140</sup> Monitor's Notes, August 18, 2020.

<sup>141</sup> See, e.g., Monitor's Notes, August 6, 2020.

source of a defendant's income (to refute the prosecution's assertion that the defendants received funding from HuT).<sup>142</sup> In any event, the court should have considered each witness request individually to determine if it was "sufficiently reasoned [and] relevant to the subject-matter of the accusation" and if the testimony could have strengthened the defense's case.<sup>143</sup> By collectively rejecting all future defense witnesses without considering the relative value of each to the defendants' case, the court compromised the accused's ability to build a defense.

Further contravening the equality of arms principle, the court's refusal to question additional defense witnesses seemed, in some cases, to be because the proposed witnesses did not have information that would help the prosecution. For example, in response to a request by the defense to hear four witnesses, Judge Zubairov inquired whether the witnesses "knew about the unlawful activities of the defendants"; the defense explained that they did not have such knowledge, since the defendants did not commit illegal activities. The court then refused to allow the witnesses' testimony, deeming it "redundant."<sup>144</sup>

## F. VIOLATIONS IN RELATION TO ANONYMOUS WITNESSES

The anonymization of prosecution witnesses, although not prohibited, must be carefully managed by courts in order to avoid the violation of defendants' fair trial rights.<sup>145</sup> A general principle of the right to call and examine witnesses is that "a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility and should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence."<sup>146</sup> The European Court of Human Rights has held that a criminal conviction that depends entirely or in large part on the testimony of anonymous witnesses, particularly where the convicting court does not provide objective reasons for such anonymization or offer adequate counterbalancing safeguards, is likely to violate the defendant's right to a fair trial.<sup>147</sup>

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<sup>142</sup> Monitor's Notes, August 10, 2020.

<sup>143</sup> See European Court of Human Rights, Polyakov v. Russia, App. No. 77018/01, January 29, 2009, para. 34.

<sup>144</sup> Monitor's Notes, August 11, 2020.

<sup>145</sup> The European Court's evaluation of the appropriateness of using anonymous witnesses centers on three factors. "[T]he Court must examine, firstly, **whether there were good reasons to keep secret the identity of the anonymous witnesses** . . . . Secondly, the Court must consider whether the evidence of those witnesses was the **sole or decisive basis of the conviction**. Thirdly, it must ascertain whether there were **sufficient counterbalancing factors, including the existence of strong procedural safeguards**, to permit a fair and proper assessment of the reliability of that evidence to take place." European Court of Human Rights, Vasilyev and others v. Russia, App. No. 38891/08, September 22, 2020, para. 37 (emphasis added).

<sup>146</sup> See European Court of Human Rights, Pichugin v. Russia, App. No. 38623/03, October 23, 2012, para. 195.

<sup>147</sup> Where sufficient objective reasons are determined to justify the anonymization of a witness, the trial court must still "subject the proceedings to the most searching scrutiny in order to be satisfied that there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit



In *Vasilyev v. Russia*, a Russian court had found the defendants guilty of terrorism for their alleged membership in Hizb-ut-Tahrir; much of the incriminating evidence regarding the accused's association with the banned group stemmed from the testimony of two anonymous witnesses whom neither the defendants nor their attorneys were permitted to see or hear without distortion.<sup>148</sup> The Court noted that the defense's ability to cross-examine these witnesses was undermined because the defense was given "virtually no details about the witnesses' personality or background", such that it was unable to "advance any reasons which the witness may have for lying and thereby question the credibility and reliability of their statements."<sup>149</sup> The Court further commented that the convicting judgement was based in large part on the testimonies of the anonymous witnesses, and that there was "no indication in the judgment that the judge was alive to the need to approach the anonymous evidence with caution," that the judge did not appropriately weight the testimonies given that they were from anonymous sources, and that the judge did not provide "detailed reasoning as to why he considered that evidence to be reliable, while having regard also to the other evidence available."<sup>150</sup>

In light of these circumstances, the Court found that the defendants' conviction largely on the basis of anonymous witness testimonies violated their right to a fair trial and their right to call and examine witnesses, citing "the absence of good reasons for granting anonymity to the witnesses", "the importance of the evidence given by them," and the trial court's failure to provide counterbalancing measures such as strong procedural safeguards.<sup>151</sup>

Similar to the *Vasilyev* case, the prosecution's use of anonymous witnesses against Mustafayev and his co-defendants violated their right to call and examine witnesses. As in that case, both anonymous witnesses – code-named "Ismailov" and "Bekirov" – testified from another room, with their faces and voices distorted so heavily that the defense repeatedly complained that they were having trouble understanding what the witnesses were saying.<sup>152</sup> Also as in *Vasilyev* and as will be described in more detail below, the trial court did not adequately justify the witnesses' anonymization (and indeed obstructed defense attempts to interrogate said justification), did not attempt to provide counterbalancing safeguards such as, for example, thorough testing of the witnesses' credibility on cross examination, and based its convicting verdict largely upon their testimony without taking into account factors that undermined their credibility. This conduct was egregious because the two anonymous witnesses were the only prosecution sources who claimed to have direct knowledge of the defendants' membership in HuT; as noted above, the defendants' HuT membership was the sole basis for the charges of

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a fair and proper assessment of the reliability of that evidence to take place." See European Court of Human Rights, *Vasilyev and others v. Russia*, App. No. 38891/08, September 22, 2020, para. 41.

