BEFORE THE GRAND CHAMBER
EUROPEAN COURT ON HUMAN RIGHTS

T.K. and S.R. v. Russia

Application no. 28492/15

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND THE EUROPEAN COUNCIL OF REFUGEES AND EXILES (ECRE)

INTERVENER

pursuant to the Registrar's notifications dated 17 July and 18 August 2020 that the Court had granted permission under Rule 44 § 6 of the Rules of the European Court of Human Rights

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11 September 2020

I. Introduction

1. In this intervention, the International Commission of Jurists (ICJ) and the European Council on Refugees and Exiles (ECRE) present additional submissions to those introduced by the ICJ before the Chamber in order to update them and address the Chamber's judgment. These present submissions will address 1) *non-refoulement* obligations under international human rights law in relation to the consideration of evidence to assess the substantial grounds to believe that a concerned person will face real risk of a serious human rights violation; 2) the use of diplomatic assurances purportedly to protect against torture and other serious human rights violations in light of international law; 3) an update on the legal framework governing extraditions from the Russian Federation to Central Asian States, in particular Kyrgyzstan, as well as Russia's extradition practice.

II. Non-refoulement obligations under international human rights law in relation to the consideration of evidence to assess the substantial grounds to believe that a real risk of a serious human rights violation exists.

2. The principle of *non-refoulement* under the ECHR and other instruments of international human rights law applicable to the respondent State entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they face a real risk of serious violations of human rights - including of the right to life, freedom from torture or ill-treatment, flagrant denial of justice or the right to liberty[1] - in the event of their removal, in any manner whatsoever, from the State's jurisdiction. This principle is absolute and no derogations are permitted either in law or in practice.[2]

3. In order for the prohibition of *non-refoulement* to be practical and effective and not theoretical and illusory,[3] this Court has found a close and rigorous scrutiny of arguable[4] claims in *non-refoulement* cases to be an integral part of protecting an individual's rights under Article 3.[5] This requires the Contracting Parties, *inter alia,* to assess all evidence at the core of a *non-refoulement* claim,[6] including, where necessary, to obtain such evidence *proprio motu*; not to impose an unrealistic burden of proof on applicants or require applicants to bear the entire burden of proof;[7] to take into account all relevant country of origin information materials originating from reliable and objective sources;[8] and to apply the principle of the benefit of the doubt in light of specific vulnerabilities of asylum seekers.[9]

[1] Othman (Abu Qatada) v. the United Kingdom, App. No. 8139/09, (17 January 2012), paras. 233, 258 -261; N.A. v. the United Kingdom, App. No. 25904/07, (17 July 2008); Soering v. the United Kingdom, App. No. 14038/88, (7 July 1989).
[2] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Adel Trebourski v. France, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, paras. 8.2 – 8.3. UN Human Rights Committee, General comment no. 31 [80]. The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.
[3] Arctico v. Italy, App. No 6694/74, (13 May 1980), para. 33.
[4] This Court has noted that in order to be arguable the right in question must not necessarily be violated and does not require certainty, but rather the claim must not be so weak that it would not be admissible under the ECtHR. Diallo v. Czech Republic, App. No 20493/07, (28 November 2011), paras. 59 -71.
[5] Jabari v. Turkey, App. No. 40035/98, (11 July 2000), paras. 39, 50.
[6] Ibid, paras. 39-40; Singh and Others v. Belgium, App. No. 33210/11, (2 October 2012), para. 104.
[7] M.S.S. v. Belgium and Greece, GC, App. No. 30696/09 (21 January 2011) paras. 344-359; Hirsi Jamaa and Others v. Italy, App. No. 27765/09 (23 February 2012) paras. 122-158.
[8] Salah Sheekh v. the Netherlands, App. No. 1948/04 (11 January 2007) para. 136.
[9] M.A. v. Switzerland, App. No. 52589/13, (18 November 2014), para.55.

