Transnational Injustices
National Security Transfers and International Law

Executive Summary

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Executive Summary

I. INTRODUCTION

Today's world is characterized by increased global connectivity. People move much more than they did 50 or 100 years ago. In order to meet criminal justice objectives, States have formalized means of ensuring criminal co-operation and the transfer of suspects. The emergence of a more globalized world in the late 20th and 21st centuries, and of a global legal order with the institution of the United Nations, has seen the burgeoning of multilateral and bilateral extradition agreements. A more recent phenomenon however is the systematic bypassing of these formal procedures by States, in the name of national security and countering terrorism or fighting serious crime, by means of expulsions or even abductions.

This phenomenon has been particularly apparent in the Commonwealth of Independent States (CIS), a region within which a significant number of people cross borders with practical and legal implications, including as regards transfers of persons suspected of the commission of national security-related offences. Such transfers have often been marked by a disregard for international and national law, both in extradition and expulsion proceedings as well as by resorting to abductions or rendition operations.

This trend is not confined to a single region of the world. The US-led rendition programme has led to the abduction, torture, secret and arbitrary detention and disappearance of more than 100 people across the globe in the name of an illegal "war on terror". The complicity of States globally, including in particular European States, in the rendition system, has come to light. Furthermore, the use of summary expulsions on "national security" grounds in proceedings served to disguise *de facto* extraditions and the risk of human rights violations in extradition proceedings exist in both EU Member States as well as States in the CIS region.

Such cases have been documented by independent, non-governmental sources in several reports analysing the facts and potential human rights violations. However, it is clear that national and international law and law enforcement systems provide the framework for these cases.

The ICJ report *Transnational Injustices - National Security Transfers and International Law* unveils the legal framework at the national and international level which makes it possible for these national security transfers to take place. For extraditions, expulsions and informal practices, such as renditions, the report outlines and compares the legal rules, jurisprudence and practice in key countries of Europe and the CIS regions, and assesses their compliance with international law, including human rights and refugee law. Beyond this regional focus, the report makes reference to other relevant national systems, in particular that of the United States. Based on this analysis, the report makes recommendations for change in law and in practice.

II. THE REPORT'S FINDINGS

a) General findings

While the frameworks governing extradition, expulsion and rendition, and their application in practice in Europe and the CIS regions are each distinct, they also share some commonalities and common patterns, such as the problems entailed in meeting the *non-refoulement* principle and other human rights obligations.

Although the particularities of national law and procedures are important, it remains the case that, in a system based on the rule of law, international human rights law necessarily sets the overarching framework governing the content and the application of those national laws. In practice, as this report shows, these obligations have often been undermined or disregarded, including in the US, Europe and the CIS.

b) Security and human rights law: the false dichotomy

It is entirely legitimate and indeed essential in the contemporary global context that, in response to transnational crime, including terrorism, and increased global mobility, States should enhance criminal co-operation to pursue justice and avoid impunity. Such co-operation is, in particular, necessary to ensure that perpetrators of human rights violations and crimes under international law do not escape justice.

It is a matter of profound concern, for example, that considerations of national security and of countering terrorism have been and continue to be used to justify, both in rhetoric and in reality, disregard for due process, the principle of *non-refoulement*, the protection of human rights, among other of the most basic tenets of the rule of law. It is clear from this report that it is in cases relating to national security that the rule of law has most often been compromised and human rights most often violated.

With regard to involuntary transfers, it is crucial to bear in mind that protecting human rights and ensuring security are not opposing aims. Indeed, under international human rights law, States have positive

obligations to protect the lives and physical integrity of people under their jurisdiction, including from terrorist threats. They have a duty to criminalise, investigate and bring to justice the perpetrators of terrorist acts.

The ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, which in the 2000s assessed the impact of counter-terrorism laws on human rights and the rule of law worldwide, affirmed that "any implied dichotomy between securing people's rights and people's security is wrong. ... On the contrary, countering terrorism is itself a human rights objective." As the ICJ *Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* states*,* "safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state".

A human rights centred approach to security is one that recognizes that human rights law is flexible and sophisticated enough to address national security and counter terrorism concerns, as well as other challenges that are engendered by the movement of people across borders. In this regard, it allows that some rights may be subject to necessary and proportionate limitations, including for the purpose of effective criminal prosecution and co-operation. It also recognizes that certain rights must never be compromised, including freedom from torture or other ill-treatment, extrajudicial killings and enforced disappearance; recognition as a person before the law; the essential elements of the right to fair trial; freedom from arbitrary detention; and *non-refoulement* to face serious human rights violations.

c) National security transfers in the selected countries

In the regions analysed - countries in the CIS, the European Union and the United States - human rights law does not appear to form the basis of the security co-operation policy; rather, it is often seen as an obstacle to it. It is clear that there is a general tendency of States, when national security is at stake, to resort to any procedure that officials perceive would perform the task most efficiently to guarantee the desired result. Respect for the rule of law, of effective and independent court rulings or of its own international and constitutional

obligations is often seen as an obstacle to achieving the authorities' perceived higher goal of "security", a concept that has been shown to be prone to abuse, especially the denial of exercise of human rights and fundamental freedoms.