<sup>148</sup> *Id.*, para. 42.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* para. 42.

<sup>151</sup> *Id.*, para. 43 (finding a violation of Articles 6(1) and 6(3)(d)).

<sup>152</sup> Monitor's Notes, February 25, 2020; Monitor's Notes, June 9, 2020.

“preparation for a forcible seizure of power or forcible retention of power” and “organising” or “participating” in the activities of a terrorist organization.

From the outset, the prosecution failed to provide concrete facts to justify the anonymization of the two prosecution witnesses, and the court did not attempt to verify whether objective reasons existed for the anonymization. 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.”<sup>153</sup> 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, stating only that “the witness reported about danger for his life” and providing no further justification.<sup>154</sup> Judge Zubairov then proceeded to strike all defense questions on cross-examination aimed at establishing the objective reason for Bekirov’s fear.<sup>155</sup>

Compounding this problematic situation, the witnesses’ personal knowledge of the facts alleged appeared questionable and the court obstructed defense attempts to interrogate this knowledge. For example, when asked to elaborate on his account of participating in secret HuT meetings, such as to name the types of literature the defendants instructed him to read or what topics were discussed in a meeting, Ismailov frequently paused for lengthy periods before providing vague answers or stating, “I don’t remember. Everything is in the case file.”<sup>156</sup> Bekirov’s testimony featured similarly long pauses in response to defense questions, including about the names of the defendants;<sup>157</sup> the defense argued that the delays might indicate that the witnesses were reading from a sheet of paper or receiving instructions on how to respond from someone who was present with them in the other room.<sup>158</sup> Rather than attempting to clarify these circumstances, the court actively undermined defense attempts to do so by striking questions during cross-examination aimed at exposing contradictions.<sup>159</sup> At one point, the judge even assisted Bekirov when

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<sup>153</sup> Monitor’s Notes, February 25, 2020.

<sup>154</sup> Monitor’s Notes, June 9, 2020.

<sup>155</sup> Monitor’s Notes, June 10, 2020; Monitor’s Notes, June 11, 2020.

<sup>156</sup> Monitor’s Notes, February 25, 2020. (For example: “Prosecutor: Did Asanov talk about any advantages of the caliphate? Ismailov: I do not remember, everything was transferred to the case file. Prosecutor: And during these classes, how and who convinced about the need to create a caliphate in the territory of Crimea after joining Russia? Ismailov: Difficult to say, I do not remember, everything [is] in the case file.”)

<sup>157</sup> For example, Bekirov testified that Asanov invited him to meetings in the mosque. When asked who else was at the meetings, after a pause, Bekirov slowly listed the full name of each defendant, with pauses between each name. The defense pointed out that the witness appeared to be reading the names from a paper. Monitor’s Notes, June 9, 2020.

<sup>158</sup> Monitor’s Notes, June 11, 2020.

<sup>159</sup> Monitor’s Notes, March 2, 2020; Monitor’s Notes, March 3, 2020 (On cross-examination at the March 2 hearing, Ismailov could not answer the question of how the meetings (“sukhbets”) could have been closed when the mosque was open to anyone; he also stated that he could not remember how the alleged HuT members controlled the participants and ensured secrecy. At the next hearing on March 3, the court struck all questions by defendant Zekirayev relating to how the “conspiracy measures” were enforced, whether the mosque was closed during the sukhbet, how other people were not let in the mosque during the sukhbet, and whether the teacher showed the books named by the witness during the sukhbet.)

he struggled to answer a defense attorney's question about the details of one defendant's actions; after a long period of silence, Judge Zubairov asked "is your reluctance [to respond] connected with [your] fears?" After the defense objected, the judge unexpectedly called for a break. Following the break, the witness stated, "I am afraid . . . for my life"; the defense's objections were overruled.<sup>160</sup>

