

***Shavkatbek Salyzhanovich
Rakhmanov v. Russia***

Application no. 49975/15

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF
JURISTS (ICJ)

INTERVENER

*pursuant to the Section Registrar's notification dated 2 September 2016 that the
President of the Section had granted permission under Rule 44 § 3 of the Rules of the
European Court of Human Rights*

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I. Introduction

In these submissions, the International Commission of Jurists (ICJ) analyses the legal framework governing extraditions from the Russian Federation to Central Asian States, in particular Kyrgyzstan, as well as Russia's extradition practice, including through the use of diplomatic assurances. These submissions aim to assist the Court in assessing the compliance of this law and practice with the European Convention on Human Rights (ECHR) and, in particular, with its procedural *non-refoulement* obligations.

II. The legal framework for extradition in the Russian Federation

In the Russian Federation, extradition procedures are governed by national legislation and international law. Domestically, extradition procedures are regulated principally by Chapter 54 of the Russian Code of Criminal Procedure (CPC). According to the CPC, in decisions to grant or refuse extradition, all relevant circumstances have to be taken into consideration, including the gravity of the offence, the place of its commission, the dates of the request and the nationality of the person sought.¹

The main international treaties framing extradition procedures between the Russian Federation and Central Asian States are the *1993 Minsk Convention*² and *2002 Chisinau Convention on mutual legal assistance in civil, family and legal cases*,³ and the *2001 Shanghai Convention on Combating Terrorism, Separatism, and Extremism*,⁴ a legal framework that provides weak safeguards against human rights violations as a result of extradition. For example, the Minsk Convention does not prohibit extradition in circumstances where the *non-refoulement* principle would prevent removal⁵ This contrasts with the Chisinau Convention, which excludes extradition for offences punishable with the death penalty;⁶ cases related to the persecution of a person on grounds of race, sex, religion, ethnicity or political opinion;⁷ or on other grounds stipulated in international treaties, binding the parties to the extradition.⁸ The Shanghai Convention binds all States Parties to cooperate in the "prevention, identification and suppression"⁹ of terrorism, separatism and extremism, and enshrines broad and vague definitions of these terms.¹⁰ It forecloses any acquittal "based upon exclusively political, philosophical, ideological, racial, ethnic, religious or any other similar considerations."¹¹ These treaties do not enshrine the principle of *non-refoulement* expressly.

The absence or weakness of human rights safeguards in these treaties is particularly significant given recent changes to the status of European Court of Human Rights' judgments in Russian law. Although the Russian Constitution and the CPC provide for

¹ A.Smirnov, K.Kalinovskiy, *Commentary to the Criminal Procedure Code of the Russian Federation*, 6th edition, 2012.

² *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, Minsk, 22 January 1993, as amended by the Protocol of 28 March 1997 ("Minsk Convention"), <http://www.cis.minsk.by/page.php?id=614>.

³ *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, Chisinau, 7 October 2002 ("Chisinau Convention"), text available in Russian on the CIS website at <http://www.cis.minsk.by/page.php?id=614>.

⁴ *Shanghai Convention on Combating Terrorism, Separatism and Extremism*, 2001 ("Shanghai Convention"), <http://kremlin.ru/supplement/3405>.

⁵ See, article 57, Minsk Convention. The Convention has been ratified by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Azerbaijan and Armenia acceded to it.

⁶ Article 81, Chisinau Convention.

⁷ Article 89.1.e, Chisinau Convention.

⁸ Article 89.1, Chisinau Convention. The Convention does not specify whether both states involved in the extradition must be a party to the treaty in question.

⁹ Article 2, Shanghai Convention.

¹⁰ Article 1.1.3, Shanghai Convention. For example, article 1.1.3 defines extremism as "an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the laws of the Parties."

¹¹ Article 3, Shanghai Convention.

the primacy of international law in the domestic legal order,¹² in its ruling no. 21-П, dated 14 July 2015, the Constitutional Court held that this Court's judgments may be implemented only insofar as they do not contravene the Russian Constitution. As a result, the ability of Russian institutions to effectively execute the decisions of this Court has been weakened, and it may ultimately have repercussions on the compliance of laws and procedures, including in the extradition context, with the ECHR. Russian legal experts have expressed the view that, in particular insofar as the regulation and practice of extraditions are concerned, the constitutional principle of international law primacy has been undermined. Further, they have documented how extradition practice indicates that domestic law, including secondary legislation, *de facto*, take precedence over Russia's international human rights obligations.¹³

III. Limitations on extradition

According to this Court's jurisprudence, the ECHR "does not prevent cooperation between States, within the framework of extradition treaties [...] provided that it does not interfere with any specific rights recognised in the Convention".¹⁴ While the Court has held that the fair trial guarantees of criminal or civil proceedings do not fully apply to extradition procedures,¹⁵ States Parties remain bound to ensure the absolute respect of the *non-refoulement* principle in all removal procedures, including extradition, regardless of their legal basis.¹⁶

