

# **Transnational Injustices**

## National Security Transfers and International Law



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## I. Introduction

Today's world is characterized by increased global connectivity. People move much more than they did 50 or 100 years ago. Certain competences and legal regulations relating to migration and asylum, formerly exclusively overseen by individual States, have been assumed by international or supranational organizations, while international treaties, including in the area of human rights law and refugee law, have placed constraints on State behaviour. Nonetheless, individual States still retain considerable jurisdictional competencies in these areas in respect of cross border criminal prosecution through extradition; deportations and other expulsions; and irregular means of involuntary transfers, such as renditions.

The European Court of Human Rights has stressed, "[a]s movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice."<sup>1</sup> 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 20<sup>th</sup> and 21<sup>st</sup> centuries, and of a global legal order with the institution of the United Nations, has seen the burgeoning of multilateral and bilateral extradition agreements (see Chapter III). 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 (Chapters III and IV) as well as by resorting to abductions or rendition operations (Chapter VI).

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 (Chapter VI). 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 (Chapters III and IV).

Such cases have been documented by independent, non-governmental sources in several reports analysing the facts and potential human rights violations.<sup>2</sup> However, it is clear that national and international law and law enforcement systems provide the framework for these cases. The purpose of this report therefore is to unveil the legal framework at the national and international level

<sup>1</sup> *Calovskis v. Latvia*, ECtHR, Application No. 22205/13, 24 July 2014, para. 129.

<sup>2</sup> See among others: Amnesty International, *Fast-track to torture—Abductions and forcible returns from Russia to Uzbekistan*, Index No. EUR 62/3740/2016, 21 April 2016; Amnesty International, *Eurasia: Return torture—Extradition, forcible returns and removals to Central Asia*, Index No. 04/001/2013, 3 July 2013.



which makes it possible for these national security transfers to take place. For extraditions, expulsions and informal practices, such as renditions, the report will attempt to outline and compare the legal rules, jurisprudence and practice in key countries of Europe and the CIS regions, and assess their compliance with international law, including human rights and refugee law. Beyond this regional focus, the report will also make 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.

### 1.1 What is an international transfer?

The definition of international transfer of a person used in this report encompasses all practices employed to transport a person from State A to State B, whether directly or indirectly and whether officially or unofficially. The transfers are international, as they necessarily have to cross a State's border. This report does not deal with international transfers carried out by organized crime gangs or terrorist organizations, i.e. by non-State actors, nor does it deal with voluntary transfers. It covers State-led international transfers. However, it includes transfers that, while carried out by private persons or organizations, are executed either under the direction of the State or by private persons acting "under colour of law" or on behalf of the State.

Transfers based on national security grounds can have a purported legal basis in national law or no legal basis. The latter encompass transfers that are based on secret governmental directives, since the "secrecy" of the legal ground lacks the minimum requirement of quality of the law to satisfy the international law definition of "prescribed by law".

Each of these categories encompasses a variety of measures. Extradition procedures, including the more contemporary surrender procedures under the European Arrest Warrant, are a prominent example of a transfer based in law. So too are expulsion procedures, which are usually encompassed within national immigration laws. Transfers without a legal basis in national law may include ordinary renditions, extraordinary renditions and disguised expulsions.

As detailed below, the boundaries between these categories are clearer in law than in practice. Often, one transfer procedure is used to perform acts with aims that are more pertinent to another kind of transfer. The "denaturation" of legal measures is an important phenomenon in transfers based on national security and is usually linked to the implicit desire to avoid effective remedies and strong human rights safeguards.

This "denaturation" has been strongly criticized by the UN International Law Commission which affirmed that "[f]ulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State. Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions."<sup>3</sup>

### 1.2 What is a national security threat?

Under international human rights law, while no human rights can ever be abrogated, certain rights can be made subject to restrictions in terms of their scope,

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<sup>3</sup> International Law Commission (ILC), *Report on the work of the 66<sup>th</sup> session*, UN Doc. A/69/10, p. 152, para. 22; *ILC Articles on Expulsion of Aliens*, Commentary, p. 152, para. 22.

including for national security or public order reasons. With regard to treaties binding on European and CIS countries, rights that can be restricted encompass the right to respect for private and family life,<sup>4</sup> the freedom to manifest one's religion,<sup>5</sup> freedom of expression,<sup>6</sup> freedom of assembly and association,<sup>7</sup> freedom of movement,<sup>8</sup> and procedural safeguards relating to expulsion of aliens.<sup>9</sup>

