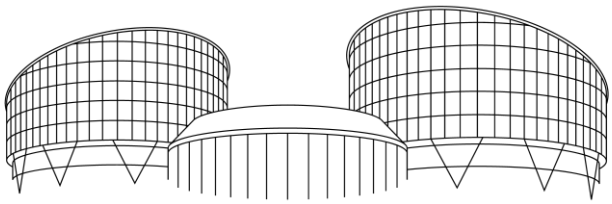

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAKHMUDZHAN ERGASHEV v. RUSSIA

(Application no. 49747/11)

JUDGMENT

STRASBOURG

16 October 2012

FINAL

11/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Makhmudzhan Ergashev v. Russia**,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 25 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49747/11) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Kyrgyzstani national, Mr Makhmudzhan Makhamadzhanovich Ergashev ("the applicant"), on 10 August 2011.

2. The applicant was represented by Ms Ye.V. Korneva, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that, if extradited to Kyrgyzstan he would be subjected to treatment prohibited by Article 3 of the Convention because he belonged to the Uzbek minority.

4. On 11 August 2011 the President of the First Section, acting upon the applicant's request of 10 August 2011, decided to apply Rules 39 and 41 of the Rules of Court, indicating to the Government that the applicant should not be extradited to Kyrgyzstan until further notice and granting priority treatment to the application.

5. On 5 October 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and lives in St Petersburg, Russia.

7. The applicant is an ethnic Uzbek. He was born and lived in the town of Osh in the south of Kyrgyzstan. From 1999 until June 2006 the applicant worked at the South Warehouse of the State Reserves Fund in Jalal-Abad. The majority of the Kyrgyzstani nationals of Uzbek origin – around 14% of Kyrgyzstan's overall population – live in the south of the country, in particular, in Osh and Jalal-Abad.

8. On 11 July 2006 the applicant arrived in St Petersburg, Russia, in order to accompany his wife's father who was having medical treatment in a clinic in St Petersburg. According to the applicant, he has not returned to Kyrgyzstan since then. He stayed in Russia and worked as a taxi driver. According to records of the traffic police for St Petersburg and Leningrad region, he committed minor traffic violations on 16 August, 17 and 22 September and 9 November 2006, as well as in 2007-2010. From 17 October 2006 to 12 January 2007 he was officially registered as residing at a certain address in St Petersburg. His wife and two children joined him in 2008. His wife obtained Russian citizenship in March 2011. His other two children and his parents stayed in Osh.

A. Criminal proceedings against the applicant in Kyrgyzstan

9. On 16 March 2007 the Jalal-Abad regional prosecutor's office brought criminal proceedings against the applicant on suspicion of embezzlement of State funds. The decision stated that the applicant had been appointed a warehouse supervisor at the South Warehouse of the State Reserves Fund on 30 December 2006 and that while in that post he had misappropriated, during the period from November 2006 to January 2007, goods stored at the warehouse in Jalal-Abad for which he was responsible at the time, had sold them and used the money so received for his personal needs.

10. On 22 May 2007 an investigator at the Jalal-Abad regional prosecutor's office charged the applicant *in absentia*, issued an order for him to be remanded in custody, declared him a wanted person and stayed the investigation until he had been arrested. On 1 October 2010 the investigator rectified the charges against the applicant, following the amendment of the Criminal Code, to embezzlement under Article 171 § 4 of the Code, which is punishable in particular by imprisonment of five to eight years.

11. On 25 March 2011 the applicant sent an application to the Jalal-Abad prosecutor's office, seeking to have the criminal proceedings

against him terminated. To demonstrate lack of grounds for suspicion he argued that a government audit carried out in June 2006 had not revealed any violations at his place of work and that he had been living in Russia at the time of the alleged offence, as confirmed, *inter alia*, by his passport and his residence registration. Decisions to dismiss his application and to stay the criminal proceedings against him until he had been extradited were communicated to his representatives orally.

B. The applicant's arrest and detention in Russia

12. On 30 August 2010 the applicant, who had been placed on an international wanted list, was arrested in the Leningrad region and placed in a temporary detention facility at the Gatchina district police department.

13. On 31 August 2010 the Gatchina Town Court allowed the Gatchina district prosecutor's request for the applicant to be remanded in custody pending a decision on his extradition. The Town Court decision was upheld on appeal by the St Petersburg City Court on 20 October 2010. All subsequent applications by the prosecutor's office for extension of the applicant's detention pending the extradition proceedings were allowed, except for an application of 5 July 2011 which was refused by the Town Court on 7 July 2011 (upheld on appeal by the Leningrad Regional Court on 24 August 2011) and the applicant's release on bail was ordered. The bail was set at 600,000 Russian roubles (RUB). The Town Court held that if the money was not deposited the applicant should remain in custody until the maximum time-limit for detention had been reached, that is until 30 August 2011, and should then immediately be released.

14. The applicant's family failed to deposit the sum required and the applicant remained in custody until 30 August 2011, when his release was ordered by a deputy prosecutor of the Leningrad region, subject to an undertaking not to leave his place of residence, appear on summons before the Leningrad regional prosecutor's office and abide by the legislation of the Russian Federation. The applicant gave the undertaking and was released on 31 August 2011.

C. Extradition and refugee proceedings

1. The Prosecutor General's Office of the Russian Federation

15. On 29 September 2010 a deputy Prosecutor General of Kyrgyzstan lodged a request with a deputy Prosecutor General of the Russian Federation, seeking the applicant's extradition to Kyrgyzstan for prosecution on charges of embezzlement. The request stated, *inter alia,* that in accordance with Article 66 of the Minsk Convention, the Kyrgyz Republic Prosecutor General's Office guaranteed that the applicant would

not be extradited to a third State without the Russian Prosecutor General's consent, that he would not be prosecuted or sentenced for any other crime committed before his extradition, that he was being prosecuted for a general criminal offence which was not of a political nature, and that he was not being discriminated against on any ground, including that of his ethnic origin. After the trial or, if convicted, after serving his sentence, the applicant would be free to leave the territory of Kyrgyzstan.

16. On an unspecified date the Prosecutor General's Office of the Russian Federation made enquiries of the Russian Ministry of Foreign Affairs on the issue of extradition to Kyrgyzstan. On 22 November 2010 the Ministry of Foreign Affairs replied as follows:

> "... the Ministry of Foreign Affairs has no information which prevents the extradition of the national of Kyrgyzstan M.M. Ergashev to the law-enforcement authorities of the Kyrgyz Republic.
>
> At the same time, when taking the ultimate decision on extradition of nationals of Kyrgyzstan, it is necessary to take into account the difficult internal political situation which has emerged in Kyrgyzstan at the present time, as well as the aggravation of inter-ethnic tension, which predetermines a possibility of biased examination of cases against citizens of this country not belonging to the titular ethnic group.
>
> In particular, the Ministry of Foreign Affairs has information concerning serious breaches in a number of court proceedings against Kyrgyz nationals of Uzbek origin; cases of intimidation of witnesses and assaults on lawyers are not infrequent."

17. On 30 December 2010 the deputy Prosecutor General of the Kyrgyz Republic provided additional assurances to the deputy Prosecutor General of the Russian Federation, stating that the request for the applicant's extradition had no connection with the events in Osh in June 2010 and earlier, that the applicant would not be subjected to torture, violence or other inhuman or degrading treatment or punishment, that he would not be sentenced to death, and that he would be provided with every opportunity to defend himself, including legal aid.