Russian law sets out a list of mandatory grounds for refusing extraditions, including: persons persecuted for holding political opinions;¹⁷ persons to whom asylum has been granted in Russia (refugee status or temporary asylum);¹⁸ and persons with respect to whom extradition has been blocked by a Russian court in accordance with national legislation and international treaties binding on the Russian Federation.¹⁹ The latter implicitly incorporates in Russian law the *non-refoulement* principle, although it is not clear that its scope is coterminous with the *non-refoulement* principle developed by this Court under the Convention. In its Decision no. 11 of 14 June 2012, in relation to article 3 ECHR, the Plenum of the Russian Supreme Court did indicate that "extradition should be refused if there were serious reasons to believe that the person might be subjected to torture, inhuman or degrading treatment in the requesting country. Extradition could also be refused if exceptional circumstances disclosed that it might entail a danger to the person's life and health on account of, among other things, his or her age or physical condition."²⁰

¹² See article 15(4) of the Russian Constitution, article 1.3 Criminal Procedure Code (CPC). The CPC provides that general principles and norms of international law and international treaties of the Russian Federation are a constituent part of its legislation concerning criminal proceedings and in case of conflict between provisions of an international treaty and those in the Code, the international norms prevail.

¹³ Opinion expressed by Eleonor Davidyan, lawyer of the project "Right to Asylum" of the Institute for Human Rights, Russian Federation, in an interview with the ICJ; similar opinion is expressed on the basis of analysis of normative legal acts and administrative practices by Asker Chermit, in PhD dissertation "Institute of extradition in the Russian Federation: Constitutional legal foundations", Moscow 2004, available at the library of the Russian Academy of the State Service under the President of the Russian Federation.

¹⁴ *Calovskis v. Latvia*, ECtHR, Application no. 22205/13, 24 July 2014, para. 129.

¹⁵ *H v Spain*, ECommHR, Application no. 10227/82.

¹⁶ *Babar Ahmad and others v UK*, ECtHR, Applications nos. 24027/07 and others, 10 April 2012, para. 168.

¹⁷ Article 63.2, Constitution. It should be noted that prior to late 1990s the Russian legal doctrine did not encompass the notion of "political offence". In ratifying in 1999 the 1957 European Convention on Extradition, Russia incorporated the clause banning extradition for political offence in its legal system. At the same time, Russian Federation considers the list of crimes that are not deemed to constitute political offences provided in Article 1 of the Optional Protocol to the Convention as non-exhaustive and hence may have extensive interpretation of what it would not consider as a political offence.

¹⁸ Art. 464(1(2)), CPC.

¹⁹ Article 464(1)(5)). Other grounds exclude extradition for Russian nationals, see, article 61.1, Constitution; article 464(1(1)). See Bulletin of the Supreme Court of the Russian Federation, 2010, no.1 pp.30,31 and B.T. Bezlepkin, Commentary to the Criminal Procedure Code of the Russian Federation (itemized), 13th edition, Moscow, 2015, p.1107.

²⁰ *Abdulkhakov v. Russia*, Application no. 14743/11, 2 October 2012, para. 77 reporting the content of Resolution of the Plenum of the Supreme Court of the Russian Federation of 14.06.2012 N 11 (ed. of 03.03.2015) "On the practice of courts on

According to the decision, Russian authorities dealing with an extradition must assess whether there are “reasons to believe that the person concerned might be sentenced to the death penalty, subjected to ill-treatment or persecuted because of his or her race, religious beliefs, nationality, ethnic or social origin or political opinions.”²¹ Courts must assess both “the general situation in the requesting country and the personal circumstances of the person whose extradition is sought. They should take into account the testimony of the person concerned and that of any witnesses, any assurances given by the requesting country, and information about the country provided by the Ministry of Foreign Affairs, by competent United Nations institutions and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.”²²

The above notwithstanding, this Court has repeatedly found violations of the ECHR in cases arising from transfers from Russia to Kyrgyzstan.²³ Moreover, in two recent cases, this Court found that both the lower courts of the Russian Federation and law enforcement authorities had disregarded the above-mentioned Supreme Court guidance.²⁴

IV. The use of diplomatic assurances in extraditions to CIS States

International human rights authorities, including, UN Treaty Bodies, the UN High Commissioner for Human Rights and independent expert mechanisms (special procedures) of the UN Human Rights Council have stated that diplomatic assurances purporting to ensure protection from torture or other ill-treatment cannot relieve States of their *non-refoulement* obligations, and thus cannot be presumed to permit a transfer that would otherwise be prohibited.²⁵

As this Court has repeatedly held, such assurances are highly unlikely to provide a sufficient guarantee that the individuals concerned would be protected against the risk of prohibited treatment to allow a transfer to those countries where there are reliable reports that the authorities resort to or tolerate torture or other ill-treatment; or when they are not given by an authority of the destination State empowered to provide them; or where the destination State does not have an effective system of torture prevention.²⁶

the issues related to extradition of persons for criminal prosecution or execution of sentence, as well as the transfer of persons to serve their sentence”.