4. Where domestic proceedings have taken place in the jurisdiction of the Contracting Party, it is established that it is not generally this Court's task to simply substitute its own assessment of the facts for that of the State's domestic courts and, as a general rule, it is for those courts to assess the evidence before them. This does not mean, however, that this Court will have no role to play in such an assessment. To the contrary, the Court necessarily retains a responsibility to supervise any result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention "would be devoid of any substance".[10] In accordance with Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention.[11] In the extradition context, this means that in cases where an applicant provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government, 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, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.[12]

5. The Court found that the domestic authorities had failed to carry out a rigorous scrutiny of the risk of ill-treatment protected by Article 3 ECHR. This finding was based on the fact that the authorities assessment largely presented simplistic reasoning for the rejections of the applicant's arguments and demonstrated a reliance on assurances of safety by authorities of the destination country despite their formulation in standard terms, which appeared tenuous given that similar assurances had consistently been considered unsatisfactory by the Court in the past.[13]

6. In assessing the weight to be attached to country material, the Court has found that consideration must be given to the sources of such material, in particular their independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, **the consistency of their conclusions and their corroboration by other sources are all relevant considerations**.[14] Due consideration must also be given to the presence and reporting capacities of the author of the material in the country in question. According to this Court, in order to evaluate a 'country's safety', due consideration must be given to the range of the publications available and the consistency of the nature of the information reported.[15]

7. The Court has further recognised that many difficulties are faced by governments and NGOs gathering information in dangerous and volatile situations.[16] It has accepted that it will not always be possible for effective

[10] Open Door and Dublin Well Woman v. Ireland, 29 October 1992, para. 69, and Scordino v. Italy (no. 1) [GC], App. no. 36813/97, para. 192.
[11] Savriddin Dzhurayev v. Russia, App. No. 71386/10, paras. 154 – 155.
[12] Ibid, para. 156. Salah Sheekh v. the Netherlands, op. cit., and Ismoilov and Others v. Russia, App. no. 2947/06, (24 April 2008), para. 120.
[13] Abdulkhakov v. Russia, App. no. 14743/11, (2 October 2012) paras. 149-50; Tadzhibayev v. Russia, App. no. 17724/14, (1 December 2015) para. 46; N.M. v Russia, App. no. 29343/18, paras. 20 – 21.
[14] Saadi v. Italy, App. No. 37201/06, (ECtHR, 28 February 2008), para. 143; NA. v. the United Kingdom, App. No. 25904/07 (17 July 2008) para. 120; and Sufi and Elmi, App. No. 8319/07 (28 June 2011) para. 230, J.K. and Others v. Sweden [GC], App. no. 59166/12 (23 August 2016) paras. 88 – 89.
[15] Safaii v. Austria, App. No. 60104/08 (5 December 2013) paras. 46-47.
[16] J.K. and Others v. Sweden, op. cit., paras. 88-89.

investigations to be carried out in the immediate vicinity of a conflict.[17] The interveners submit that the latter finding should logically be applied *mutatis mutandis* to the situations where direct, safe and unfettered access to victims of specific human rights violations, including torture, may be compromised, and where the actors denouncing such violations risk being prosecuted or facing treatment prohibited by the Convention. An additional factor in such assessment would be whether the State in question is a party to the Convention.

8. UN treaty bodies, identifying State obligations under universal human rights treaties, have consistently found that the individual risk of irreparable harm in *non-refoulement* cases should always be examined on the basis of available contextual information relating the general human rights situation in the country concerned,[18] where possible in association with the particular human rights aspects[19] and all other "relevant elements" of the case.[20] They will consider authoritative information from international organizations, such as the UNHCR Guidelines, reports from independent experts of the UN Human Rights Council, and concluding observations of UN Treaty Bodies, which are very often consulted as authoritative country of origin information.[21]

9. The interveners share the conclusions of the dissenting judges of the Court that in order to comply with *non-refoulement* obligations under the Convention the authorities of the transferring Contracting Party **must conduct a real and effective investigation** of the situation the persons to be transferred would face in the destination countries**, including *proprio motu***. Where the applicant alleging treatment contrary to the absolute prohibition under Article 3 of the Convention has adduced evidence capable of proving their arguable claim, the transferring State will only comply with the obligation of a rigorous assessment where it dispels **any doubt** raised by it. Schematic reliance on and selective use of country reports to suggest that a particular country is trying to improve its general human rights record without thoroughly assessing information from reputable sources suggesting otherwise can never be sufficient and is capable of breaching the obligations under the Convention. This is particularly so without an individualised and diligent assessment of all the facts and circumstances and contradictions between the parties of a particular case.