The definition of the grounds for restricting rights is therefore important. It is however a particularly challenging task. What constitutes a threat to national security is difficult to grasp. The Human Rights Committee does not define national security nor public order though it stresses that restrictions of human rights invoked on these grounds must be strictly construed.<sup>10</sup> Even if the grounds of national security and public order are among those that allow restriction of certain rights in the *European Convention on Human Rights* (ECHR) and its Protocols, no precise definition has been provided internationally.<sup>11</sup> The European Court of Human Rights has held that the ECHR does not require legislation to precisely define what national security is because "[b]y the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance".<sup>12</sup> However, "in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a discretion granted to the executive in the sphere of national security to be expressed in terms of unfettered power."<sup>13</sup>

In the European Union, the concepts of national security, public policy and public security—that allow restrictions on freedom of movement or enhanced surveillance measures—include situations in which

- a foreigner has been convicted of a criminal offence carrying a penalty involving deprivation of liberty of at least one year,<sup>14</sup>
- "a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests,"<sup>15</sup> or

<sup>4</sup> *European Convention on Human Rights* (ECHR), article 8.3. This right is not expressly qualified in article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). Restrictions are permitted (see: Human Rights Committee (CCPR), *General Comment No. 16*, 28 September 1988), but the grounds are not expressly fixed.

<sup>5</sup> ECHR, article 9.3; ICCPR, article 18.3.

<sup>6</sup> ECHR, article 10.2; ICCPR, article 19.3.

<sup>7</sup> ECHR, article 11.2; ICCPR, articles 21 and 22.

<sup>8</sup> ECHR, article 2 of Protocol 4; ICCPR, article 12.

<sup>9</sup> ECHR, article 1 of Protocol 7; ICCPR, article 13.

<sup>10</sup> Human Rights Committee (CCPR), *General Comment No. 33*, UN Doc. CCPR/C/GC/33, 25 June 2009, paras. 30–31; Human Rights Committee (CCPR), *General Comment No. 27*, UN Doc. CCPR/C/21/Rev. 1/Add. 9, 1 November 1999, para. 11; Human Rights Committee (CCPR), *General Comment No. 15*, 30 September 1986, para. 10.

<sup>11</sup> See: Explanatory Report of Protocol No. 7 ECHR, ETS No. 117, Strasbourg 22 November 1984.

<sup>12</sup> *Kennedy v. UK*, ECtHR, Application No. 26839/05, 18 May 2010, para. 159; *Zakharov v. Russia*, ECtHR, Application No. 47143/06, 4 December 2015, para. 247.

<sup>13</sup> *Zakharov v. Russia*, ECtHR, *op. cit.*, para. 247.

<sup>14</sup> Schengen Information System II Regulation, article 24.2.

<sup>15</sup> *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, Case C-145/09, Judgment, 23 November 2010, para. 44. See also: paras. 20 and 41 See, *inter alia*: *Campus Oil Limited and others v. Minister for Industry and Energy and others*, CJEU, Judgment, Case C-72/83, 10 July 1984, paras. 34 and 35; *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany*, CJEU, Judgment, Case C-70/94, Judgment, 17 October 1995, para. 27; *Alfredo Albore*, CJEU, Judgment, Case C-423/98, 13 July 2000, para. 22; *Commission of the European Communities v. Hellenic Republic*, CJEU, Case C-398/98, Judgment, 25 October 2001, para. 29; *H. T. v. Land Baden-Württemberg*, CJEU, Judgment, Case C-373/13-T, 24 June 2015, para. 78.

- “perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.”<sup>16</sup>

In France, national security encompasses “the defence of the institutions and of the national interests, the respect of the laws, the maintenance of the peace and the public order, and the protection of peoples and goods”.<sup>17</sup> In the UK, the House of Lords has defined national security as “the security of the United Kingdom and its people. On the other hand, the question of whether something is ‘in the interests’ of national security is not a question of law. It is a matter of judgment and policy.”<sup>18</sup>

### 1.3 Conclusions

International law and national laws of the selected countries contain only vague definitions of national security, public order and public security. These vague definitions, coupled with the tendency to resort to informal transfer practices and to the “denaturation” of legal procedures, have deleterious consequences for the principle of legality, a tenet of the rule of law and for the enjoyment of all human rights.

This report focuses on the law pertaining to national security-based transfers because this is the group of transfers where there is greatest legal uncertainty and which is most prone to serious violations of human rights.

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<sup>16</sup> *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, CJEU, Joined Cases C-482/01 and C-493/01, Judgment, 29 April 2004, para. 66. See also: para. 67. See also: *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, CJEU, Case C-554/13, Judgment, 11 June 2015, paras. 41–42 and 50; *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, Doc. No. COM(2009) 313 final, 2 July 2009, p. 10.