²¹ *Ibid.*

²² *Ibid.*

²³ With respect to return of ethnic Uzbeks to Kyrgyzstan in the aftermath of the June 2010 events in Southern Kyrgyzstan, the main authority on ECtHR position are the cases of *Khamrakulov v. Russia*, no.68894/13 § 65-66, 16 April 2015, and *Makhmudzhan Ergashev v. Russia* (no. 49747/11, § 72, 16 October 2012). More recently, *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015; *U.N. v. Russia*, Application no. 4348/15, 26 July 2016; and *R. v. Russia*, Application no. *R. v. Russia*, Application no. 11916/15, 26 January 2016. See, for other Central Asia States, cases of *Abdulkhanov v. Russia*, *op. cit.*, §141-142; *Ismoilov and Others v. Russia*, no. 2947/06, § 121, 24 April 2008; *Muminov v. Russia*, no. 42502/06, §§ 93-96, 11 December 2008 and *Yakubov v. Russia*, no. 7265/10, §§ 81 and 82, 8 November 2011). *Karimov v. Russia*, no. 54219/08, § 100, 29 July 2010; *Sultanov v. Russia*, no. 15303/09, § 72, 4 November 2010; and *Ergashev v. Russia*, no. 12106/09, § 113, 20 December 2011.

²⁴ See, *Mukhitdinov v. Russia*, Application no. 20999/14, 21 May 2015, paras. 50 ; *Mamazhonov v. Russia*, Application no. 17239/13, para. 157 and following.

²⁵ *Concluding Observations on France*, CCPR, CCPR, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, para. 20; *Concluding Observations on Russia*, CCPR, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 17. The Committee against Torture has categorically stated that “under no circumstances must diplomatic guarantees be used as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return”, *Concluding Observations on Spain*, CAT, UN Doc. CAT/C/ESP/CO/5, 9 December 2009, para. 13; *Saadi v. Italy*, ECtHR, GC, Application No. 37201/06, Judgment of 28 February 2008, paras.147-148; *M.S.S. v. Belgium and Greece*, ECtHR, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011, paras. 353-354; *Sidikovy v. Russia*, ECtHR, Application No. 73455/11, Judgment of 20 June 2013, para. 150.

²⁶ *Saadi v. Italy*, ECtHR, *op. cit.*, paras.147-148; *Ryabikin v. Russia*, ECtHR, Application No. 8320/04, Judgment of 19 June 2008, para. 119; *Gafarov v. Russia*, ECtHR, Application No. 25404/2009, Judgment of 21 October 2010; *Ben Khemais v. Italy*, ECtHR, Application No. 246/07, Judgment of 24 February 2009, para. 61; *Ismoilov and Others v. Russia*, ECtHR, Application No. 2947/06, Judgment of 24 April 2008, para.127; *Soldatenko v. Ukraine*, ECtHR, Application No. 2440/07,

In *Othman (Abu Qatada) v. the United Kingdom*, this Court clarified that, when considering the reliability of diplomatic assurances, it “will assess whether the assurances are specific or are general and vague whether the assurances concern treatment which is legal or illegal in the receiving State whether they have been given by a Contracting State whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible”.²⁷

In some instances, the UN Human Rights Committee has rejected diplomatic assurances indicating that, to be acceptable, a monitoring mechanism would, at a minimum, have to a) begin to function promptly after the arrival of the concerned person in the destination State; b) allow private access to the detainee by an independent monitor; and c) allow for the availability of independent forensic and medical expertise, at any moment.²⁸ For the Committee against Torture, the monitoring would have to be, “in fact and in the concerned person’s perception, objective, impartial and sufficiently trustworthy.”²⁹ Even where such high levels of safeguards do apply, the former UN Special Rapporteur on Torture affirmed that, “diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and *refoulement*.”³⁰ The ICJ supports the view of the Special Rapporteur and opposes reliance on diplomatic assurances against torture or other ill-treatment where any transfer would, in the absence of such assurances, violate the *refoulement* prohibition.³¹

In the extradition context, the use of diplomatic assurances has become common among States in the CIS region, in particular as regards ill-treatment of certain categories of “fugitives” from Central Asian States accused of serious offences, including of membership in or affiliation with “radical Islamist religious groups” that are listed as “terrorist or extremist” in their countries of origin.³² In Central Asian countries, such assurances are usually issued by the Prosecutor General’s Office.³³ There is no official format for diplomatic assurances in the region,³⁴ but a mutually accepted and somewhat uniform format has developed. Commonly, assurances reiterate the countries’ common principles and rules on extradition, namely, double criminality and the rule of specialty. They often contain “guarantees” against the risk of torture or ill-treatment, as well as commitments that defence rights or more broadly a fair trial, will be secured. The assurances may also sometimes include a statement that the prosecution of the individual concerned is not being sought on political grounds, and

Judgment of 23 October 2008, para. 74; ; *Ryabikin v. Russia*, ECtHR, *op. cit.*, para. 119; *Makhmudzhan Ergashev v. Russia*, ECtHR, Application No. 49747/11, 16 October 2012, paras. 74-76.

²⁷ *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012, para. 189

²⁸ *Alzery v. Sweden*, CCPR, Communication No. 1416/2005, Views of 10 November 2006, para. 11.5; *Zhakhongir Maksudov and Others v. Kyrgyzstan*, CCPR, Communications Nos. 1461, 1462, 1476 & 1477/2006*, Views of 31 July 2008, paras. 12.5-12.6; *Concluding Observations on Denmark*, CCPR, UN Doc. CCPR/C/DNK/CO/5, 16 December 2008, para. 10.