10. **The interveners concur with the views of the dissenting judges in the Chamber judgment that in cases departing from the Court's consistent assessment of the permissibility of refoulement to a particular country or region, evidence sufficient to justify the departure should be rigorously assessed based on this Court's case law, including through the consideration of reports by INGOs and NGOs. Where such assessment is engaged in relation to treatment prohibited by the Convention in the**

[17] Ibid.
[18] CCPR, X. v. Denmark, Communication no. 2389/2014, 21 October 2015, 7.3; CCPR, Pillai v. Canada, Communication no. 1763/2008, 9 May 2011, 11.4. See also, CEDAW, R.S.A.A. et al v. Denmark, Communication No. 86/2015, 15 July 2019, 8.5, and CAT, Abichou v Germany No. 430/2010 16 July 2013, para. 116. In Abichou v Germany, notwithstanding the diplomatic assurances that were provided, the Committee investigated the actual human rights situation in the destination country at the time of the extradition. In doing so it refers to its own observations on the human rights situation of the country concerned along with the more recent reports by Human Rights Committee corroborated by numerous non-governmental sources.
[19] CCPR, M.I. v. Sweden, Communication no. 2149/2012, 26 September 2013, 7.5, where the Committee examines the complainant's risk "[a]gainst the background of the situation faced by persons belonging to sexual minorities".
[20] Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan, CCPR/C/93/D/1461,1462,1476& 1477/2006: "the Committee must consider all relevant elements. The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed illtreatment existed."
[21] CCPR, M.M. v. Denmark, Communication No. 2345/2014, 18 April 2019, 8.7.

absolute terms, including Article 3, extra caution should be engaged. The lack of sufficient evidence that a situation of risk of torture or ill-treatment has not clearly ceased to exist militates for an assessment that there is a continued existence of the risk.

III. The use of diplomatic assurances against torture and other serious human rights violations in light of international law.

11. International human rights authorities, including UN Treaty Bodies, in particular the UN Human Rights Committee and the Committee on Torture, responsible respectively for the International Covenant on Civil and Political Rights and the Convention against Torture, have affirmed that diplomatic assurances purporting to ensure protection from torture or other ill-treatment cannot relieve States of their *non-refoulement* obligations under those respective treaties, and thus must not used presumptively to permit a transfer that would otherwise be prohibited.[22]

12. 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.[23]

13. This Court has laid down strict conditions that must be met if a State's reliance on diplomatic assurances is to be accorded determinative weight in any non-refoulment assessment .[24] In particular, in ***Othman (Abu Qatada) v. UK,*** it identified **specific requirements to be satisfied** in extradition cases.[25] According to this Court's established case law on diplomatic assurances in general, a State wishing to rely on diplomatic assurances must ascertain, on the basis of objectively verifiable evidence, that the assurances would be complied with in practice and that such compliance could be "***objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers***". Moreover, an effective system of protection against torture, investigation of such allegations and criminal accountability and punishment of those responsible should be put in place in the destination State. Finally, the reliability of the assurances would have to be thoroughly examined and affirmed by the domestic courts of the sending State. [26] The Court has consistently held that the risk of torture and ill- treatment must be ruled out for any assurance to be considered.[27] The inescapable implication of this Courts jurisprudence, taken

[22] 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.
[23] 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, op. cit., para.127; Soldatenko v. Ukraine, ECtHR, Application No. 2440/07, Judgment of 23 October 2008, para. 74; ; Makhmudzhan Ergashev v. Russia, ECtHR, Application No. 49747/11, 16 October 2012, paras. 74-76.
[24] Trabelsi v Belgium, no 140/10 (ECtHR, 7 October 2014); Othman (Abu Qatada) v. UK, op. cit.; Ryabikin v. Italy no 8320/04 (ECtHR, 19 June 2008), Ismoilov and Others v. Russia, op. cit.; Saadi v. Italy, op. cit..
[25] Othman (Abu Qatada) v. UK, op. cit., para. 189.
[26] Ibid.
[27] Saadi v. Italy, op. cit., para. 148; Ismoilov and Others v. Russia, op. cit., para. 127; Ryabikin v. Italy, App. No. 8320/04 (19 June 2008), para. 119.