This approach leads to the misuse of different kinds of legal proceedings for transfers of criminal suspects. Expulsions, whether or not lawful, have been used in place of extradition proceedings that did not produce the desired results. The use of varying transfer processes or practices seems to be also dictated by the lack or weaknesses of effective and independent remedies – before ordinary courts - for expulsion procedures. When political pressure becomes the overwhelming consideration, it has been shown that executive institutions tend to circumvent national legislative frameworks and legal procedures by resorting to such means as abductions and rendition operations.

d) International cooperation and respect for human rights

At the international level, it is sometimes the legal framework itself that is either lacking or insufficiently clear to safeguard human rights protection. There is a tendency to offload aspects of criminal justice co-operation, including with regard to arrest warrants, to international or supranational organizations, which permits direct communication and co-operation between police forces or prosecutors. This phenomenon is seen in relation to organizations such as INTERPOL, the CIS Inter-State database system or SIS II, none of which have in place the appropriate human rights safeguards and effective and independent remedies against abuses and human rights violations. In the absence of these guarantees, such systems of co-operation, while dictated by reasons of efficiency, risk bypassing rule of law safeguards traditionally provided by national courts.

e) Extradition Procedures

Each of the regions examined is undergoing processes of harmonization of their extradition and related criminal procedure rules. In the European Union, the European Arrest Warrant system is diminishing the role of the executive in these procedures and attempting to accelerate the process. In CIS countries, and particularly in the Russian Federation

and Central Asian States, the Shanghai Cooperation Organisation and the Minsk and Chisinau Conventions are part of a general plan to standardize laws and practices so as to speed up extradition procedures. Reform processes of this type need not be problematic. Faster, regulated extradition procedures may allow States to rely more on law based international co-operation, instead of resorting to other sometimes abusive practices.

However, the reality of these processes of harmonization is a focus on technical rules of criminal procedure law and not on the need to safeguard the human rights that most of these rules are there to protect. This is a problem common to both the EU and CIS States examined. In respect of the latter, the situation is aggravated by the weaker roles that the regional treaties assign to independent courts with more prominent roles reserved for non-independent prosecutors and the police as decision-makers. The EU, after several years of advocacy by civil society, has now undertaken a process of reform to include human rights guarantees in the extradition process. States parties to the SCO, and the Minsk and Chisinau Conventions should do the same and put these criminal co-operation systems in line with human rights law.

Unlike in the EU States considered, extradition procedures of CIS States include a limited role for courts and judges, which is one of the glaring differences between the two systems. The role of an independent and impartial judiciary in upholding human rights in the transfer of suspects is crucial. Courts have a duty and a responsibility to thoroughly scrutinize different aspects of the case, protect the rights of any persons concerned, assess the human rights considerations in extradition, deportation or removal cases and provide effective remedies where human rights are alleged to have been violated. As guardians of human rights and the rule of law, judges have a responsibility in the cases that come before them to uphold the principle of *non-refoulement* and to prevent arbitrary detention, torture and ill-treatment, enforced disappearance, denial of fair trial guarantees and other violations of human rights.

f) Renditions systems

The US-led rendition and secret detention programme is a stark demonstration of the consequences of a deliberate circumvention of legal processes in the transfer of suspects. Such consequences have also been confirmed by the abductions carried out in the CIS region. These practices are centred on the removal of a person from the protection of the law and, hence, they are at the origin of multiple gross violations of human rights, including torture and inhuman or degrading treatment; enforced disappearance; incommunicado, arbitrary and prolonged detention; and breaches of the principle of *non-refoulement*. The intention to prevent access to remedies, and in particular judicial remedies, whether national or international, is apparent in all systems examined.

The multitude of studies by governmental, intergovernmental and non-governmental sources into extraordinary renditions has demonstrated that the purported efficiency of these systems is fostered by a lack of accountability, overall impunity and concocted impacts and results. The idea that turning the page is sufficient to move on and that individuals and States will learn by themselves from their mistakes, has been demonstrated to be purely illusory. From its long experience in working to uphold human rights in states of emergency and in transition, the ICJ can attest to the hard lesson of history that when effective accountability is missing, sooner or later violations of human rights are repeated.

g) Conclusion

The ICJ has always advocated that counter-terrorism must be based on a criminal justice-centred approach. In this regard, criminal co-operation among States is key and should be carried out only through a human rights compliant extradition system. Transfer systems must be built with independent, impartial and effective courts at their centre and courts must respect and fully implement international law. This approach supports more efficient criminal justice co-operation and the fight against impunity, since transfers that comply with human rights will not meet opposition from national or international courts.