<sup>17</sup> Code de la sécurité intérieure, article L111-1.

<sup>18</sup> *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (11 October, 2001), para. 50.

## II. International Human Rights Law Applicable to All Transfers

International law and standards, many of them universal, are the common denominator applicable to all States and regions under analysis to assess the compliance of transfer practices with human rights. First, most of these transfers are undertaken pursuant to international agreements or practices. It is therefore fitting to check them against international standards. Second, all persons falling within the jurisdiction of these States enjoy equivalent human rights protection under international human rights law. This body of law is therefore the appropriate framework to ensure an objective and comparative analysis of laws and practices in this field.

In this part of the report, we will outline the international law and standards applicable to all forms of transfer. When a particular body of international law is applicable to a specific form of transfer, be it extradition or expulsion, it will be considered in the respective Chapters.

The universal human rights treaties concluded under the auspices of the United Nations are binding on all the countries contemplated in this report. Of particular note for purposes of this report are the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Those standards, and the jurisprudence arising from their supervisory bodies, are critical to their quasi-universal reach. Complementary to these are the standards and jurisprudence of the Council of Europe's human rights bodies, most notably the *European Convention on Human Rights* (ECHR) and the European Court of Human Rights. They have been confronted with issues of mobility of persons for decades and have developed the most detailed standards. The treaty standards are part of both the universal and European systems, and, at least as they apply to States that are party to them, are of equal normative source and are mutually reinforcing. The Russian Federation and the European Union countries covered in this report are strictly bound by the European Convention, while the Central Asian States are not. Nonetheless, even for those States, the European Convention and jurisprudence of the European Court constitute highly authoritative interpretive sources and should be taken into account.

### 2.1 International law and counter-terrorism

Since 1985, the UN General Assembly has repeatedly reminded States of the "necessity of maintaining and safeguarding the basic rights of the individual in accordance with the relevant international human rights instruments and generally accepted international standards"<sup>19</sup> and reiterated that "all measures to counter terrorism must be in strict conformity with international human rights standards."<sup>20</sup> This obligation is stressed in the *UN Declaration on Measures to*

<sup>19</sup> General Assembly (GA) Resolution 40/61 (1985), Preamble; GA Resolution 42/159 (1987), Preamble; GA Resolution 44/29 (1989), Preamble; GA Resolution 46/51 (1991), Preamble; GA Resolution 49/185 (1995), Preamble and article 3. With other formulations, GA Resolution 53/108, para. 3; GA Resolution 55/158, para. 3; GA Resolution 56/88, para. 3; GA Resolution 57/27, para. 3. See also: GA Resolution 48/122 (1994), para. 2; GA Resolution 50/86 (1996), para. 3; GA Resolution 52/133, para. 4; GA Resolution 52/165, para. 3; GA Resolution 54/110, para. 3; GA Resolution 56/160, para. 6; GA Resolution 57/27, para. 6.

<sup>20</sup> GA Resolution 50/86 (1996), Preamble; GA Resolution 52/133, Preamble; GA Resolution 54/164, Preamble; GA Resolution 56/160, Preamble; GA Resolution 57/219, para. 1.

*Eliminate International Terrorism*<sup>21</sup> while the *UN Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* stressed “the importance of full compliance by States with their obligations under the provisions of the 1951 Convention and the 1967 *Protocol relating to the Status of Refugees*, including the principle of *non-refoulement* of refugees to places where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion.”<sup>22</sup>

In 2003, in the wake of the attacks of 11 September, the UN Security Council reminded States that they “must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”<sup>23</sup> This language has been reaffirmed in numerous subsequent Security Council Resolutions, and has been echoed by the UN General Assembly and the UN Human Rights Council.<sup>24</sup> The UN Global Counter-terrorism Strategy reaffirmed that “States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”<sup>25</sup>

## 2.2 The principle of *non-refoulement*

The principle of *non-refoulement*, prohibiting the involuntary transfer of anyone to a country where he or she faces a real risk of persecution or serious violations of human rights, is a fundamental principle of international law. The principle, which has its source both in customary and treaty law, constitutes a powerful limitation on the right of States to control entry into their territory and to expel non-nationals as an expression of their sovereignty. It has its origin in international refugee law<sup>26</sup> and international treaty law governing extradition.<sup>27</sup> In international human rights law, the legal basis of the principle of *non-refoulement* lies in the obligation of all States to respect and protect the human rights of all people within their jurisdiction,<sup>28</sup> and in the requirement that a human rights treaty be interpreted and applied so as to make its

<sup>21</sup> GA Resolution 49/60 (1995), Annex, article 5. See also, GA Resolution 51/210 (1997), article 3.