in consideration of the exceptional nature of reliance on diplomatic assurances in Article 3 cases and of the absolute prohibition of torture, is that these conditions set out by this Court for their acceptance are cumulative and not alternative (unless they are inapplicable to specific case), as the context of the case of Othman implies.[28]

14. This position is reinforced by the positions of UN treaty bodies and special procedures of the UN Human Rights Council, which have emphasized the need for strict scrutiny of diplomatic assurances against torture or other ill-treatment. The Committee against Torture noted that diplomatic assurances "*cannot be used as an instrument to avoid the application of the principle of non-refoulement*", especially when post-expulsion monitoring has not taken place.[29] In *Boily v. Canada,* the Committee emphasized that the assurances should be approached with strict scrutiny as the fact of their request alone means that the State is already in a situation doubt about the recipient State's compliance with their relevant human rights obligations.[30] Any monitoring would have to be, "***in fact and in the concerned person's perception****, objective, impartial and sufficiently trustworthy*."[31]

15. Similarly, successive UN Special Rapporteurs on Torture have affirmed that, "diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and *refoulement*."[32] The current Special Rapporteur, Nils Melzer, in relation to the use by State of diplomatic assurances in case of risk of torture or ill-treatment, expressed "his alarm at the implicit complacency and acquiescence expressed by the use of diplomatic assurances for merely selective compliance with the prohibition of torture and ill-treatment. Moreover, where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return, diplomatic assurances, even in conjunction with post-return monitoring mechanisms, are inherently incapable of providing the required protection." [33]

16. Indeed, the UN Human Rights Committee has generally rejected recourse to 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.[34]

17. In the view of the interveners, in line with the positions of these UN bodies, reliance on diplomatic assurances against torture or other ill-treatment is in

[28] Othman (Abu Qatada) v. UK, op. cit.
[29] CAT, Tursunov v. Kazakhstan, Communication No. 538/2013, 3 July 2015, para. 9.10; UN Committee Against Torture (CAT), General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018, paras. 19 and 20.
[30] CAT, Boily v. Canada, Communication No. 327/2007, 13 January 2012, 14.4 and 15.
[31] Pelit v. Azerbaijan, CAT, Communication No. 281/2005, Views of 29 May 2007, para. 11.
[32] Theo Van Boven, UN Special Rapporteur on Torture, Annual Report, UN Doc. A/59/324, 1 September 2004, paras. 31-42. 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. See also Human Rights Council - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 26 feb 2018 A/HRC/37/50, para. 46.
[33] Human Rights Council - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, paras. 47 – 48.
[34] 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; Con CAT, Tursunov v. Kazakhstan, Communication No. 538/2013, 3 July 2015, 9.10.cluding Observations on Denmark, CCPR, UN Doc. CCPR/C/DNK/CO/5, 16 December 2008, para. 10. See also

principle not compatible with the prohibition on *refoulement* where any transfer would, in the absence of such assurances, fall afoul of this prohibition.[35]

18. However at a minimum, and in light of the jurisprudence of this Court, the interveners submit that, in situations where **States rely on diplomatic assurances to secure a person's Convention rights, such assurances must not only be tested against reliable, individualized and factual information but also examined in the light of the context in which they are provided.**[36] Any assurances given by a State with a domestic system which has documented shortcomings and previous violations of Convention rights in relation the assessment of the general situation for the principle of *non-refoulement* will presumptively not satisfy the requirements of specificity or practicality.