III. RECOMMENDATIONS

In order to ensure that international cooperation in the transfer or criminal suspects for national security offences fully respects human rights law, the ICJ recommends that:

1. The system of transfers of criminal suspects be centred exclusively on formal and law based extradition proceedings. The principal decision-maker in extradition proceedings should be a judicial authority. The decision should only be made by a prosecutor if within the national system he or she enjoys the same level of independence as judges, in law and in practice. The judicial authority involved must be fully independent both at an institutional and personal level, in law and in practice.
2. Governments, prosecutors, law enforcement authorities and the judiciary must fully implement human rights and procedural safeguards and guarantees in proceedings for extradition, deportation or other transfers that are already enshrined in national law, and must interpret and apply such safeguards in accordance with the State's international human rights law obligations. Where there is a gap in the implementation of a State's international legal obligations regarding transfers, governments should act to reform their laws to meet those obligations.
3. States must ensure that there is a central role for the courts in overseeing transfers, not only in law but also in practice. Judiciaries should exercise their role in the authorization and review of extradition, deportation and detention to the fullest extent.
4. Courts should place human rights guarantees, in particular the principle of *non-refoulement*, at the centre of their decision making and provide a full, impartial and prompt review of executive decisions. Prior to any transfer, judges should make a full assessment of the risk of violations of human rights of the suspect following transfer, taking into account the circumstances of the individual case and drawing on information on the general human rights situation in the country. Under no circumstances should a judge authorize any transfer where there is a real risk

of torture or ill-treatment; denial of the right to life; enforced disappearance; denial of the right to a fair trial; or any other serious human rights violation. No transfer should be carried out until a decision has been taken before the highest court available in the procedure.

5. Domestic law should make clear to all justice system actors what the status of international law is in the national legal system. International human rights law must be fully implemented in national legal systems either via its direct applicability and unambiguous interpretation by courts and/or via its implementation in clear legislation and detailed regulations. Domestic legislation must make clear that decisions of international human rights bodies are binding on domestic courts and other State authorities.

6. Judicial and other State authorities must interpret the international law obligations of the State in the field of extradition and expulsion together with the international obligations of international human rights law, international humanitarian law and refugee law, including the case-law of international human rights bodies. The obligation to apply extradition and expulsion procedures based on treaties, other international standards and/or EU law can never circumvent the equally binding obligations of the State under international human rights, humanitarian law, and refugee law treaties.

7. Governments must ensure that no one is held incommunicado or in secret places of detention, including when they are detained prior to transfer, and that all persons detained or apprehended pending removal are informed of their right to a lawyer and given prompt access to independent qualified legal advice.

8. States must take active steps to discharge their positive obligations to prevent transfers in violation of human rights from or to their jurisdiction, in particular by putting in place protection plans against kidnapping and the transfer of suspects outside the law.

9. Where human rights have been violated in transfer cases, effective judicial and, where appropriate, other remedies and reparation must be available to remedy violations of those rights

which should include, as necessary, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

10. Transfers in violation of human rights will not be prevented in the future without accountability for the abuses of the past. Governments, prosecution services and law enforcement authorities must take steps to independently and promptly investigate, prosecute and bring to justice those responsible for violations of human rights through rendition operations. This should be done through thorough, timely inquiries that are independent of government and law enforcement agencies. They should remove barriers to accountability for renditions, including restrictive rules relating to State secrets, and other doctrines, such as "political question" and "act of State", that serve to frustrate the right to an effective remedy.

11. States must fully respect and execute decisions of international human rights bodies and national courts and tribunals. In particular, the interim measures of these bodies preventing transfer of a suspect pending consideration of the case by a court or non-judicial bodies must be implemented and national laws should oblige courts and any other authorities to do so and provide for sanctions for non-compliance.

12. Systems of harmonization of criminal substantive and procedural law with a view to speeding up extradition processes, however named, must fully incorporate human rights guarantees as included in the human rights treaties and standards binding on all States involved in the process.

13. International and supranational organizations entrusted with facilitating extradition or other transfers must establish independent, impartial and effective systems of prevention of and redress for human rights violations for which the organization may directly or indirectly be responsible, and should have the power to order Member States to remedy these violations.

14. Abductions of persons under the jurisdiction of a State, some of which lead to enforced disappearance, should be treated in law and in practice as grave crimes and violations of human rights. They should be qualified and treated as such by the relevant

State authorities with adequate legal consequences for committing such crimes, in line with international human rights law.

15. Effective, independent and impartial investigations must be carried out to identify persons directly and indirectly responsible for rendition operations and abduction practices that violate human rights and involve crimes under international law. Those responsible should be prosecuted, tried and, if convicted, sentenced to a proportionate punishment and appropriate administrative sanctions to ensure non-repetition.

16. The doctrine of State secrets should be disapplied to all information and documents linked directly or indirectly to rendition operations and abduction practices. Prohibition of the use of State secrets in cases of gross violations of international law and crimes under international law should be clearly incorporated into national law, with the highest legal status, as a guarantee in the constitution or its equivalent, so that it cannot be trumped by considerations of national security. An independent court should have jurisdiction to assess, and issue decisions via open judgments on, requests for information to be classified and challenges for the disclosure of information.

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