<sup>22</sup> Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, in GA Resolution 51/210, Preamble.

<sup>23</sup> UN Resolution 1456 (2003), Annex, para. 6. Reiterated in Resolution 1566 (2004), Preamble; Resolution 1535 (2004) Preamble; Resolution 1624 (2005), Preamble; Resolution 1787 (2007), Preamble; Resolution 1805 (2008), Preamble.

<sup>24</sup> GA Resolution 62/159, Preamble, para. 7; GA Resolution 68/276; GA Resolution 40/61 (1985), Preamble; GA Resolution 42/159 (1987), Preamble; GA Resolution 44/29 (1989), Preamble; GA Resolution 46/51 (1991), Preamble; GA Resolution 49/185 (1995), Preamble and article 3. With other formulations, GA Resolution 53/108, para. 3, GA Resolution 55/158, para. 3; GA Resolution 56/88, para. 3; GA Resolution 57/27, para. 3; GA Resolution 50/86 (1996), Preamble; GA Resolution 52/133, Preamble; GA Resolution 54/164, Preamble; GA Resolution 56/160, Preamble; GA Resolution 57/219, para. 1. See also, among others: Human Rights Council (HRC) Resolution 31/3; HRC Resolution 29/9, HRC Resolution 25/7.

<sup>25</sup> GA Resolution 60/288, Annex, para. IV.2.

<sup>26</sup> *UN Convention Relating to the Status of Refugees*, 1951 (Geneva Refugee Convention), article 33.

<sup>27</sup> See, among others: *International Convention Against the Taking of Hostages*, adopted on 17 December 1979 by GA Resolution 146 (XXXIV), UN GAOR, 34th Session, Supp. No. 46, UN Doc. A/34/46, article 9; *European Convention on Extradition* (ECE), adopted on 13 July 1957, article 3; *European Convention on the Suppression of Terrorism*, adopted on 27 January 1977, article 5; *Inter-American Convention on Extradition*, adopted on 25 February 1981, article 4; and *UN Model Treaty on Extradition*, article 3. See also: GA Resolution 63/185, para. 10.

<sup>28</sup> See: ECHR, article 1; ICCPR, article 2. The *Convention against Torture* expressly provides for the principle of *non-refoulement* in its article 3.

safeguards practical and effective.<sup>29</sup> It is expressly contained in some human rights treaties, while for others its applicability has been affirmed through the jurisprudence of interpretive authorities.

Regarding refugees, article 33.1 of the *Geneva Convention relating to the Status of Refugees* of 1951 provides that States shall not “expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>30</sup> This obligation is operative whether a formal determination of refugee status has been made by the destination country, whether the case is still being determined, or if the refugee is intending to apply for asylum. Indeed, the *non-refoulement* principle applies even if no application has been made or is intended. This principle is also reflected in several international law instruments.<sup>31</sup> It is not subject to derogation or limitation.<sup>32</sup> The refugee law principle of *non-refoulement* applies both to refugees present on the territory of the State and as well as at the border.<sup>33</sup> This principle applies to all transfers, including extradition procedures<sup>34</sup> and it must be observed in all situations of large-scale influx.<sup>35</sup>

The definition of *refoulement* under article 33.1, unlike the definition of refugee, refers to risks arising in any country where the person concerned might be sent, which may not necessarily be the country of origin or habitual residence. This includes third States that might transfer the person to an unsafe country (indirect *refoulement*). The “threat to life or freedom” is also broader than, and includes, the refugee definition. Indeed the UNHCR and other authorities consider it as encompassing circumstances of generalized violence which pose a threat to the life or freedom of the person, irrespective of whether or not such violence amounts to individualized persecution.<sup>36</sup>

Nevertheless, the *Geneva Refugee Convention* provides for a restriction on this protection. Namely, the protection may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that

<sup>29</sup> See, for example: *Soering v. United Kingdom*, ECtHR, Plenary, Application No. 14038/88, 7 July 1989, para. 87; *Ahorugeze v. Sweden*, ECtHR, Application No. 37075/09, Judgment of 27 October 2011, para. 85.

<sup>30</sup> See: *Conclusion No. 79 (XLVII) General*, Executive Committee, UNHCR, 47<sup>th</sup> Session, 2006, para. (j). See also: *Conclusion No. 81 (XLVIII) General*, ExCom, UNHCR, 48<sup>th</sup> Session, 1997, para. (i); *Conclusion No. 82 (XLVIII) on Safeguarding Asylum*, ExCom, UNHCR, 48<sup>th</sup> Session, 1997, para. (d-i). See also: *Concluding Observations on Portugal*, CCPR, UN Doc. CCPR/CO/78/PRT, 17 September 2003, para. 83.12.