19. In particular, the interveners underline that where an **independent monitoring mechanism** has been put in place to ensure that the assurances are complied with in practice, this would need to be truly independent from the Government authorities, including in terms of funding, membership and fear of any retaliation. It would need to have an unfettered and confidential access to a person transferred and it must be ensured that the responsible domestic authorities collaborate with such a mechanism **in good faith**, including remedying violations, or identifying those responsible and bringing them to justice, should be guaranteed. In addition and to be aligned with the obligations under the CAT, it would, in the Committee against Torture's words, need to be "***in fact and in the concerned person's perception****, objective, impartial and sufficiently trustworthy."*

IV. The legal framework for extradition in the Russian Federation

20. The ICJ and ECRE refer to the ICJ third party intervention in the present case before the Chamber of the European Court of Human Rights with regard to the description and analysis of the legal framework for extradition in place in the Russian Federation.[37]

21. In the previous intervention, the organisations underlined how this Court has repeatedly found violations of the ECHR in cases arising from transfers from Russia to Kyrgyzstan.[38] In practice, in extradition proceedings, it appears that Russian courts rarely use the power to assess the existence of a risk of arbitrary *refoulement* and tend to defer to the decision of the General Prosecutor's Office

[35] 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.
[36] This is in line with the UNHCR, Note on Diplomatic Assurances and International Refugee Protection, August 2006, §§48-49With Othman, the Court had a major departure from its previous jurisprudence only in light of the very long negotiation by the United Kingdom of all single requirements dictated by the Court in its judgement. The Court in that ruling did not accept that the criteria could really be alternative.
[37] ICJ, Transnational Injustice – National Security Transfers and International Law, Geneva, 2017, available at https://www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf .
[38] 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, App. No. 68894/13 (16 April 2015) paras. 65-66; Makhmudzhan Ergashev v. Russia, App. No. 49747/11, (16 October 2012), para. 72. More recently, Tadzhibayev v. Russia, App. no. 17724/14 (1 December 2015); U.N. v Russia, App. no. 4348/15 (26 July 2016); and R. v Russia, App. no. 11916/15 (26 January 2016). See, for other Central Asia States, cases of Abdulkhanov v. Russia, App. No. 22782/06 (3 October 2013) paras. 141-142; Ismoilov and Others v. Russia, op. cit., para. 128; Muminov v. Russia, App. no. 42502/06 (11 December 2008) paras. 93-96; Yakubov v. Russia, App. no. 7265/10 (8 November 2011) paras. 81 and 82; Karimov v. Russia, App. no. 54219/08 (29 July 2010) para. 100; Sultanov v. Russia, App. no. 15303/09 (4 November 2010) para. 72; Ergashev v. Russia, App. no. 12106/09 (20 December 2011) para. 113; Mukhitdinov v. Russia, App. no. 20999/14 (21 May 2015) para. 50; Mamazhonov v. Russia, App. no. 17239/13, paras. 157 and following.

rather than carry out an assessment of the risk of arbitrary refoulement.[39] This appraisal of the extradition practice in Russian courts is supported by this Court's case-law.[40] More recently, the civil society organisation Civic Assistance Committee (CAC) submitted evidence to a hearing during the March 2019 meeting of the Committee of Ministers of the Council of Europe on the execution of the cases of the Garabayev group (that concerns this typology of cases of extradition, expulsion and abductions). The submission confirmed that even in 2019 courts had not yet effectively implemented the legal reforms presented in the Action Plan 2019 by the Russian Government nor had they implemented the 2012 Directive of the Supreme Court of Russian on the principle of *non-refoulement*. [41] Furthermore, the reform of the Criminal Procedure Code of the Russian Federation presented by the Government as a solution for the shortcomings identified by this Court in extradition proceedings had not yet been approved in 2019. Amnesty International also documented resumed practices of abduction or informal transfer of suspects to Azerbaijan and Tajikistan.[42]

22. In its notes of the meeting, the Committee of Ministers of the Council of Europe found that, with regard to the post-transfer mechanism set up by the by the Prosecutor General's Office and the Ministry of Foreign Affairs of the Russian Federation, "*it is still not clear how frequent the planned visits will be or what action is envisaged in case ill-treatment is detected. More detailed information is thus needed on the Methodological instructions circulated on this matter by the Ministry of Foreign Affairs to its personnel, regarding notably visits to persons who have been the object of forced removal (including the control of conditions of detention and protection against ill-treatment)*." [43] Accordingly. The Committee asked for examples of such visits. With regard to the announced reform of the Criminal Procedure Code, the Committee of Ministers of the Council of Europe concluded that its "*questions and concerns have not been fully addressed."*[44]

23. Based on these findings, the Committee of Ministers decided not to close the enhanced supervision of the execution but to "encourage the authorities to provide information on the practice of visits to detained applicants removed in violation of Articles 3 and/or 34 of the Convention, notably by Russian diplomatic personnel, and any findings made in that context."[45]

24. The ICJ and ECRE submit that an 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 Federation 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. This situation is documented in the most recent reports as well as in the 2019 findings by the Committee of Ministers of the Council of Europe.