The defense also raised objectively serious concerns about the incentives of the witnesses to misrepresent the facts. Given that the identity of both anonymous witnesses was actually known to the defendants (they were able to infer the witnesses' identities from their testimony), the defense was able to cite reasons that the witnesses might have been motivated to lie. The defense alleged, for example, that Ismailov was a fugitive from justice from a third country with an expired passport and no residence permit, providing him with a clear and obvious incentive to cooperate with the FSB in incriminating the defendants.<sup>161</sup> Yet when the defense raised these concerns about the witness's credibility, the presiding judge interrupted, saying "The court considers your statements the abuse of your rights."<sup>162</sup> Bekirov, on the other hand, testified openly in court that he was an active member of HuT and that he had helped finance the organization;<sup>163</sup> he was thus vulnerable to being prosecuted himself and correspondingly vulnerable to being pressured into testifying.<sup>164</sup> The court struck defense questions that aimed at establishing whether he could have been pressured by the FSB to cooperate.<sup>165</sup>

Not only did the court curtail defense attempts to interrogate the credibility of the anonymous witnesses but the court also ignored these objectively justified concerns in its verdict convicting seven of the defendants, finding the witnesses fully reliable and credible and basing its finding of the defendants' guilt largely on the testimony of the anonymous witnesses. The court dismissed the defense's concerns about the anonymous witnesses with a single sentence that referred to all of the prosecution's witnesses: "The materials

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<sup>160</sup> Monitor's Notes, June 11, 2020. Before the break, the defense attorney asked Bekirov whom the defendant Asanov said that they needed to recruit for the "seizing of power," after which Bekirov was silent for a while and then said that he couldn't answer. After the break, the same defense attorney asked, "Did you witness Asanov conducting militant Islamic propaganda?" After a long pause, Bekirov made an incoherent sound and then said "...if my memory is not mistaken, he said that kyafers should accept Islam." The defense attorney asked where this conversation took place and who was present. Bekirov responded that there were a lot of people, but he could not name any of them because he was afraid for his life. The defense attorney addressed the court: "Your Honor, I consider it unreasonable." Judge Zubairov responded: "The court accepts the [witness's] response."

<sup>161</sup> On this basis, the defense moved for the court to declare Ismailov's testimony inadmissible, which the court declined to do. The defense repeated these concerns during closing arguments. Monitor's Notes, March 17, 2020; Monitor's Notes, September 8, 2020.

<sup>162</sup> Monitor's Notes, January 27, 2020.

<sup>163</sup> Monitor's Notes, June 10, 2020.

<sup>164</sup> The defense raised this issue with the presiding judge during Bekirov's testimony (Monitor's Notes, June 10, 2020) and raised it again as a credibility issue during closing arguments. Monitor's Notes, September 9, 2020.

<sup>165</sup> E.g., Monitor's Notes, June 11, 2020. (Mustafayev's lawyer Gemezhdi asked: "Were there any circumstances that would allow FSB officers to put pressure on you, such as your wife's death, an illegal situation...") The court interrupted her, saying only "The question is disallowed.")

of the case do not contain any reasons for slandering the defendants by the above-mentioned witnesses [referring to all of the prosecution witnesses], and the statements of the defense side about the existence of such are far-fetched and have not been confirmed during the trial.”<sup>166</sup> Exactly as in *Vasilyev*, the lack of reasoning in the verdict demonstrated that the court was not “alive to the need to approach the anonymous evidence with caution.”<sup>167</sup>

Also as in *Vasilyev*, the judgement convicting Mustafayev and six of his co-defendants makes no mention of the reduced weight of anonymous witness testimony and, while considering the testimony of the anonymous and other prosecution witnesses “consistent, non-contradictory, mutually complementary and complying with other evidence examined in the court session,”<sup>168</sup> provides no concrete reasoning for its finding of such – particularly troubling in light of the material contradictions between the testimonies of the two anonymous witnesses and the lack of specificity in their accounts. Aside from violating the defendants’ right to call and examine witnesses, this was also a gross violation of the men’s right to be presumed innocent, as discussed above.

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<sup>166</sup> Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 20 (unofficial English translation).

<sup>167</sup> See European Court of Human Rights, *Vasilyev and others v. Russia*, App. No. 38891/08, September 22, 2020, para. 42.

<sup>168</sup> Southern District Military Court, First Instance Judgment, September 16, 2020, pg. 18 (unofficial English translation).

## CONCLUSION



The criminal proceedings against Mustafayev, Asanov, Ametov, Belyalov, Zekiryaev, Ibragimov, Saliev, and Smailov entailed severe violations of their right to a fair trial, their right to be free from arbitrary detention, and general requirements of international humanitarian law. In order to comply with its obligations under the ICCPR, ECHR, and Fourth Geneva Convention, the Russian Federation should immediately release the seven men who were convicted. The Russian Federation must also cease prosecuting Ukrainian citizens in occupied territory under Russian legislation and stop the illegal transfer of detainees to Russian territory.