18. On 3 March 2011 the deputy Prosecutor General of the Russian Federation approved the request of the Prosecutor General's Office of the Kyrgyz Republic for the applicant's extradition. The decision noted that the acts of which the applicant was accused were punishable under the Criminal Code of the Russian Federation with a penalty exceeding one year's imprisonment, that the prosecution was not time-barred, that the applicant was a national of Kyrgyzstan, that he had not acquired Russian nationality, and that his extradition was not in breach of international agreements or domestic law.

19. The deputy Prosecutor General of the Russian Federation requested the Special Representative of the President of the Russian Federation on international cooperation in the fight against terrorism and transnational organised crime to provide assistance, via the Foreign Affairs Ministry, in

ensuring the observance of the applicant's rights after his transfer to Kyrgyzstan (letter 81/2-1864-10 of 2 March 2011).

2. Federal Migration Service of the Russian Federation

20. On 19 December 2010 the applicant lodged a request with the Federal Migration Service (FMS) for refugee status. He stated that if returned to Kyrgyzstan he, as an ethnic Uzbek, would be in real danger of his life because of the inter-ethnic conflict in the country.

21. On 7 February 2011 his application was rejected by the FMS for St Petersburg and Leningrad region. The FMS noted, in particular, that according to its records, after his entry to Russia on 11 July 2006 the applicant had gone abroad only once - from 29 May to 3 June 2008, to Uzbekistan. There were cancelled stamps in his passport certifying his exits from and entries to Russia, and also stamps which were not authentic, according to an expert opinion of 4 February 2011. Two pages of his passport were missing. According to the FMS, the applicant's lengthy four-year stay in Russia without returning to Kyrgyzstan, where his family had been living, had apparently shown that he had been avoiding entering his country because he was wanted by the law-enforcement bodies, and the fact that he had applied for asylum six months after the June 2010 events meant that he had not felt himself to be in any danger. The FMS found that the applicant had come to and stayed in Russia not because he wished to receive asylum but in order to find employment and improve his financial situation. He was not therefore eligible for refugee status.

22. The FMS reviewed the situation in Kyrgyzstan after the June 2010 events, including the constitutional referendum and the parliamentary elections. It noted reports by Human Rights Watch and The Jamestown Foundation, as well as the UN's development programmes carried out in cooperation with the Kyrgyz authorities which were aimed, first of all, at building peace and democratic governance, fighting poverty and working with local communities, and were financed by grants which had doubled during the last five years and totalled 21,000,000 US dollars in 2011. It further noted that 2011 had been declared the Year of Inter-Ethnic Concord and Friendship, with various programmes organised by local authorities, and national and international trade fairs. The FMS considered that the situation in Kyrgyzstan had significantly changed, there had been no inter-ethnic incidents and the Government had been undertaking enhanced measures to ensure the security of its citizens and to improve the social, economic and political situation in the country.

23. The applicant appealed against the decision of the FMS of St Petersburg and Leningrad region to the FMS of the Russian Federation, which upheld the decision on 24 May 2011, noting that the applicant's fears of persecution on the ground of his ethnic origin had not been justified.

3. Judicial review of the extradition decision

24. The applicant lodged a court appeal against the Prosecutor General's extradition order. He submitted that, in view of the unstable political situation in Kyrgyzstan and ethnic unrest between the Kyrgyz majority and the Uzbek minority, the decision in question entailed for him a serious risk that he would be subjected to torture. He referred to statements by the Russian Ministry of Foreign Affairs of 22 November 2010, The Independent International Commission of Inquiry into the events in southern Kyrgyzstan, Human Rights Watch and other sources.

25. On 9 June 2011 the St Petersburg City Court examined the applicant's appeal at an open hearing in the presence of the applicant, his lawyer and the prosecutor. The applicant argued, in particular, that Uzbeks were oppressed and discriminated against in Kyrgyzstan and that he might therefore be subjected to torture or other ill-treatment. The City Court noted that the decision for the applicant's extradition complied with the requirements of Article 56 of the Minsk Convention and the Code of Criminal Procedure of the Russian Federation. The decision had been taken by the appropriate authority. The applicant was a national of Kyrgyzstan and had not obtained Russian nationality. There were no criminal proceedings against him in Russia in connection with the acts imputed to him. There was no court decision about the existence or otherwise of impediments to his extradition. Therefore the City Court did not find any grounds for refusal of his extradition. It examined the assurances of the Prosecutor General's Office of the Kyrgyz Republic and stated that it had no reasons to doubt that they would be observed. It took into account that, according to the information the FMS for St Petersburg and the Leningrad region had when it made its decision in the applicant's case, which was upheld by the FMS of the Russian Federation, the social, economic and political situation in Kyrgyz Republic had normalised since the inter-ethnic clashes in June 2010. It also took into account that the applicant was accused of an ordinary crime which had no political or ethnic character, and that it had been committed in 2006-07, long before the inter-ethnic clashes. The applicant had not claimed that he was being persecuted for political reasons, stating that he had moved to Russia to find employment. Therefore, the fears that he might be subjected to ill-treatment or discrimination on the ground of his ethnic origin or other grounds had not been objectively justified.

26. The City Court further stated that a court appeal against the FMS's decisions in the applicant's case to refuse him refugee status could not suspend or block the applicant's extradition. It noted that while the applicant had arrived in Russia more than three years previously for material gain he had applied for refugee status only after his detention, thereby pursuing the aim of delaying his extradition. It further noted that the applicant's guilt was

beyond its scope of examination. It held that the extradition decision was lawful and dismissed the appeal.

27. On 7 November 2011 the Supreme Court of the Russian Federation examined the applicant's appeal against the City Court's judgment in which he argued, in particular, that if extradited he would run a real risk of torture because he belonged to the Uzbek minority, as confirmed by, *inter alia*, The Independent International Commission of Inquiry into the events in southern Kyrgyzstan, and that the Kyrgyz Republic's official assurances would not prevent that risk. Having heard the applicant's counsel and the prosecutor, the Supreme Court endorsed the lower court's findings, noting also that the applicant had left Kyrgyzstan for Russia in order to find employment and not because of persecutions on the ground of his ethnic origin, and that the decision to extradite him had been taken in accordance with Article 61 of the Agreement between the Russian Federation and Kyrgyzstan On Legal Aid and Legal Relations in Civil, Family and Criminal Cases of 14 September 1992, and that the request for extradition had complied with Articles 1 and 12 of the European Convention on extradition of 13 December 1957 and Article 58 of the Minsk Convention. The Supreme Court rejected the applicant's appeal and upheld the lower court's decision.

4. Judicial review of the refusal of refugee status

28. On 25 November 2011 the St Petersburg Dzerzhinskiy District Court rejected the applicant's appeal against the FMS's decisions. It stated in its judgment that the applicant had submitted at the hearing that he did not fear for the life and health of his children and parents who had stayed in Osh, that he had not been persecuted on account of his ethnic origin, political or religious grounds, though there had always been tensions between Uzbeks and Kyrgyz in everyday life, and he had known about the harassment of Uzbeks in Kyrgyzstan from his friends and brother who had been beaten up during the events in June 2010. The District Court found that it did not follow from the materials before it that the applicant had left his country and did not wish to return there because of some real events menacing him personally. The absence of a real threat was confirmed, in particular, by the fact that his family, which included minor children, living in Osh had never been discriminated against. He had failed to submit any evidence that he or his family had been persecuted on the ground of their ethnic origin, or any evidence for such fears. He had referred in general to the situation in the country, without giving any details.