²⁹ *Pelit v. Azerbaijan*, CAT, Communication No. 281/2005, Views of 29 May 2007, para. 11.

³⁰ Manfred Nowak, UN Special Rapporteur on Torture, Annual Report to the General Assembly, UN Doc. A/60/316, 30 August 2005 (Nowak Report 2005), para. 32.

³¹ See, ICJ, *Assessing Damage, Urging Action, Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, pp.104-106 and 118-119; ICJ, Legal Commentary to the ICJ Berlin Declaration, 2008, pp.100-104.

³² See, Amnesty International, *Return to Torture: Extraditions, forcible Returns and Removals to Central Asia*, 2013, Index: EUR 04/001/2013, p. 23.

³³ In Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, Turkmenistan, Belarus and Ukraine.

³⁴ However, the Russian Supreme Court in its guidance on the application of Art.462 of the CPC by courts has indicated in its interpretation of the provisions of Art.462(3) that the assurances have to be indicated in the extradition request itself. The absence of such guarantees (assurances) is a barrier to granting a decision to extradite the wanted person (Bulletin of the Supreme Court of the Russian Federation, 2006, no.4, p.23), as cited in B.T. Bezlepkin, Commentary to the Criminal Procedure Code of the Russian Federation (itemized), 13th edition, Moscow, 2015, p.1106

provide for some monitoring mechanism. However, in extraditions to Central Asian States, this mechanism is usually limited to monitoring by diplomatic staff of the sending country and does not envisage the establishment of any independent monitoring system.³⁵

In the face of the existence of a real risk of torture or other ill-treatment, it has been the consistent approach of both this Court and UN Treaty Bodies in extradition cases from the Russian Federation to Central Asian States to refuse to accept as sufficient safeguards against *refoulement* mere references to diplomatic assurances, or to the purported adherence to international treaties prohibiting torture, or to the existence of domestic mechanisms established to protect human rights.³⁶

In the recent case of *Tadzhibayev v. Russia*, this Court found that a diplomatic assurance provided to the Russian Federation by the Kyrgyzstan authorities was not sufficient to protect against *refoulement* to face a risk of torture or other ill-treatment, contrary to article 3 ECHR. The Court found that the Kyrgyzstan authorities had not "demonstrated the existence of an effective system of legal protection against torture that could act as an equivalent to the system required of Contracting States. Moreover, it ha[d] not been demonstrated ... that Kyrgyzstan's commitment to guaranteeing access to the applicant by Russian diplomatic staff would lead to effective protection against proscribed ill-treatment in practical terms, as it has not been shown that the aforementioned staff would be in possession of the expertise required for effective assessment of the Kyrgyz authorities' compliance with their undertakings. Nor was there any guarantee that they would be able to speak to the applicant without witnesses. In addition, their potential involvement was not supported by any practical mechanism setting out, for instance, a procedure by which the applicant could lodge complaints with them or for their unfettered access to detention facilities."³⁷

V. The use of notices in the CIS region

When issuing an arrest warrant and/or an extradition request for a person suspected to be outside of the country's jurisdiction, CIS States can communicate such request via both Interpol and the 'Interstate wanted persons database' operated within the CIS framework.³⁸

Interpol will transmit the request via its Red Notice system and send it "to all the Organization's Members".³⁹ According to its Constitution, INTERPOL must respect the Universal Declaration of Human Rights⁴⁰ and the strict prohibition not "to undertake any intervention or activities of a political, military, religious or racial character."⁴¹ However,

³⁵ See e.g. Assurances issued by Kyrgyzstan to the Russian Federation in case of *Abdilaziz Khamrakuolov Khamrakuolov v Russia*, no.68894/13 § 69, 16 April 2015; assurances issued by Uzbekistan to Kazakhstan in case of "29 Uzbek refugees" (*Abdusamatov and 28 Others v Kazakhstan*, CCPR, 2011).

³⁶ See, *X. v the Russian Federation*, CAT, Communication no. 542/2013, UN Doc. CAT/C/54/D/542/2013, 30 June 2015; *Rustamov v. Russia*, no. 11209/10, 3 July 2012; *Umirov v. Russia*, no. 17455/11, 18 September 2012, *Azimov v Russia*, no. 67474/11, § 133, 18 April 2013, *Khamrakuolov v Russia*, op cit; *Abdusamatov and 28 Others v Kazakhstan*, op cit; *Khairullo Tursunov v Kazakhstan*, CAT, Communication No. 538/2013, 2015, para. 9.10.

³⁷ *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015, para.46.

³⁸ The database allows for exchange of information on wanted suspects and fugitives between CIS countries. It is operated by the Russian Federation's Federal government agency "The Main Information and Analytical Centre of the Ministry of Interior of the Russian Federation" within the framework of the CIS Interstate Information Bank (MIB). In late August 2015, Ukraine announced that it will cease operation of the database on its territory due to Russia's failure to detain and extradite former Ukrainian president Victor Yanukovich and members of his family.

³⁹ Resolution III/IRPD/GA/2011 (2014), article 1.13.