<sup>31</sup> See: *Revised Bangkok Declaration*, articles III and V; *Declaration on Territorial Asylum* of 1967, UNGA resolution 2132(XXII), 14 December 1967, article 3.

<sup>32</sup> *Conclusion No. 79*, UNHCR, *op. cit.*, para. (i). See also: UN GA Resolution 51/75, UN Doc. A/RES/51/75, 12 February 1997, para. 3.

<sup>33</sup> *Conclusion No. 6 (XXVIII) non-refoulement*, UNHCR, Executive Committee, 28<sup>th</sup> session, 1977, para. (c). See also: *Conclusion No. 17 (XXXI) Problems of Extradition Affecting Refugees*, ExCom, UNHCR, 31<sup>st</sup> Session, 1980, para. (b). The need to admit refugees into the territories of States includes no rejection at frontiers without fair and effective procedures for determining status and protection needs: See: *Conclusion No. 82*, UNHCR, *op. cit.*, para. (d-iii).

<sup>34</sup> See: *Conclusion No. 17*, UNHCR, *op. cit.*, paras. (c) and (d).

<sup>35</sup> See: *Conclusion No. 19 (XXXI) Temporary Refuge*, ExCom, UNHCR, 31<sup>st</sup> Session, 1980, para. (a); *Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situation of Large-Scale Influx*, UNHCR, Executive Committee, 32<sup>nd</sup> session, 1981, para. (II-A-2).

<sup>36</sup> See: UNHCR, *Note on non-refoulement (Submitted by the High Commissioner)*, UN Doc. EC/SCP/2, 23 August 1977, para. 4; and, Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of non-refoulement: Opinion*, 20 June 2001, pp. 124–125, paras. 128–133.



country.”<sup>37</sup> The first restriction—the danger to national security—must concern a foreseeable prospective danger in the future and not be only based on past conduct. The feared danger must be a danger to the country of refuge.

While the authorities have a certain discretionary latitude in identifying the danger, they must conduct an individual assessment as to whether there are “reasonable grounds” for considering the refugee a danger to national security, based on the principles of necessity and proportionality. In this regard, the authorities will have to consider: the seriousness of the danger for national security; the likelihood of the realization of the danger and its imminence; whether the danger to the security would be diminished significantly or eliminated by the removal of the individual; the nature and seriousness of the risks to the individual from *refoulement*; and whether other avenues may be found whether in the country of refuge or in a safe third country.<sup>38</sup>

The principle of *non-refoulement* is also well established in international human rights law, including under the ECHR, CAT and ICCPR, where it applies to all transfers of nationals or non-nationals, including migrants, whatever their status, as well as refugees.<sup>39</sup> For the principle of *non-refoulement* to apply, the risk faced on return must be real, i.e. be a foreseeable consequence of the transfer, and personal, i.e. it must concern the individual person claiming the *non-refoulement* protection.<sup>40</sup>

To date, the principle of *non-refoulement* has been affirmed by international courts and tribunals as applying to risks of violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment; of violations of the right to life; and of flagrant denial of justice and of the right to liberty. However, this list is non-exhaustive. It is also likely that the prohibition would apply, under certain circumstances, to other serious violations of human rights.<sup>41</sup>

The scope of what constitutes torture or other cruel, inhuman or degrading treatment or punishment may vary according to the human rights treaty and the jurisprudence and commentary of the supervisory authority. As a general matter, the proscribed conduct will concern not only acts involving severe physical pain or actual bodily injury but also those that cause intense mental suffering, fear, anguish or feelings of inferiority to the victims, or humiliate or debase them.<sup>42</sup> Whether the threshold for conduct that amounts to such

<sup>37</sup> *Geneva Refugee Convention*, article 33.2.

<sup>38</sup> See: *Lauterpacht/Bethlehem*, *op. cit.*, pp. 137–138, para. 178.

<sup>39</sup> See, for example: *Soering v. United Kingdom*, ECtHR, *op. cit.*, paras. 87 and 90.

<sup>40</sup> Human Rights Committee (CCPR), *General Comment No. 31*, UN Doc. CCPR/C/21/Rev. 1/Add. 13, 26 May 2004, para. 12; *Na v. United Kingdom*, ECtHR, Application No. 25904/07, Judgment of 17 July 2008, paras. 109, 113; *Saadi v. Italy*, ECtHR, GC, Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Nnyanzi v. United Kingdom*, ECtHR, Application No. 21878/06, Judgment of 8 April 2008, para. 51; *Cruz Varas and others v. Sweden*, ECtHR, Plenary, Application No. 15576/89, Judgment of 20 March 1991, para. 69; *Chahal v. United Kingdom*, ECtHR, Application No. 22414/93, 15 November 1996, para. 74; *Soering v. United Kingdom*, ECtHR, *op. cit.*, paras. 85–91.