29. An appeal against the District Court's judgment lodged by the applicant's counsel did not comply with the relevant procedural requirements and on 20 January 2012 the District Court refused the applicant's request for an extension of the time-limit for lodging a proper

appeal. Proceedings in which the applicant challenged that finding are pending.

D. Situation in Kyrgyzstan

30. On 7 April 2010 President Bakiyev was overthrown after popular demonstrations and a Provisional Government headed by Roza Otunbayeva assumed power.

31. On 10 June 2010 and the days which followed inter-ethnic clashes erupted in the south of the country in Osh and Jalal-Abad, in which ethnic Kyrgyz and ethnic Uzbeks committed violence against each other.

32. Kyrgyzstan adopted a new Constitution via a 27 June 2010 referendum. According to the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Limited Referendum Observation Mission Report, the authorities succeeded in creating the necessary conditions for the conduct of a peaceful constitutional referendum despite challenging circumstances.

33. On 10 October 2010 Kyrgyzstan held parliamentary elections. The OSCE/ODIHR provided a cautiously optimistic assessment of the elections, despite some shortcomings.

34. On 30 October 2011 Kyrgyzstan held presidential elections. According to the OSCE/ODIHR Election Observation Mission Final Report, "the election was conducted in a peaceful manner, but shortcomings underscored that the integrity of the electoral process should be improved to consolidate democratic practice in line with international commitments. Candidate registration was inclusive, giving voters a wide choice, and the electoral campaign was open and respected fundamental freedoms. These elements, however, were overshadowed by significant irregularities on election day, especially during the counting and tabulation of votes." The inauguration of the newly-elected President Mr Atambayev took place on 1 December 2011.

1. KIC

35. The Independent International Commission of Inquiry into the events in southern Kyrgyzstan ("KIC") was established with a support by the Kyrgyz authorities. After broad consultation with numerous international bodies, including the UN, the OSCE, the EU, the CIS and the office of the UN High Commissioner for Human Rights, the terms of reference were established and endorsed. The KIC was mandated to investigate the facts and circumstances relevant to incidents that took place in southern Kyrgyzstan in June 2010, qualify the violations and crimes under international law, determine responsibilities and make recommendations, particularly on accountability measures, so as to ensure the non-repetition of the violations and to contribute towards peace, stability

and reconciliation. The KIC acknowledged the excellent cooperation of the authorities of Kyrgyzstan. It published its report in May 2011. The executive summary of the report states, *inter alia*, as follows:

> "2. ... The events must be viewed in the context of the historical and political background of the region, particularly the relationship between the communities of ethnic Kyrgyz and ethnic Uzbeks. In this regard the KIC notes the under-representation of ethnic Uzbeks in public life and the rising force of ethno-nationalism in the politics of Kyrgyzstan. The KIC notes further the power vacuum and consequent political rivalries, fragile state institutions and the weak rule of law in southern Kyrgyzstan in the wake of the 7 April overthrow of the Bakiyev government.
>
> 3. The events resulted in significant loss of life and injury, of which the majority of victims were ethnic Uzbeks. In total about 470 people died. It is expected that this figure will grow but not substantially. About 1,900 people received medical assistance at hospitals. Many thousands of people were displaced. About 111,000 people were displaced to Uzbekistan and a further 300,000 were internally displaced. There was also significant property damage, again to a disproportionately high number of ethnic Uzbek owned properties. In total about 2,800 properties were damaged. The KIC notes that ethnic Kyrgyz also suffered very significant losses, in terms of life, health and property. The KIC has found that both communities suffered loss.
>
> 8. In addition to the documented international and domestic criminal acts, the KIC has found that there have been and still are serious violations of international human rights law committed by the State in the aftermath of the events. There is a consistent and reliable body of material which tends to show that acts of torture were committed in detention centres by the authorities of Kyrgyzstan in the aftermath of the June events. Of particular concern to the KIC is that such acts of torture are ongoing and that the response of the authorities to allegations of torture has been grossly inadequate.
>
> 9. Criminal investigations and trials which have resulted from the June events have been marked by breaches of the ICCPR fair trial rights. Large scale sweep operations conducted in Uzbek *mahallas* on 21 to 23 June and the smaller scale search operations which then followed have involved ill-treatment and arbitrary arrest and detention. There has been selective prosecution targeting the ethnic Uzbek minority. Defence lawyers representing ethnic Uzbek defendants have been subject to improper interference and intimidation.
>
> 10. ... The Provisional Government, which had assumed power two months before the events, either failed to recognize or underestimated the deterioration in inter-ethnic relations in southern Kyrgyzstan. ...
>
> 14. As to conflict prevention and reconciliation, the KIC recommends measures on inclusive state building; ... Kyrgyzstan should take a strong public stand against extreme nationalism and ethnic exclusivity. ...
>
> 15. ... The government should ensure the conduct of thorough, independent and impartial investigations into crimes or other human rights violations without reference to ethnicity and should consider seeking international assistance to do so. ... The Government should immediately stop all arbitrary arrests, torture in detention and other human rights violations. ..."

2. Amnesty International

36. In their June 2012 report "Kyrgyzstan: Dereliction of Duty" Amnesty International stated, in particular, as follows:

> "Despite the acknowledgment by a number of officials that torture and other ill-treatment in detention continues to be a problem and despite repeated efforts, including issuing decrees and instructions, by the former President and the new Prosecutor General to stop the routine use of beatings and other ill-treatment in order to extract confessions, there appears to be little commitment at regional and local levels to effectively and decisively address and prevent these serious human rights violations. ...
>
> While human rights monitors report fewer arbitrary arrests, nevertheless, two years on from the June violence, torture and other ill-treatment, including beatings, by law enforcement officers unfortunately appear to continue to be routine ... There are serious concerns that while investigating crimes police officers have continued to target Uzbeks and Uzbek neighbourhoods, threatening to charge them with serious crimes, such as murder, in relation to the June violence in order to extort money from them. Those who have returned from seasonal work in Russia or Kazakhstan or families who have relatives working outside the country are particularly vulnerable to arbitrary detention, intimidation and extortion since they are assumed to have ready access to money and foreign currency. ...
>
> Impunity for law enforcement officers who have perpetrated torture and other ill-treatment has long been a serious problem in Kyrgyzstan, especially at the local and regional levels. Since the June 2010 violence this has become ever more apparent but despite a number of positive initiatives and concrete measures in 2011 by the former President and the current Prosecutor General on the prohibition of torture, regrettably only a handful of prosecutions for torture or other ill-treatment in police custody appear to have taken place. ... Given the admissions by the Prosecutor General and the current and former Presidents that torture and other ill-treatment is widespread the extremely low number of prosecutions of security officers for torture and the absence of any convictions for torture casts doubt on the commitment of the authorities to seriously and effectively redress these crimes and human rights violations."

3. Human Rights Watch

37. In their report 'Distorted Justice', published in June 2011, Human Rights Watch noted an impact which the June 2010 events had had on the problem of torture:

> "Lawyers and other observers noted that the problem of torture and ill-treatment worsened significantly after the June events, and was routine in cases involving ethnic Uzbek suspects detained on charges unrelated to the June 2010 violence. In an interview about the use of torture in Kyrgyzstan in 2010, a human rights defender who has researched police torture in Kyrgyzstan for four years noted:
>
> The June events [exacerbated] the situation regarding torture and completely untied the hands of the police officers and the security service. We even heard about the use of torture by the tax police. ... Many are convinced that if torture is used against, for example, Uzbeks, then that is normal."