⁴⁰ Article 2, INTERPOL Constitution

⁴¹ Article 3, INTERPOL Constitution. The scope of this article covers "offences of a predominantly political, racial or religious character even if - in the requesting country - the facts amount to an offence against the ordinary law", Resolution No AGN/53/RES/7, 2. If some countries do not execute the extradition request based on article 3 of the INTERPOL Constitution, "this is reported to the other NCBs in an addendum to the original notice indicating that the offender has been released", (para 9) but it does not invalidate the request *per se*. The General Assembly of Interpol identified the following offences as

research by the NGO Fair Trials International has found that INTERPOL had not been applying these guarantees consistently in practice.⁴² For example, it has documented that “the Russian Federation implements its devolved responsibilities by a set of instructions to law enforcement agents agreed by various agencies including the Federal Security Service ... which simply reiterates that ‘the international search for persons alleged to have committed crimes of a political, military, religious or racial character is not performed.’ ... [T]his has not stopped Russia seeking to abuse INTERPOL’s system.”⁴³

In the INTERPOL system, the entities primarily responsible for filtering information, for providing regular review and, therefore, for the application of these safeguards, including “obligations under international law”,⁴⁴ are the National Country Bureaus (NCBs), the offices designated by Member States as the proxy of INTERPOL in the country.⁴⁵ The General Secretariat retains a screening role, and must provide a preliminary review of Red Notices and supervision.⁴⁶ A Commission for the Control of Files (CCF) can process individual complaints for insertion in the Red Notices database.⁴⁷ However, by its own admission, it does not have the power to delete them or issue binding opinions.⁴⁸

Within the framework of the ‘CIS Interstate wanted persons database’, law enforcement agencies can send requests to conduct search and arrest operations. The requesting warrant is treated as having the legal force of a domestic warrant. Once the wanted person is found, the relevant authority informs their counterparts.⁴⁹ This information normally triggers extradition proceedings and serves as a basis for preparation of extradition requests by the State that has jurisdiction over the requested person.

There is a considerable difference in the remedies available in regard to these two databases. Unlike with INTERPOL system, the CIS database does not explicitly provide for a mechanism ensuring that persons sought on political or other protected grounds are not placed on the wanted list. No complaint mechanism is contemplated in its recently adopted working rules,⁵⁰ which clarify the procedure for operating the

falling per se under article 3: “membership of a prohibited organization, the expression of certain prohibited opinions, offences involving the press, insulting the authorities, offences against the internal or external security of the State, desertion from the armed forces, treason, espionage, practicing a prohibited religion, recruitment or propaganda for particular religions, membership of a racial association” and “acts committed by politicians in connection with their political activities, even if those concerned are prosecuted after their fall from power and, in some cases, after they have fled abroad. The situation is different in the case of an offence committed by a politician acting as a private individual”, Resolution No AGN/53/RES/7, II.1-2. However, “(w)hen offences are committed by persons with definite political motives but when the offences committed have no direct connection with the political life of the offenders’ country or the cause for which they are fighting, the crime may no longer be deemed to come within the scope of Article 3. This is particularly true when offences are committed in countries which are not directly involved (i.e. outside the “conflict area”) and when the offences constitute a serious threat to personal freedom, life or property. Offences committed outside the conflict area in order to draw attention to a particular cause (aircraft hijackings, the taking of hostages, kidnappings) do not come within the scope of Article 3.” (III.3-4)

⁴² Fair Trials International, *Strengthening respect for human rights, strengthening INTERPOL*, November 2013, para. 110.

⁴³ *ibid*, para. 135.

⁴⁴ Resolution III/IRPD/GA/2011 (2014), article 34.3.e

⁴⁵ *ibid*, article 9.4, article 10.3, article 11.2, article 21.2.b, article 17.2-4, article 34.1-2

⁴⁶ Resolution III/IRPD/GA/2011 (2014), articles 86, 22.5, 74, 123.4, 131, 17.5-6 24.1.b, 51, 81.

⁴⁷ article 36, Constitution; articles 1 and 18, Rules on the Control of Information and Access to Interpol’s Files

⁴⁸ 2012 CCF Annual Report, para. 95. See also, Florence de VILLENFAGNE and Claire GAYREL, *DATA PROTECTION AT ICPO-INTERPOL ASSESSMENT, ISSUES AND OUTLOOK*, CRIDS Centre de Recherche Information, Droit et Société (Information, Law and Society Research Centre) Notre Dame de la Paix University Namur, Belgium, 29 April 2011, p. 54.

⁴⁹ The Rules on the CIS Interstate wanted persons database provides that detention is conducted on the basis of the arrest request contained in the search request; the procedural document that serves as basis for detention under these Rules are requested thereafter (§26.1). The Rules also stipulate the detaining entity informed a supervising judicial body or prosecutor’s office of the arrest and subsequent review of the request for detention by the searching state is reviewed on the basis of domestic law of the detaining state, i.e. review of the lawfulness and validity for detention is dependent on the domestic legal system of the country on whose territory the person was apprehended.