<sup>41</sup> *Ibid.*, para. 12; *Saadi v. Italy*, ECtHR, *op. cit.*, para. 127; *Chahal v. the United Kingdom*, ECtHR, *op. cit.*, para. 79; *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48; *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012; *Al-Moayad v. Germany*, ECtHR, Application No. 35865/03, Admissibility Decision, 20 February 2007, paras. 100–102; *Z and T v. United Kingdom*, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006, The Law.

<sup>42</sup> *Raninen v. Finland*, ECtHR, Case No. 52/1996/771/972, Judgment of 16 December 1997, para. 167; *M. S. S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 219; Human Rights Committee (CCPR), *General Comment No. 20*, 30 September 1992, para. 5.



treatment or punishment has been met may depend on the sex, age or health of the victim.<sup>43</sup> Recently, the European Court of Human Rights has included “situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.”<sup>44</sup>

The principle of *non-refoulement* also applies when there is a risk of enforced disappearance.<sup>45</sup> A *non-refoulement* provision is expressly contained in the *Convention on the Protection of All Persons from Enforced Disappearance*. Enforced disappearances also constitute acts of torture or ill-treatment and, often, violations of the right to life.<sup>46</sup>

Under international human rights treaties and jurisprudence, the transfer of a person to a country where there is a risk of subjection to the death penalty has frequently been proscribed in connection with state obligations concerning the right to life and/or freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>47</sup>

It is widely accepted that the risk of serious human rights abuses does not necessarily have to come directly from the feared conduct of State agents in order to trigger the protection of *non-refoulement*, it can also originate from the conduct of non-State actors in two types of situation: when the conduct of those non-State actors may nonetheless be attributable to the State;<sup>48</sup> or when the State is unwilling or unable to protect the person at risk.<sup>49</sup>

<sup>43</sup> *Saadi v. Italy*, ECtHR, *op. cit.*, para. 134; *Ribitsch v. Austria*, ECtHR, Application No. 18896/91, Judgment of 4 December 1995, para. 38.

<sup>44</sup> *Paposhvili v. Belgium*, ECtHR, Application No. 41738/10, 13 December 2016, para. 183.

<sup>45</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, adopted on 20 December 2006 (ICED), article 16; *UN Declaration on the Protection of all Persons from Enforced Disappearance*, adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992, A/RES/47/133, article 8.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Judge v. Canada*, CCPR, Communication No. 829/1998, Views of 20 October 2003, para. 10.4; Re-confirmed in *Kwok Yin Fong v. Australia*, CCPR, Communication No. 1442/2005\*, Views of 23 November 2009, para. 9.4; *Ng v. Canada*, CCPR, Communication No. 469/1991\*, Views of 7 January 1994, para. 16.4; *Al-Saadoon and Mufti v. United Kingdom*, ECtHR, Application No. 61498/08, Admissibility Decision, 30 June 2009, para. 137; *Kaboulov v. Ukraine*, ECtHR, Application No. 41015/04, Judgment of 19 November 2009; *Shamayev and others v. Georgia and Russia*, ECtHR, Application No. 36378/02, Judgment of 12 April 2005, para. 333; *Kindler v. Canada*, CCPR, Communication No. 470/1991\*, Views of 18 November 1993, para. 15.2; *Soering v. United Kingdom*, ECtHR, *op. cit.*, para. 111. See also: *Ilascu and others v. Russia and Moldova*, ECtHR, Application No. 48787/99, 8 July 2004, paras. 429–432.

<sup>48</sup> See: *ILC, Articles on Responsibility of States for Internationally Wrongful Acts*, articles 5 and 8.

<sup>49</sup> *Na v. United Kingdom*, ECtHR, *op. cit.*, para. 110. See also: *H. L. R. v. France*, ECtHR, Application No. 24573/94, 29 April 1997, para. 40; *Salah Sheekh v. the Netherlands*, ECtHR, Application No. 1948/04, Judgment of 11 January 2007, paras. 137, 147; *N. v. Finland*, ECtHR, Application No. 38885/02, Judgment of 26 July 2005, paras. 163–165; *M. E. v. France*, ECtHR, Application No. 50094/10, Judgment of 6 June 2013, paras. 47–53; *Auad v. Bulgaria*, ECtHR, Application No. 49390/10, Judgment of 11 October 2011, para. 98; UNHCR, Agents of Persecution, UNHCR Position, 15 March 2005, para. 4. See also: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, September 1979, para. 65; *Naveed Akram Choudhary v. Canada*, CCPR, Communication No. 1898/2009, Views of 28 October 2013, paras. 9.7–9.8; *Concluding Observations on France*, CCPR, Report of the Human Rights Committee to the General Assembly, 52<sup>nd</sup> session, Vol. I, UN Doc. A/52/40 (1997), para. 408; *Recommendation 1440 (2000) Restrictions on asylum in the Member States of the Council of Europe and the European Union*, PACE, para. 6.