38. Human Rights Watch World Report 2012: Kyrgyzstan (Events of 2011) contains the following findings concerning the situation in Kyrgyzstan:

> "In 2011 Kyrgyzstan continued to grapple with the consequences of the June 2010 violence that erupted between ethnic Kyrgyz and Uzbeks in the country's south, killing more than 400 people. Four commissions of inquiry were completed and thousands of criminal investigations continued in 2011, with the justice process skewed to scapegoat ethnic Uzbeks for the violence.
>
> Torture and arbitrary detentions in the context of investigations into the June 2010 violence are rampant and go largely unpunished. Ethnic Uzbeks in the south are particularly vulnerable to police torture. Violations of international fair trial standards plagued the administration of justice in the south.
>
> ...
>
> The authorities opened more than 5,000 criminal cases into the June 2010 violence. Although most of those killed were ethnic Uzbek, 83 percent of those facing prosecution for homicide were also ethnic Uzbek.
>
> In 2011 trials in connection with the June 2010 violence continued to be held with violations of international fair trial standards. Defendants, mostly ethnic Uzbeks, are found guilty and sentenced to prison terms ranging from several years to life primarily based on confessions that many allege were coerced under torture.
>
> ...
>
> While local human rights NGOs report that incidents of arbitrary detentions and torture in police custody decreased in 2011 in the south, these abuses remain rampant and unpunished, particularly in the context of investigations into the June 2010 violence. Most judges in such cases dismiss, ignore, or fail to order investigations into torture allegations. In at least nine cases police also arbitrarily detained and tortured ethnic Uzbek men and threatened to charge them in relation to the June 2010 violence if they did not pay large sums.
>
> Human Rights Watch research found at least two ethnic Uzbeks died in 2011 due to injuries sustained when detained in police extortion schemes. Given the routine use of torture by the country's law enforcement officials, efforts by the prosecutor's office to investigate allegations of torture were inadequate. ..."

4. International Crisis Group report

39. International Crisis Group Asia report no. 222 of 29 March 2012 "Kyrgyzstan: widening ethnic divisions in the south" reads, *inter alia*, as follows:

> "Kyrgyzstan's government has failed to calm ethnic tensions in the south, which continue to grow since the 2010 violence, largely because of the state's neglect and southern leaders' anti-Uzbek policies. Osh, the country's second city, where more than 420 people died in ethnic clashes in June of that year, remains dominated by its powerful mayor, an ardent Kyrgyz nationalist who has made it clear that he pays little attention to leaders in the capital. While a superficial quiet has settled on the city, neither the Kyrgyz nor Uzbek community feels it can hold. Uzbeks are subject to illegal detentions and abuse by security forces and have been forced out of public life...

> The nationalist discourse that emerged after the Osh violence unnerved the interim government that had replaced President Kurmanbek Bakiyev in April 2010. Until the end of its term in late 2011, it was largely ignored, and sometimes openly defied, by Osh Mayor Melis Myrzakmatov, the standard-bearer of an ethnic Kyrgyz-first policy and the most successful radical nationalist leader to emerge after the killings. This did not change when President Almazbek Atambayev, a northerner, took office in December 2011. Senior members of his administration express dismay at tensions in the south but say they have no way of influencing the situation there.
>
> Uzbeks are increasingly withdrawing into themselves. They say they are marginalised by the Kyrgyz majority, forced out of public life and the professions; most Uzbek-language media have been closed; and prominent nationalists often refer to them as a diaspora, emphasising their separate and subordinate status. International organisations report continuing persecution of Uzbeks by a rapaciously corrupt police and prosecutorial system, almost certainly with the southern authorities' tacit approval.
>
> The flight of many Uzbek business people and the seizure of Uzbek-owned businesses have sharply diminished the minority's once important role in the economy. The sense of physical and social isolation is breeding a quiet, inchoate anger among all segments of the community – not just the youth, who could be expected to respond more viscerally to the situation, but also among the Uzbek elite and middle class. ...
>
> The views of southern Kyrgyz have also hardened since the violence. Many feel that Uzbeks brought disaster on themselves with an ill-advised power grab in June 2010. This version of history has not been proven; it is privately doubted even by some senior Kyrgyz politicians, but hardly ever challenged by them. Myrzakmatov enjoys considerable approval among broad segments of southern Kyrgyz society – including among the younger, better educated and urbanised social groups that might have been expected to take a more liberal and conciliatory position.
>
> Ominously, he re-stated and strengthened his tough anti-Uzbek approach in late 2011 in a book on the June 2010 violence. Depicting Uzbeks as an essentially separatist force that threatens Kyrgyzstan's survival, he stressed the need for non-Kyrgyz ethnic groups to understand their future role would be as subordinates."

40. The International Crisis Group states that the police in Kyrgyzstan are currently almost exclusively ethnically Kyrgyz. "The wave of abusive detentions, extortion and torture directed at the Uzbek community since soon after June 2010 is widely referred to simply as 'impunity'. If police abuse and torture are unexceptional, the extent, duration and the clear target of this campaign has been highly unusual. Most long-time observers feel that senior southern politicians and officials continue to countenance abuses in order to ensure police support. With rare exceptions the victims have all been Uzbek, some as young as fourteen. They range from migrant workers, often thought to have large amounts of cash on their return from Russia or elsewhere, to businessmen." "The government acknowledges the problem of torture and has taken steps to address it, but these have proven almost completely ineffectual. The prosecutor-general issued three decrees in 2011 aimed at checking and punishing the use of torture and ill treatment of detainees. There have, however, been no successful prosecutions. Three

memorandums of understanding between prosecutors and southern human rights organisations have likewise had little effect."

5. UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

41. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, visited Kyrgyzstan from 5 to 13 December 2011 at the invitation of the Government, which provided him with unrestricted access to detention facilities. The purpose of the visit was to assess the situation as regards torture and ill-treatment in the country, including conditions of detention, and to identify measures needed to prevent torture and ill-treatment in the future. The report on that mission was presented at the 19th session of the United Nations Human Rights Council and states, *inter alia*, as follows:

"9. Kyrgyzstan is a party to the main United Nations human rights treaties prohibiting torture and ill-treatment, including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Kyrgyzstan acceded to the Optional Protocol to the Convention against Torture in 2008. The State is also a signatory to the Rome Statute of the International Criminal Court.

35. ... pursuant to Presidential Decree No. 41, various public advisory councils were established within the Ministry of the Interior and Prosecutor General's office in Bishkek, Osh and Jalal-Abad, entrusted with monitoring places of detention. In addition, public monitoring councils, which comprise representatives from civil society, were created under the Ministry of the Interior, the State Service for the Execution of Punishments and the State Committee of National Security to monitor detention facilities and other closed institutions. Furthermore, a draft law on the police force and the prospect of reforming the Ministry of the Interior are both under discussion. The draft bill on the national centre for the prevention of torture had been finalized and was to be submitted to Parliament for discussion early in 2012. Since May 2011, three memorandums of understanding had been signed by prosecutors and civil society organizations – for Jalal-Abad province, for Osh City and for Osh province – providing for public councils to identify solutions and building confidence in the prosecutorial authorities. The first initiative of the public councils was the installation of closed-circuit cameras in some temporary detention facilities in Jalal-Abad province.