⁵⁰ The Rules (Регламент компетентных органов по осуществлению межгосударственного розыска лиц) were adopted on 30 October 2015 by the Decision of the Heads of Governments of CIS States on the Rules for authorized bodies on conducting the Interstate search for wanted persons, at the Dushanbe Summit of CIS States, although the database itself has been in existence and operations for many years prior, based on the CIS Agreement for cooperation between Ministries

database.⁵¹

VI. Judicial review of the extradition request

As highlighted above, in extradition cases, Contracting Parties remain bound by their *non-refoulement* obligations, and by their obligation to secure the right to an effective remedy for human rights violations (Article 13 ECHR). To ensure compliance with the latter, people threatened with extradition in circumstances where a real risk of violation of Convention rights is arguable must have: a) access to relevant documents and accessible information on the domestic legal procedures governing conduct of their case; b) where necessary, translated material and interpretation; c) effective access to quality legal advice, if necessary by provision of legal aid;⁵² d) the right to participate in adversarial proceedings; a reasoned extradition decision; and e) a fair and reasonable opportunity to dispute the factual basis for the extradition.⁵³

The right to an effective remedy also requires review of the extradition decision by an independent and impartial appeals authority, which has competence to assess the human rights issues raised by the case, to review the extradition decision on both substantive and procedural grounds, and to quash the decision, when the protection of human rights so requires.⁵⁴ To provide an effective remedy, the appeal must have suspensive effect on the extradition from the moment the appeal is filed.⁵⁵ Stays of execution of the extradition order at the discretion of a court or other body are not sufficient to guarantee the right to an effective remedy.⁵⁶

In particular, when the *non-refoulement* principle is engaged, this Court has ruled that in all phases of the extradition proceedings, from their very beginning to the last judicial instance, the authorities must carry out an "independent and rigorous scrutiny"⁵⁷ of the risk of arbitrary *refoulement*.⁵⁸ Indeed, the Court stressed that, in cases of extradition, "the Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources" in respect of the situation existing at the time of the extradition.⁵⁹

In the Russian Federation, the person concerned, directly or through his or her legal representative, can challenge the extradition decision made by the Prosecutor General

of Interior on information exchange of 3 August 1992 (*Соглашение о взаимоотношениях министерств внутренних дел в сфере обмена информацией от 3 августа 1992 года*) and CIS Agreement on information exchange in the field of countering crime of 22 May 2009 (*Соглашение об обмене информацией в сфере борьбы с преступностью от 22 мая 2009 года*)

The official text of the Rules is available at the website of the and available at <http://bkbopcis.ru/assets/files/vsyo.pdf>

⁵¹ The Rules provide that the Main Information and Analytics Centre of the Ministry of Interior of the Russian Federation which is responsible for establishing and running the centralized register of wanted persons should run an annual review and update of the list, however, no provisions for striking out persons sought on political grounds or checks whether prosecution in fact amounts to persecution are provided. The only authority envisaged for withdrawing persons from the wanted list are the requesting states.

⁵² *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 301.

⁵³ *Ibid.*, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, ECtHR, Application No. 1365/07, Judgment of 24 April 2008, paras. 56-65. See also, *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, Application No. 27765, 23 February 2012, paras. 202-204.

⁵⁴ *Vilvarajah and Others v. United Kingdom*, ECtHR, Applications Nos. 13163/87–13164/87–13165/87–13447/87–13448/87 Judgment of 30 October 1991, para. 99; *Isakov v. Russia*, ECtHR, Application No. 14049/08, Judgment of 8 July 2010, para. 137; *Yuldashiev v. Russia*, ECtHR, Application No. 1248/09, 8 July 2010, para. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application No. 53688/08, Judgment of 10 June 2010, paras. 82 and 84; *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 133. See also, *C.G. and Others v. Bulgaria*, ECtHR, *op. cit.*, para. 56.

⁵⁵ *Jabari v. Turkey*, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, para. 50; *Conka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 79; *Gebremedhin v. France*, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58, 66; *Muminov v. Russia*, ECtHR, Application No. 42502/06, Judgment of 11 December 2008, para. 101.

⁵⁶ *Conka v. Belgium*, ECtHR, *op. cit.*, paras. 81-85.

⁵⁷ *Savridin Dzhurayev v Russia*, Application no. 71386/10, para. 165.

⁵⁸ See, for a practical application, and the finding of a violation in respect to the Russian Federation, *Zokhidov v Russia*, Application no. 67286/10, para. 129-131.

⁵⁹ *Savridin Dzhurayev v Russia*, Application no. 71386/10, para. 156.

in a public hearing before a competent court,⁶⁰ within ten days of the receipt of notification of the decision itself.⁶¹ If the person is under arrest, the administration of the detention facility is under an obligation to refer an appeal to the competent court, immediately upon his or her arrival, and to inform a prosecutor.⁶²

The appeal has suspensive effect on the execution of the extradition.⁶³ The decision is taken in open court by a single judge in the presence of a prosecutor, the person whose extradition is sought and the latter's legal counsel.⁶⁴ The judicial review, however, is usually limited to an assessment of whether the extradition order was made in accordance with applicable international and domestic law procedure,⁶⁵ although the court may consider whether the alleged offence has in fact occurred and, at least in theory, it may inquire into the nature of the alleged offence, its location, time and date, and may review any evidence and order judicial investigation measures provided for under Chapter 27 of the Criminal Procedure Code.⁶⁶