The principle of *non-refoulement* makes no distinction with respect to the type of transfer.<sup>50</sup> Interestingly, the European Court of Human Rights has found that “an article 3 issue would arise in respect of a mandatory life sentence without parole and a discretionary life sentence if it could be shown that the applicant’s imprisonment could no longer be justified on any legitimate penological grounds and that the sentence was irreducible *de facto* and *de jure* . . . .”<sup>51</sup>

Certain rights and obligations that engage the *non-refoulement* principle, such as the prohibition of torture and other ill-treatment and the arbitrary deprivation of the right to life, are considered absolute rights because they are peremptory norms of international law or are *non-derogable* under international human rights treaties. It is well-established that, where the right in question following transfer is an absolute right the principle of *non-refoulement* is similarly absolute and is not subject to limitation or exception, whether in law or in practice.<sup>52</sup> This rule applies to all expulsions, regardless of considerations of national security, or other strong public interest arguments, economic pressures or heightened influx of migrants.<sup>53</sup> In this respect, the protection of the human rights principle of *non-refoulement* is broader than that of its refugee law equivalent.<sup>54</sup>

As is also clear from the jurisprudence of the European Court of Human Rights, what matters are not the reasons for expulsion, but only the risk of serious violations of human rights in the country of destination.<sup>55</sup> The Court held in *Saadi v. Italy* that, consistent with the absolute nature of article 3 rights, national security interests, even purportedly heightened threats, could not justify a more ready acceptance of a risk of torture or inhuman or degrading treatment.<sup>56</sup>

Obligations of *non-refoulement* apply both to transfers to a State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of further transfer to a third country, where the person will be at risk (indirect *refoulement*).<sup>57</sup> The Grand Chamber of the European Court of Human Rights, in *Hirsi Jamaa and others v. Italy*, clarified that the sending State must “ensure that the intermediary country offers sufficient guarantees

<sup>50</sup> *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 131; *Soering v. UK*, ECtHR, *op. cit.*, para. 113.

<sup>51</sup> *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 143. On uncapped consecutive sentences, see: para. 145.

<sup>52</sup> *Zhakhongir Maksudov and others v. Kyrgyzstan*, CCPR, Communications Nos. 1461–1462–1476–1477/2006, Views of 31 July 2008, para. 12.4; *Tapia Paez v. Sweden*, CAT, Communication No. 39/1996, Views of 28 April 1997, para. 14.5; *Tebourski v. France*, CAT, Communication No. 300/2006, Views of 11 May 2007, paras. 8.2 and 8.3. See also: *Dadar v. Canada*, CCPR, Communication No. 258/2004, Views of 5 December 2005, para. 8.8; and *Concluding Observations on Slovenia*, CAT, Report of the Committee against Torture to the General Assembly, 55<sup>th</sup> Session, UN Doc. CAT A/55/44 (2000), p. 34, para. 206; *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, Communication No. CAT/C/48/D/444/2010, Views of 1 June 2012, para. 13.7; *Saadi v. Italy*, ECtHR, *op. cit.*, para. 127; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para. 79.

<sup>53</sup> *M. S. S. v. Belgium and Greece*, ECtHR, *op. cit.*, paras. 223–224.

<sup>54</sup> *Saadi v. Italy*, ECtHR, *op. cit.*, para. 138; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para. 80.

<sup>55</sup> *Ibid.*, para. 138.

<sup>56</sup> *Ibid.*, para. 140. This was further underlined by the Court in subsequent cases including *Ismoilov and others v. Russia*, ECtHR, Application No. 2947/06, Judgment of 24 April 2008, para. 126; *Bay-sakov and others v. Ukraine*, ECtHR, Application No. 54131/08, Judgment of 18 February 2010, para. 51; *Auad v. Bulgaria*, ECtHR, *op. cit.*, para. 101.