37. The Special Rapporteur received numerous accounts and eyewitness testimonies suggesting that torture and ill-treatment had been historically pervasive in the law enforcement sector. This practice has been intensified by the turbulence of the past two years with the ousting of President Bakiev in April 2010, followed by the violence that took place in the South in June 2010. During the violence in June 2010 and its aftermath, reports consistently highlighted the frequency and gravity of arbitrary detention, torture and ill-treatment by law enforcement bodies.

38. Throughout the mission, testimonies of victims and their lawyers pointed to general patterns of torture and ill-treatment committed by police officers after arrest and during the first hours of informal interrogation. During interviews with victims,

> the Special Rapporteur heard multiple allegations of torture that shared the same pattern: asphyxiation with plastic bags and gas masks with no flow of oxygen; punches and beatings with truncheons; the application of electric shock and the introduction of foreign objects into the anus, or the threat of rape. ... The Special Rapporteur was told that the use of torture by the criminal investigation police was exacerbated by the heavy reliance on confessions in the judicial system.
>
> 39. The Special Rapporteur has concluded that, in the immediate aftermath of the violence of June 2010, there was a significant increase of continued arbitrary arrests and detentions, incidents of forced confession under the use of torture and ill-treatment during arrest and while in detention, denial of access to a lawyer of one's choosing, denial of independent medical aid, threats and extortion of money in exchange for dropping or mitigating charges. These incidents, usually committed by the operative-investigating officers of the Ministry of the Interior during the first hours of apprehension and interrogation, continued to be widespread throughout 2011.
>
> 46. The Special Rapporteur received reports according to which, in practice, confessions obtained under torture are not expressly excluded as evidence in court. Moreover, the majority of verdicts in criminal cases are mostly based on voluntary confessional statements made during the investigation or at the time of surrender. In addition, the courts encourage this practice by giving undue weight to confessions when evaluating evidence. If a defendant claims during trial that the confession was obtained through torture, the courts either ignore such statements altogether or conduct a superficial inquiry by simply questioning the police officers in court. After the officers deny the use of torture, the judge concludes that the defendant's allegations are not substantiated and should be treated as an effort to avoid justice.

42. The Special Rapporteur noted that in contrast to the open recognition of the existence of torture and ill-treatment by the current and former President, the deputy Speaker, the Head of the Parliamentary Committee and the Prosecutor General, he had heard of no "such instructions communicated by the responsible officials of the Ministry of the Interior to condemn torture and ill-treatment or to declare unambiguously that torture and ill-treatment by police officers would not be tolerated", and that it remains to be seen how the Prosecutor General's instructions "will be implemented at the city and provincial levels".

6. United Nations High Commissioner for Human Rights

43. A report of the United Nations High Commissioner for Human Rights, Navanethem Pillay, on technical assistance and cooperation on human rights for Kyrgyzstan covering the period from June 2010 to February 2011, which was examined by the Human Rights Council at its 17th session, stated, in particular, as follows:

> "5. Despite the efforts of the Government to address human rights issues, a number of serious concerns persist, such as the increase in reports of discriminatory practices by government bodies towards minorities, and the ongoing use and practice by law enforcement bodies of ill-treatment and torture while detainees are in custody.
>
> 6. Deficiencies in the administration of justice pose a major impediment to the reestablishment of the rule of law. The judicial system must maintain its impartiality irrespective of the ethnicity of victims, lawyers and defendants. ...

36. Further to the June 2010 violence, the authorities took steps to investigate and bring to justice those suspected of involvement in the events. The Office of the Prosecutor in Osh and Jalal-Abad reportedly initiated investigations into more than 5,000 cases. In cases which have come to trial, most defendants have been ethnic Uzbek. Scores of individuals wanted for involvement in the June 2010 violence reportedly remain at large.

37. Trials of defendants accused of involvement in the June 2010 violence have failed to uphold basic standards for fair trial, in courts both of first and second instance. Alleged violations of fair trial standards include torture and ill-treatment ...

43. On 11 January 2011, the National Commission of Inquiry established by President Otunbaeva in July 2010 presented its report. According to the Commission, the violence was instigated by ethnic Uzbek community leaders and supporters of former president Bakiyev. The Commission states that members of the provincial government and the security forces failed to respond promptly and prevent the violence. The Commission also found that members of law enforcement tortured detainees, most of whom were ethnic Uzbeks.

44. On 13 January 2011, the Ombudsman of Kyrgyzstan presented his report on his investigation into the June events, stating that his office supports the conclusions of the National Commission of Inquiry, in particular that the conflict was initiated by ethnic Uzbek provocateurs. According to the conclusion of the Ombudsman's investigation, the conflict was due to the socio-economic situation in the southern region that originated in the Soviet time, when ethnic Uzbeks enjoyed better living standards than ethnic Kyrgyz.

45. There have been concerns about the lack of independence and impartiality of both investigations. At least three members of civil society, who were among members of the National Commission of Inquiry, expressed concerns about the modalities, composition and the terms of reference of the National Commission. Both reports largely reflected views held among some ethnic Kyrgyz politicians and the majority of the public. Debates in Parliament on the findings of the National Commission were characterized by numerous provocative nationalistic statements and biased remarks regarding the role of ethnic Uzbeks in the violence. ...

47. In the aftermath of the June 2010 violence, OHCHR received numerous reports of arbitrary detention in Osh and Jalal-Abad. In the majority of the cases documented by the Office, the victims were ethnic Uzbek. ... There were numerous reports of extortion by police in such cases of detention. ...

48. During the period under review, OHCHR documented cases of torture or ill-treatment. The frequency and gravity of allegations raised serious concern. While most cases involved various forms of beatings, the Office also documented cases of torture in which victims described being subjected to electro-shock, including to the genitals; suffocation; sustained beatings; and death threats. Torture was reportedly often accompanied by ethnicity-based harassment and humiliation.

49. Concerns about frequent allegations of torture and ill-treatment were compounded by the failure of the authorities to take steps to investigate such allegations, bring to justice perpetrators and provide victims with redress. During the period under review, the Office of the Prosecutor in Osh did not pursue investigations into allegations of torture, despite the numerous cases in which significant evidence was available and in which complaints had been filed.

50. ... To date, the police, prosecutors and members of the judiciary have not acted upon allegations of torture in the aftermath of the June 2010 violence.

67. Since the April 2010 unrest and particularly following the June 2010 inter-ethnic violence, there has been growing concern at the rise in discriminatory practices faced by members of minorities at the institutional level. This is increasingly reflected in attitudes within the public at large. In particular, ethnic Uzbeks have faced ongoing discrimination in the aftermath of the June 2010 inter-ethnic violence.

68. In recent months, concern has increased at the growing inter-ethnic tensions in the country, which are contributing indirectly to the rise in internal migration and emigration. Statements by a few officials in various regions of the country have often fuelled the nationalistic discourse and contributed to feelings of vulnerability within the minority communities.

69. Reports of cases where ethnic minorities are subjected to the illegal seizure of their land, unlawful takeover of their businesses, or physical or verbal threats, are becoming more commonplace. Due to a pervasive fear among victims of such ethnically motivated acts, there is a general reluctance to file complaints with the law enforcement bodies. To date, no criminal case has been brought by the law enforcement authorities under article 299 of the Criminal Code, which proscribes "incitement to inter-ethnic hatred".