However, in practice, it appears that Russian courts rarely use this power and tend to defer to the decision of the General Prosecutor's Office rather than carry out an assessment of the risk of arbitrary *refoulement*.⁶⁷ This appraisal of the current extradition practice in Russian courts is supported by this Court's case-law. Recently, in the case of *Tadzhibayev v. Russia*, the Court criticized "the reasoning put forward by the Supreme Court and its failure to take into account materials originating from reliable sources, such as reports by international NGOs."⁶⁸ It was not convinced that "the issue of the risk of ill-treatment was subjected to rigorous scrutiny in the asylum or extradition proceedings."⁶⁹

In *Mukhitdinov v. Russia*, it found that domestic courts to which an extradition decision had been appealed "appeared to attach the decisive weight to the assurances ..., taking them at face value, without engaging in an analysis of the context in which they were given or making their detailed assessment against the Convention requirements."⁷⁰ This in particular occurred despite "the authoritative directions given by the Supreme Court to the lower courts in its Ruling no. 11 of 14 June 2012 to engage in a thorough and comprehensive review of the serious claims of ill-treatment."⁷¹

The court decision granting or dismissing the appeal against the General Prosecutor's Office's extradition decision can be subsequently appealed to the Judicial Collegium on criminal cases of the Supreme Court of the Russian Federation,⁷² within seven days of the decision. If the appeal dismissal is upheld, the extradition decision becomes final and enforceable. In practice, in Russia the extradition decision is executed on the same day on which it becomes final.⁷³ While Russian law provides for an option of cassation

⁶⁰ Supreme Court of the Republic, district or regional court, court of the city of federal importance, court of autonomous region or autonomous district, depending on the whereabouts of the persons against whom the extradition decision was delivered.

⁶¹ Article 463.1, CPC.

⁶² Article 463.2 CPC.

⁶³ Article 462.6 CPC.

⁶⁴ Article 463.4, CPC.

⁶⁵ Article 463.6 CPC and article 355.2-3 CPC.

⁶⁶ *Ibid.*

⁶⁷ Opinion expressed by Eleonor Davidyan, lawyer of the project "Right to Asylum" of the Institute for Human Rights, Russian Federation, in an interview with the ICJ.

⁶⁸ *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015, para. 44.

⁶⁹ *Ibid.*

⁷⁰ *Mukhitdinov v. Russia*, op cit paras. 50; *Mamazhonov v. Russia*, op cit para. 154.

⁷¹ *Mukhitdinov v. Russia*, op cit paras. 50; *Mamazhonov v. Russia*, op cit para. 157.

⁷² Article 463.9 CPC

⁷³ *Ibid.*

appeals pursuant to Chapters 47.1 and 48.1 of the CPC,⁷⁴ this procedure does not have automatic suspensive effect and, in practice, lawyers rarely seek such an appeal in extradition proceedings.⁷⁵

VII. Rights of suspects following extradition to Kyrgyzstan

International human rights authorities, including this Court, have consistently expressed profound concern at the Kyrgyzstan authorities' failure to respect the prohibition of torture or other ill-treatment with regard to persons of Uzbek ethnic origin "charged with a number of serious offences allegedly committed in the course of the violence of June 2010."⁷⁶ The Court has identified people falling into this situation as a "particularly vulnerable group"⁷⁷ routinely subjected to treatment contrary to article 3 ECHR.

For example, in the recent case of *U.N. v Russia*, this Court held that expulsion of an ethnic Uzbek applicant to Kyrgyzstan would lead to *refoulement* in violation of article 3 ECHR "given the attested widespread and routine use of torture and other ill-treatment by law-enforcement agencies in the southern part of Kyrgyzstan ..., the impunity of law-enforcement officers, and the absence of sufficient safeguards for the applicants in the requesting country."⁷⁸ In *R v Russia*, decided earlier in 2016, the Court affirmed that such transfers "ought to be seen in the context of the rise of ethno-nationalism in the politics of Kyrgyzstan, particularly in the south, the growing inter-ethnic tensions between Kyrgyz and Uzbeks, the continued discriminatory practices faced by Uzbeks at an institutional level and under-representation of Uzbeks in, amongst other areas, law-enforcement bodies and the judiciary."⁷⁹ These findings are echoed by the April 2016 Country Report on Human Rights Practices of the US State Department, stating that "[d]espite widespread acknowledgement of torture by government officials and the establishment of governmental bodies to monitor and fight torture, authorities investigated or prosecuted very few cases of alleged torture."⁸⁰

The case of Azimjan Askarov, a human rights defender of Uzbek ethnicity sentenced to life imprisonment for the alleged murder of a police officer in the midst of the violent events of 2010, evidences the gravity of the violations of human rights against ethnic Uzbek defendants. In 2012, the ICJ published a detailed report on the case which concluded that Azimjan Askarov had been "subject to multiple violations of his internationally protected human rights [to a level amounting to] a manifest violation of the right to a fair trial as protected by Article 14 ICCPR, and ... likely to give rise to a denial of justice."⁸¹ The ICJ found that consistent allegations of torture of Mr Askarov

⁷⁴ The appeal court's ruling (*определение суда*) can be challenged in cassation to the Judicial Collegium of the Supreme Court of Russia (Article 355 (2(3)) of the CPC)

⁷⁵ Opinion expressed by Eleonor Davidyan, lawyer of the project "Right to Asylum" of the Institute for Human Rights, Russian Federation, in an interview with the ICJ.