[39] ICJ, Transnational Injustice, op. cit. p. 68.
[40] Tadzhibayev v. Russia, App. no. 17724/14 (1 December 2015) para. 44. Mukhitdinov v. Russia, op. cit., paras. 50; Mamazhonov v. Russia, op. cit., paras. 154, 157.
[41] See CAC submission, available at http://hudoc.exec.coe.int/ENG?i=DH-DD(2019)324E, pp. 5 and 11.
[42] See AI submission at http://hudoc.exec.coe.int/ENG?i=DH-DD(2019)302E .
[43] See Notes of March 2019 meeting available at http://hudoc.exec.coe.int/ENG?i=004-14088 .
[44] Ibid.
[45] See decision available at http://hudoc.exec.coe.int/ENG?i=004-14088 , para. 4

V. Rights of suspects following extradition to Kyrgyzstan

25. International human rights authorities, including this Court, have consistently expressed profound concern at the failure of Kyrgyzstan to respect its obligations concerning 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."[46] This Court has identified people falling into this situation as a "particularly vulnerable group"[47] routinely subjected to treatment contrary to article 3 ECHR.[48]

26. This evidence is by no means outdated, but has been strongly confirmed during the recent examination of the human rights record of Kyrgyzstan in the UN Human Rights Council's Periodic Review (UPR) that took place in 2020. During the examination of the country's human rights situation in the UPR Working Group, many States expressed concern at reports of persecution of certain sectors of society based also on grounds of ethnicity, including the Uzbek minority in the country.[49] Many were concerned at continuous reports of torture and ill-treatment and the impunity related to these crimes.[50] The national preventive mechanism against torture was considered insufficiently financed and not effective enough,[51] and human rights defenders were seen to be at risk.[52]

27. To these concerns of ill-treatment, persecution and impunity, the Kyrgyz Government delegation merely replied that "there was no need to create an independent mechanism to investigate allegations of torture related to the violent events of 2010, given that all torture complaints had been considered and relevant decisions had been made. It was asserted that the complaints had been received long after the events –two to three years –and after the disappearance of the signs of torture."[53]

28. On 9 June 2020, however, Human Rights Watch reported that Kyrgyz authorities "*have failed to take necessary, if difficult, steps toward ensuring justice and accountability for abuses committed during and after the outbreak of violence in southern Kyrgyzstan a decade ago.*"[54] It further concluded that "the profoundly flawed criminal investigations and trials, mainly affecting the ethnic Uzbek minority, were marred by widespread arbitrary arrests and ill-treatment, including torture. Prosecutorial authorities refused to investigate torture allegations, and frequent physical attacks against defendants and their lawyers marred courtroom proceedings."[55] These concerns were preceded by the findings of the UN Special