78. On administration of justice:

(b) ... In case of retrials related to the June 2010 events, the hearings should not take place in courts in the south of the country in order to ensure impartiality of judges. Judges should maintain their impartiality irrespective of the ethnicity of victims, lawyers and defendants. To ensure such impartiality, provincial rotation mechanisms of judges and other participants in judicial processes should be adopted.

79. On torture and detention:

(b) The Government, prior to the establishment and commencement of functions of the national preventive mechanism under the Optional Protocol to the Convention against Torture, should guarantee unrestricted access by civil society monitoring groups to all places of deprivation of liberty ...

82. On minority rights:

(a) Utmost attention should be paid to building trust and confidence among communities throughout the country and to ensure the prevention of hate speech, which could fuel further tensions. The Government, at the highest levels, should emphasize that promotion and protection of minority rights are an integral part of and a main priority for peace and reconciliation and a central pillar of the country's political, economic and security strategies;

..."

44. Following the examination of the report the Human Rights Council adopted, in June 2011, a resolution in which it, *inter alia*, urged "the Government of Kyrgyzstan to ensure that progress is made in improving the human rights situation in the areas of administration of justice, torture and arbitrary detention, the right to adequate housing, the rights of women, minority rights and human rights mechanisms" and "to promote and protect human rights and fundamental freedoms for all, in particular, to address ongoing arbitrary detentions, torture and corruption by law-enforcement and Government officials".

45. A report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan covering the period from June 2011 to February 2012, which was examined by the Human Rights Council at its 20th session in July 2012, notes that "serious institutional deficiencies have hampered the delivery of justice and undermined the rule of law, and points out that the lack of progress in addressing these matters impacts on reconciliation and peacebuilding efforts between the ethnic communities, as well as between civil society and authorities, with serious risks for the long-term stability of the country. The report further describes the ongoing practice of arbitrary detention and torture and continued discriminatory patterns based on ethnic grounds. In this context, it highlights institutional shortcomings, lack of capacity and, in some instances, lack of political will to take necessary measures." It notes that ten months after the signature of the memorandums of understanding between prosecutors and human rights organisations in Osh Province, Osh City and Jalal-Abad Province setting out mechanisms for regular dialogue and cooperation on the prevention and prosecution for torture within the framework of public councils, little substantial progress has been made, due in part to the lack of trust on the part of human rights NGOs in the prosecutorial authorities and the overall lack of strategic engagement by all parties, posing challenges to the effective functioning of the public councils. As regards the installation of closed circuit television cameras in the temporary police detention centres in Jalal-Abad, the report notes that while they "can be an additional measure to prevent torture, it is not a panacea for the human rights violations observed in detention centres, given the potential ease with which the system can be bypassed or disabled." The report also stated as follows on the minorities' issue:

> "69. There is a wide gap between the authorities' view of inter-ethnic relations and those of ethnic minority communities themselves. Authorities paint a positive picture, while communities raise concerns including: (i) the need to stop any police misconduct, in particular arbitrary arrest, extortion, ill-treatment and torture; ..."

46. In her opening remarks at a press conference on 10 July 2012 during her visit to Kyrgyzstan, UN High Commissioner for Human Rights, Navanethem Pillay, stated, *inter alia*, as follows:

> "... The most serious problem lies in the failure to implement laws and reforms in line with international standards, as well as to act in accordance with Kyrgyzstan's new Constitution.
>
> Take torture as an example: under international law there is an absolute prohibition of torture. This is reflected in the Kyrgyz Constitution, Article 22 of which categorically prohibits torture and all other forms of cruel, inhuman and degrading treatment and punishment. The Criminal Code also recognizes torture as a crime. Yet we continue to receive evidence of torture being committed by state authorities, including 68 cases of alleged torture or ill-treatment between August 2010 and February 2012 in the context of criminal investigations into the June 2010 violence in Osh and neighbouring regions. This is believed to be only a fraction of the real total.

I was encouraged to hear from the Minister of Interior that in recent months the process of establishing accountability for police officers is starting to produce results, with internal investigations launched in 286 cases, resulting in 38 officers being subjected to criminal investigation, and 47 others being fired from their jobs. It is important that the full details of such cases become known both as a deterrent to other police officers thinking of carrying out acts such as torture or extortion, and as reassurance to the general public who, by the Ministry of Interior's own candid admission, have largely lost trust in what should be a key state institution.

I have congratulated Kyrgyzstan on the adoption on 7 June of the Law on National Center for the Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment – a result of four years of concerted efforts by the Ombudsman, the Parliament, the Ministry of Justice, civil society and the international community. I hope that this important law will soon be signed by the President, and that subsequent steps will ensure that the new torture prevention body it creates will be impartial, independent and effective.

Those who order or commit torture should be investigated, arrested and charged. I have urged the President to lead the effort to eradicate this intolerable and illegal practice by making clear public statements stressing there will be zero tolerance for torture from now on. I also note the strong position the Prosecutor-General has taken on preventing torture, issuing three decrees on the subject since taking up office in April 2011. I have recommended that authority over police detention facilities be transferred from the Ministry of Interior to the State Service on Execution of Sentences, and that all detention facilities be opened to independent monitoring.

Discrimination, especially on ethnic, religious and gender grounds, remains a deeply problematic issue with ethnic and national minorities significantly underrepresented in the executive government and bureaucracy, law enforcement bodies and judiciary.

Discrimination is particularly evident in Osh, where around 50 percent of the population is of Uzbek origin, but there is not a single Uzbek judge among the judiciary. I have myself heard the cries for justice from members of the affected communities who have been victimized twice – while the violence was taking place, and in its aftermath."

This imbalance is reflected in many key national and local institutions including the police ..."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Constitution of the Russian Federation

Article 21

"2. No one shall be subject to torture, violence or other severe or humiliating treatment or punishment."

Article 62

"3. Foreign nationals and stateless persons shall enjoy in the Russian Federation the rights and bear the obligations of citizens of the Russian Federation, except for cases envisaged by federal law or international agreements entered into by the Russian Federation."

Article 63

"2. In the Russian Federation it shall not be allowed to extradite to other States those people who are persecuted for political convictions, as well as for actions (or inaction) not recognised as a crime in the Russian Federation. The extradition of people accused of a crime, and also the handover of convicts to serve sentences in other States shall be carried out on the basis of federal law or international agreements entered into by the Russian Federation."

B. The Criminal Code of the Russian Federation

47. According to the Russian Criminal Code, foreign citizens and individuals with no citizenship residing in Russia who have committed a crime outside its borders can be extradited to a State seeking their extradition with a view to criminal prosecution or execution of a sentence (Article 13 § 2).

C. The Code of Criminal Procedure of the Russian Federation

48. The Russian Federation can extradite a foreign national or a stateless person to a foreign State on the basis of either a treaty or the reciprocity principle to stand trial or serve a sentence for a crime punishable under Russian legislation and the laws of the requesting State. An extradition on the basis of the reciprocity principle implies that the requesting State assures the Russian authorities that under similar circumstances they would grant a Russian request for extradition (Article 462 §§ 1 and 2).

49. Extradition can take place where (i) the actions in question are punishable by more than one year's imprisonment or a more severe sentence; (ii) the requested individual has been sentenced to six months' imprisonment or a more severe punishment; and (iii) the requesting State guarantees that the individual in question would be prosecuted only for the crime mentioned in the extradition request, that upon completion of the criminal proceedings and the sentence he or she would be able to leave the territory of the requesting State freely and that he or she would not be expelled or extradited to a third State without the permission of the Russian authorities (Article 462 § 3).