⁷⁶ See, as example, the reference in *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015, para. 43; *M R. v Russia*, Application no. 11916/15, 26 January 2016, para. 56; *Azimjan Askarov v. Kyrgyzstan*, CCPR, Communication no. 2231/2012, UN Doc. CCPR/C/116/D/2231/2012, 31 March 2016.; CCPR, Concluding Observation on Kyrgyzstan, UN Doc. CCPR/C/KGZ/CO/2, paras. 14-15; CAT, Concluding Observations on Kyrgyzstan, UN Doc. CAT/C/KGZ/CO/2, paras. 5-8.

⁷⁷ *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015, para. 43.

⁷⁸ *U.N. v Russia*, Application no. 14348/15, 26 July 2016, para. 38. See also, for recent cases, *Tadzhibayev v. Russia*, Application no. 17724/14, 1 December 2015, paras. 42-43, 46; *R. v Russia*, Application no. 11916/15, 26 January 2016, paras. 56, 62. See also Khamrakulov, cited above, § 65; Mamadaliyev v. Russia, no. 5614/13, § 60, 24 July 2014; Kadirzhanov and Mamashev, cited above, § 91; Gayratbek Saliyev, cited above, § 61; and Makhmudzhan Ergashev v. Russia, no. 49747/11, §§ 71-73, 16 October 2012.

⁷⁹ *R. v Russia*, Application no. 11916/15, 26 January 2016, para. 55.

⁸⁰ US State Department, *Country Report on Human Rights Practices 2015 - Kyrgyzstan*, April 2016, available at <http://www.refworld.org/country,,,KGZ,,5716124b10,0.html>. See also the reports of Amnesty International, Report on Kyrgyzstan 2015-2016, available at <https://www.amnesty.org/en/countries/europe-and-central-asia/kyrgyzstan-report-kyrgyzstan/>; and Human Rights Watch, World Report 2016 – Kyrgyzstan, available at <https://www.hrw.org/world-report/2016/country-chapters/kyrgyzstan>.

⁸¹ International Commission of Jurists, *Report on the arrest, detention and trial of Azimzhan Askarov*, Geneva, 2012, para 265, available at <http://www.icj.org/icj-report-kyrgyz-human-rights-defender-azimzhan-askarov-victim-of-severe-ill-treatment-and-unfair-trial/>.

and his co-accused had not been sufficiently investigated and “torture and ill-treatment of the defendants allegedly continued up to and during the trial.”⁸² The report concluded that the trial was “... conducted in an atmosphere of fear, intimidation, tolerance of hatred and nationalistic threats and attacks. ... The threats to lawyers, witnesses, judges and the constant use of torture against the defendants, seriously undermined the possibility of the proper administration of justice and the validity of the judgments by the trial and appeals courts.”⁸³ These findings were supported in March 2016 by the UN Human Rights Committee which found in the case of *Azimjan Askarov v. Kyrgyzstan* that the complainant’s right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, his right to a fair trial, right to an effective remedy and right to liberty had been violated.⁸⁴

VIII. Conclusions

Analysis of the law and practice on extraditions from the Russian Federation to Central Asian States reveals a number of critical human rights deficits.

There is significant divergence between the domestic legal texts and jurisprudence and the practice of the Russian authorities. Several cases have demonstrated that both the lower courts and law enforcement authorities disregard the ruling of the Supreme Court of the Russian Federation on the application of the *non-refoulement* principle. This lack of effective compliance with and respect for the *non-refoulement* principle makes the judicial review of extraditions to Central Asia States ineffective.

Furthermore, it is documented that Russian authorities rely routinely on diplomatic assurances from the authorities of Central Asian States without carrying out scrutiny of their adequacy. This weakness is compounded by the functioning of the CIS Interstate wanted persons database, which provides no remedy against abuse.

The ICJ submits that the lack of respect for the procedural aspect of the principle of *non-refoulement*, the consequent ineffectiveness of domestic remedies in this regard, and the abysmal record of Kyrgyzstan in upholding its obligation to respect and protect the prohibition of torture or other ill-treatment mean that extraditions from the Russian Federation to Kyrgyzstan entail a high risk of violations of both substantive and procedural aspects of the principle of *non-refoulement*.

⁸² *Ibid.*, para. 265

⁸³ *Ibid.*, para. 266

⁸⁴ *Azimjan Askarov v. Kyrgyzstan*, CCPR, Communication no. 2231/2012, UN Doc. CCPR/C/116/D/2231/2012, 31 March 2016. On 12 July 2016, the Supreme Court of Kyrgyzstan ordered a re-hearing of the case but refused to release Mr Askarov despite the decision of the UN Human Rights Committee to “take appropriate steps to immediately release [him]”. See, Amnesty International, Kyrgyzstan: Supreme Court leaves 65-year-old Prisoner of Conscience languishing in jail, 12 July 2016, available at <https://www.amnesty.org/en/latest/news/2016/07/kyrgyzstan-supreme-court-leaves-prisoner-of-conscience-languishing-in-jail/>