[46] See, as example, the reference in Tadzhibayev v. Russia, App. no. 17724/14 (1 December 2015) para. 43 ; R. v Russia, App. no. 11916/15 (26 January 2016) para. 56.
[47] Tadzhibayev v. Russia, App. no. 17724/14 (1 December 2015) para. 43.
[48] U.N. v Russia, App. no. 14348/15 (26 July 2016) para. 38. See also, Tadzhibayev v. Russia, App. no. 17724/14 (1 December 2015) paras. 42-43, 46; R. v Russia, App. no. 11916/15 (26 January 2016) paras. 56, 62; Khamrakulov, op. cit., para. 65; Mamadaliyev v. Russia, op. cit., para. 60; Kadirzhanov and Mamashev, op. cit., para. 91; Gayratbek Saliyev, op. cit., para. 61; Makhmudzhan Ergashev v. Russia, op. cit., paras. 71-73; R. v Russia, op. cit., para. 55.
[49] See report of the Working Group of the UN Human Rights Council, available at https://www.upr-info.org/sites/default/files/document/kyrgyzstan/session_35_-_january_2020/report_of_the_working_group_english_kyrgystan.pdf . Positions by Australia (para. 30), Germany (para. 55); Uruguay (para. 111); Canada (140.29); Fiji (140.31); Belgium (140.68).
[50] Ibid. Positions by Slovenia (para. 97); Canada (140.55-56); Brazil (140.54); Chile (140.57); Germany (140.61); Italy (140.62); Switzerland (140.65); Poland (140.64); Austria (140.66); USA (140.67).
[51] Ibid. Positions by Czechia (para. 140.58); Finland (140.59); Paraguay (140.63).
[52] Ibid. Positions by Canada (140.79) ; Ireland (140.90).
[53] Ibid. para. 114.
[54] Human Rights Watch, Kyrgyzstan: Justice Elusive 10 Years On, 9 June 2020, available at https://www.hrw.org/news/2020/06/09/kyrgyzstan-justice-elusive-10-years
[55] Ibid.

Rapporteur on minorities issues after his visit to the country in 2019[56] and by decisions of the UN Human Rights Committee in 2017[57] and 2018.[58]

29. The ICJ and ECRE maintain that 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.[59] In March 2016 the UN Human Rights Committee 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.[60]

30. The views of the UN Human Rights Committee have not been implemented. During the UN Human Rights Council's UPR Review of Kyrgyzstan, several States called on Kyrgyzstan to fully implement the decision and for the immediate liberation of Askarov.[61] To these concerns, the Kyrgyz Government replied that "the courts of Kyrgyzstan had undertaken all the necessary steps in the criminal case against Mr. Askarov, in line with the Code of Criminal Procedure. A judicial assessment of the case had been made and the relevant judicial decisions had been taken in accordance with legislation. On 13 January 2020, the Supreme Court had received an appeal from Mr. Askarov that would be considered."[62] The appeal was subsequently rejected and Askarov died in custody on 25 July 2020 for double pneumonia – likely caused by COVID19 – despite many requests to be released due to the pandemic and its serious health conditions. The UN Special Rapporteur on human rights defenders called his death "a stain on the human rights record of the Government of Kyrgyzstan."[63] Her statement was supported by the Special Rapporteur on minority issues, the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. [64]

31. The ICJ and ECRE submit that even the most recent independent reports still document the lack of respect for the procedural aspect of the principle of *non-refoulement*, the consequent ineffectiveness of domestic remedies in this regard in the Russian Federation, and the abysmal record of Kyrgyzstan in upholding its obligation to uphold the prohibition of torture or other ill-treatment. Consequently, extraditions and other transfers from the Russian Federation to Kyrgyzstan entail a high risk of violations of both substantive and procedural aspects of the principle of *non-refoulement.*

[56] UN Special Rapporteur on minority issues, Fernand de Varennes, Visit to Kyrgyzstan, 6-17 December 2019, End of mission statement, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25422&LangID=E .
[57] See, Fakhridin Ashirov v. Kyrgyzstan, CCPR, UN Doc. CCPR/C/120/D/2435/2014, 19 September 2017.
[58] See, Marat Abdiev v Kyrgyzstan, CCPR, UN Doc. CCPR/C/124/D/2892/2016, 18 December 2018.
[59] International Commission of Jurists, Report on the arrest, detention and trial of Azimzhan Askarov, Geneva, 2012, para 265-266, available at http://www.icj.org/icj-report-kyrgyz-human-rights-defender-azimzhan-askarov-victim-of-severe-ill-treatment-and-unfair-trial/.
[60] 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/
[61] UN Working Group report, op. cit., positions by Ireland (para. 64) ; USA (para. 110) ; Finland (140.87).
[62] Ibid., para. 122.
[63] UN, Kyrgyzstan: Death of human rights defender Azimjan Askarov a stain on country's reputation, sys UN expert, 30 July 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26138
[64] Ibid.