50. The Russian Prosecutor General or his or her deputy decides on extradition requests (Article 462 § 4). A decision by the Russian Prosecutor General or his or her deputy may be appealed against before a regional court within ten days of receipt of the notification of that decision (Article 463 § 1).

51. The regional court, sitting in a composition of three judges, confirms or otherwise the lawfulness and well-foundedness of the extradition decision within one month of the receipt of the appeal, in a public hearing at which the prosecutor, the person whose extradition is sought and his or her

counsel (if the latter has participated in the earlier proceedings) may participate (Article 463 § 4). The court does not examine issues of the individual's guilt, and is limited to establishing whether the extradition decision is compatible with Russian laws and treaties (Article 463 § 6). The court decides either to declare the extradition decision unlawful and to quash it, or to dismiss the appeal (Article 463 § 7). The regional court's decision can be appealed against before the Russian Supreme Court within seven days of its delivery (Article 463 § 9).

D. The 1993 Minsk Convention

The 1993 CIS Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases ("the Minsk Convention"), to which Russia and Kyrgyzstan are parties, provides as follows:

Article 56. Obligation of extradition

"1. The Contracting Parties shall ... at each other's request extradite persons who find themselves in their territory, for criminal prosecution or to serve a sentence.

2. Extradition for criminal prosecution shall extend to offences which are criminally punishable under the laws of the requesting and requested Contracting Parties, and which entail at least one year's imprisonment or a heavier sentence."

Article 66. Restrictions on criminal prosecution of persons being extradited

"1. A person being extradited may not – other than with the consent of the requested Party – be held criminally responsible or punished for any crime committed before the extradition, unless such crime constitutes the reason for such extradition.

2. Nor may such person be extradited to any third State other than with the consent of the requested Party ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

52. The applicant complained that his extradition to Kyrgyzstan would constitute a violation of Article 3 of the Convention, which states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

53. The applicant submitted that, if extradited to Kyrgyzstan, he would be subjected to torture or inhuman or degrading treatment or punishment because he belonged to the Uzbek ethnic minority. He referred to various sources, including publications by the KIC, Human Rights Watch and Amnesty International.

54. The applicant also complained under Article 13 of the Convention in conjunction with Article 3 that when deciding on his extradition the authorities had not rigorously scrutinised his arguments concerning the risk of ill-treatment in the event of his extradition. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The Government

55. The Government contested that argument. They stated that the Prosecutor General's Office of the Russian Federation had obtained the assurances of the Prosecutor General's Office of the Kyrgyz Republic that, in particular, the applicant would not be subjected to torture, inhuman or degrading treatment in case of his extradition. It also had requested assistance from the Russian Ministry of Foreign Affairs in the monitoring of the preservation of the applicant's rights after his extradition, in particular by way of visits to him by diplomatic staff of the Ministry of Foreign Affairs in Kyrgyzstan. In examining the applicant's appeals against the extradition decision the domestic courts had found no objective grounds to doubt the Kyrgyz Republic's assurances, and had taken into account the fact that the situation in Kyrgyzstan had normalised after the inter-ethnic clashes in June 2010, that the applicant had been accused of an ordinary criminal offence which was not of an ethnic or political nature, and which had been committed in 2006-07, long before the June 2010 events.

56. There was a well established domestic judicial practice of examining arguments concerning a risk of treatment contrary to Article 3 of the Convention in extradition proceedings and thereby providing effective remedies for those complaining about such risk. Thus, in the case of R. Zohidov the Russian Supreme Court had quashed a decision to extradite him to Uzbekistan in view of the risk that he would be subjected to torture or inhuman or degrading treatment.

57. The Government submitted that one could not be extradited before the examination of his or her application for refugee status.

58. In accordance with the Court's decision to apply Rule 39, the applicant's extradition had been postponed until the Court's notice.

2. The applicant

59. The applicant maintained his complaint. He argued that the authorities had based their conclusion that there was no risk of torture or inhuman or degrading treatment on the FMS's decision of 7 February 2011, and had disregarded other information.

60. He stated that the assurances of the Kyrgyz Republic Prosecutor General did not offer a reliable guarantee against ill-treatment. The requests for assistance from the Special Representative of the President of the Russian Federation on international cooperation in the fight against terrorism and transnational organised crime and the Ministry of Foreign Affairs, that the protection of his rights would be monitored after his extradition, in particular by way of visits to him by diplomatic staff of the Russian Ministry of Foreign Affairs in Kyrgyzstan, had not been followed up, as the applicant was not aware of any written consent on the part of those bodies to such monitoring. Nor had any such documents been submitted by the Government to the Court.

61. As regards the Government's example of the case of R. Zohidov, who had been represented by the same lawyer as the applicant's lawyer in the present case, the domestic courts had decided to refuse Mr Zohidov's extradition to Uzbekistan because his prosecution had become time-barred, and not because of any possible violation of Article 3 of the Convention. Mr Zohidov had however been handed over to Uzbekistan's law-enforcement authorities with the knowledge of the Russian authorities, and detained and convicted.

62. The applicant submitted that the refugee status proceedings in his case had had no suspensive effect on his extradition.

B. The Court's assessment

1. Article 3

(a) Admissibility

63. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

64. It is the settled case-law of the Court that extradition by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I, and *Soering v. the United Kingdom*, 7 July 1989, § 91, Series A no. 161). In such a case, Article 3 implies an obligation not to extradite the person in question to that country (see *Iskandarov v. Russia*, no. 17185/05, § 125, 23 September 2010). Article 3 is absolute and it is not possible to weigh the

risk of ill-treatment against the reasons put forward for the expulsion (see *Saadi v. Italy* [GC], no. 37201/06, § 138, ECHR 2008).

65. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (see *Cruz Varas and Others v. Sweden*, 20 March 1991, §§ 75-76, Series A no. 201, and *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 107, Series A no. 215). If the applicant has not been extradited when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Mamatkulov and Askarov*, cited above, § 69).

66. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *Ryabikin v. Russia*, no. 8320/04, § 112, 19 June 2008).

67. As regards the general situation in a particular country, the Court considers that it can attach a certain weight to the information contained in recent reports from independent international human rights protection organisations or governmental sources (see, for example, *Chahal v. the United Kingdom*, 15 November 1996, §§ 99-100, *Reports of Judgments and Decisions* 1996-V; *Müslim v. Turkey*, no. 53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, ECHR 2005-VI; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007).

68. In cases where an applicant alleges that he or she is a member of a group systematically exposed to ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 138-49, 11 January 2007, and *Saadi*, cited above, § 132).

69. In the present case the decision to extradite the applicant was taken in connection with his prosecution on charges of embezzlement of State funds, punishable by a lengthy prison term, in criminal proceedings which are pending against him in Jalal-Abad in the south of Kyrgyzstan, which was the scene of the violent inter-ethnic clashes between Kyrgyz and Uzbeks in June 2010, and where he is apparently, in the absence of any

other arrangements known to the Court, to be extradited. The applicant's remand in custody had been ordered by the Jalal-Abad investigating authority (see paragraphs 9-10 above).

70. The Court observes that in the domestic proceedings in which the applicant challenged the decision for his extradition he argued, with reference, *inter alia*, to the findings of the KIC and Human Rights Watch, that as an ethnic Uzbek he would face a serious risk of torture if he were to be extradited (see paragraph 24 above). The St Petersburg City Court's judgment of 9 June 2011 contains general statements about the normalisation of the situation in Kyrgyzstan after the June 2010 inter-ethnic clashes and the absence of any political or ethnic element to the charges against the applicant, and has no regard to the sources cited by the applicant, or, indeed, any assessment of the risk of ill-treatment for its finding that the applicant's fears were not justified (see paragraph 25 above). In so far as it refers to the Federal Migration Service's decisions in the applicant's case, those decisions, while noting the June 2010 events and various developments in Kyrgyzstan since then, such as the constitutional referendum, the parliamentary elections and cooperation with UN bodies, failed to address the issue of ill-treatment by law-enforcement authorities (see paragraphs 21-23 above). By the time of the Russian Federation Supreme Court's review of the St Petersburg City Court's judgment on the applicant's appeal, various reports by reputable international human rights observers, some of which the Court now has before it, had already been published (see paragraphs 35, 37, 43 and 44 above). However, there is no mention of any such or any other reliable sources in the Supreme Court's decision of 7 November 2011, or any detailed assessment of the risk of the applicant's ill-treatment to compensate for the City Court's failure to do so. Having regard also to the proceedings in which the applicant appealed against the FMS's decisions (see paragraph 28 above), the Court considers that the applicant's complaint has not received an adequate reply at the national level.

71. Since the inter-ethnic clashes in June 2010 in Osh and Jalal-Abad the situation in Kyrgyzstan has indeed significantly changed. There have been a number of important developments in Kyrgyzstan, notably the adoption of the new Constitution, the parliamentary and the presidential elections, the work of the international and national commissions of inquiry into the June 2010 events, a number of legal reforms with a view to bringing national legislation into line with international norms in the field of human rights marked by the Government's cooperation with United Nations and other international bodies (see paragraphs 32-35, 41, 43 and 46 above).

72. At the same time it follows from the evidence before the Court that the situation in the south of the country is characterised by torture and other ill-treatment of ethnic Uzbeks by law-enforcement officers, which increased in the aftermath of the June 2010 events and has remained widespread and

rampant, being aggravated by the impunity of law-enforcement officers. The problem must be viewed against the background of the rise of ethno-nationalism in the politics of Kyrgyzstan, particularly in the south, the growing inter-ethnic tensions between Kyrgyz and Uzbeks, continued discriminatory practices faced by Uzbeks at the institutional level and under-representation of Uzbeks in, *inter alia*, law-enforcement bodies and the judiciary. Despite the acknowledgment of the problem and measures taken by the country central authority, in particular the Prosecutor General, their efforts have so far been insufficient to change the situation (see paragraphs 35-46 above). As the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted, he had heard of no "such instructions communicated by the responsible officials of the Ministry of the Interior to condemn torture and ill-treatment or to declare unambiguously that torture and ill-treatment by police officers would not be tolerated", and that it remains to be seen how the Prosecutor General's instructions "will be implemented at the city and provincial levels" (see paragraph 42 above) where, according to Amnesty International, "there appears to be little commitment ... to effectively and decisively address and prevent these serious human rights violations" (see paragraph 36 above).

73. The Court does not overlook the fact that the criminal proceedings against the applicant concern an offence of an economic nature allegedly committed in 2007 and thus unrelated to the June 2010 violence. However, it appears from the sources before the Court that, while the said practice of torture and other ill-treatment of ethnic Uzbeks is particularly evident in the context of prosecution of the June 2010 related offences, given their nature and mass character (more than 5,000 criminal cases opened, see paragraphs 38 and 43 above), it is not limited to those offences, being described by Human Rights Watch as "routine in cases involving ethnic Uzbek suspects detained on charges unrelated to the June 2010 violence" (see paragraph 37 above). Furthermore, those who have returned from working in Russia are considered particularly vulnerable to intimidation and extortion by law-enforcement officers (see paragraphs 36 and 40 above).

74. The Court notes further that in deciding on the applicant's extradition the Russian authorities relied, without any scrutiny, on assurances from the Kyrgyz Republic, the observance of which they found "no reason to doubt" (see paragraph 25 above). The Court observes that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (see *Saadi*, cited above,

§ 148; and *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 187-89, 17 January 2012).

75. The assurances of the Kyrgyz Republic in the present case are rather specific (see paragraphs 15 and 17 above). They are given by the Prosecutor General of the Kyrgyz Republic and concern treatment which is illegal in that State (see paragraphs 41 and 46 above). While they appear to be formally binding on the local authorities, the Court has serious doubts, in view of the poor human rights record of the south of the country, whether the local authorities there can be expected to abide by them in practice (see paragraph 72 above). Furthermore, the Court notes that the Government's reference to the possibility of monitoring the observance of the assurances through the Special Representative of the President of the Russian Federation on international cooperation in the fight against terrorism and transnational organised crime and the Foreign Affairs Ministry of the Russian Federation is not supported by any evidence except for the general request for assistance by the deputy Prosecutor General (see paragraph 19 above) with no information about any follow-up. Although the Court does not doubt the good faith of the Kyrgyz authorities in providing the assurances mentioned above, it is not, in these circumstances, persuaded that they would provide the applicant with an adequate guarantee of safety.

76. For the reasons outlined above, in particular the attested widespread and routine use of torture and other ill-treatment by law-enforcement bodies in the southern part of Kyrgyzstan in respect of members of the Uzbek community, to which the applicant belongs, and impunity of law-enforcement officers, the Court finds it substantiated that the applicant would face a real risk of treatment proscribed by Article 3 if returned to Kyrgyzstan.

77. Accordingly, the order for his extradition to Kyrgyzstan would, if executed, give rise to a violation of Article 3 of the Convention.

2. Article 13 in conjunction with Article 3

78. The Court notes that the complaint under Article 13 in conjunction with Article 3 of the Convention about the Russian authorities' alleged failure to rigorously assess the risk that the applicant would be ill-treated if he were extradited is linked to the complaint examined above and must therefore likewise be declared admissible.

79. It further notes that it has already examined that allegation in the context of Article 3 of the Convention. Having regard to the finding relating to Article 3 (see paragraph 77 above), the Court considers that it is not necessary to examine this complaint separately on the merits (see, among other authorities, *Gaforov v. Russia*, no. 25404/09, § 144, 21 October 2010; *Khaydarov v. Russia*, no. 21055/09, § 156, 20 May 2010; and *Khodzhayev v. Russia*, no. 52466/08, § 151, 12 May 2010).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

81. The applicant claimed 12,000 euros (EUR) in respect of non-pecuniary damage.

82. The Government considered the claim excessive.

83. The Court considers that its finding that the applicant's extradition, if carried out, would breach Article 3 of the Convention constitutes sufficient just satisfaction.

B. Costs and expenses

84. The applicant also claimed EUR 15,440 and 58,726.46 Russian roubles (RUB) for costs and expenses incurred before the domestic courts and before the Court.

85. The Government stated that the applicant had failed to show that the costs and expenses had actually been incurred.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award, after exclusion, *inter alia*, of costs related to the applicant's detention which was not the subject of the complaints before it, the sum of EUR 7,500, covering costs under all heads, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest rate

87. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

III. RULE 39 OF THE RULES OF COURT

88. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties

declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

89. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that, if the decision to extradite the applicant to Kyrgyzstan were to be enforced, there would be a violation of Article 3 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 13 in conjunction with Article 3 of the Convention;

4. *Holds* that its finding made under Article 3 constitutes sufficient just satisfaction as regards the claim for compensation for non-pecuniary damage;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

7. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of

the proceedings not to extradite the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 16 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President