<sup>57</sup> CCPR, *General Comment No. 31*, *op. cit.*, para. 12; *General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22*, CAT, UN Doc. A/53/44, annex IX, 21 November 1997, para. 2; *Hamayak Korban v. Sweden*, CAT, Communication No. 88/1997, Views of 16 November 1998, para. 7; *Salah Sheekh v. the Netherlands*, ECtHR, *op. cit.*, para. 141; *M. S. S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 342.

to prevent the person concerned being removed to his country of origin without an assessment of the risks faced".<sup>58</sup>

## 2.3 Refugee status under international law

The right to seek asylum under international law was first recognized in an international instrument in the *Universal Declaration of Human Rights*, which states, in article 14.1, that "everyone has the right to seek and to enjoy in other countries asylum from persecution".<sup>59</sup> The *Geneva Convention relating to the Status of Refugees* of 1951, read together with its Additional Protocol of 1967 (*Geneva Refugee Convention*), defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."<sup>60</sup>

A person falls within the definition of a refugee from the moment he or she meets the criteria of article 1A.2 of the *Geneva Refugee Convention*. A determination by the State to "grant" refugee status is not a determination of the status, but only its formal recognition.<sup>61</sup> However, there are situations that may serve to exclude recognition of refugee status, in particular when there are serious reasons for considering that:

- The person seeking refugee status has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes (article 1F(a));<sup>62</sup>
- He or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee (article 1F(b));
- He or she has been guilty of acts contrary to the purposes and principles of the United Nations (article 1F(c)).

It is well established that the exclusion clauses must be applied "restrictively".<sup>63</sup> On the particular exclusion clause of "non-political crime", the UNHCR has clarified that, "[i]n determining whether an offence is 'non-political' or is, on

<sup>58</sup> *Hirsi Jamaa and others v. Italy*, ECtHR, Application No. 27765/09, 23 February 2012, para. 147.

<sup>59</sup> See: Guy S. Goodwin-Gil, *The Refugee in International Law*, Oxford University Press, 2<sup>nd</sup> Edition, 1998, p. 175; and Alice Edwards, "Human Rights, Refugees and The Right 'To Enjoy' Asylum", 17 Int'l J. Refugee L. 293 (2005), p. 299. Within the European Union, the right of asylum is enshrined in article 18 of the *Charter of Fundamental Rights of the European Union* ("EU Charter").

<sup>60</sup> Geneva Refugee Convention, article 1A.2.

<sup>61</sup> See: *UNHCR Handbook*, op. cit., para. 28.

<sup>62</sup> See: *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted on 9 December 1948; the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols; the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 *Charter of the International Military Tribunal* (the London Charter), and most recently the 1998 *Statute of the International Criminal Court* which entered into force on 1 July 2002 (Rome Statute).

<sup>63</sup> *UNHCR Handbook*, op. cit., para. 149. See also: *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Geneva Convention relating to the Status of Refugees*, UNHCR, UN Doc. HCR/GIP/03/05, 4 September 2003 (UNHCR Guidelines on Application of the Exclusion Clauses), para. 2; Recommendation Rec (2005) 6 of the Committee of Ministers to Member States on exclusion from refugee status in the context of article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, adopted by the CMCE on 23 March 2005 at the 920<sup>th</sup> meeting of the Ministers' Deputies, paras. 1 (a), (b) and (g), and 2.

the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object."<sup>64</sup> It is also important to recall that, "[f]or a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles."<sup>65</sup>

On a procedural level, exclusion decisions should in principle be considered during the regular Refugee Status Determination Procedure (RSDP) and not at the admissibility stage and certainly not where "accelerated" procedures have been adopted. Because they may involve complex evaluations, they should be part of a full factual and legal assessment of the whole case. The UNHCR has established the rule that "inclusion should generally be considered before exclusion".<sup>66</sup> There may be exceptions to the rule, for example when there is an indictment has been issued against the asylum seeker by an international criminal tribunal; when there is apparent and readily available evidence pointing strongly towards the asylum-seeker's involvement in particularly serious crimes; or in the appeal stage where the application of the exclusion clauses is the issue to be considered.<sup>67</sup> Procedural fairness is always paramount. In this respect, the UNHCR has recalled that "[e]xclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned".<sup>68</sup>

Finally, it must be recalled that people who have been denied refugee status under an exclusion clause or whose status has ceased can always avail themselves of the protection from expulsion assured by the principle of *non-refoulement* under the *Geneva Refugee Convention* and international human rights law (see above, Section 2.2.).

## 2.4 Other forms of international protection

Many States and regional inter-governmental organizations (IGOs) have established, since the adoption of the *Geneva Refugee Convention*, an array of other forms of protection and protective measures conceived for people who do not satisfy the definition of "refugee" under that Convention, or for people for whom the circumstances of entry to the State of refuge does not allow them to access immediately the ordinary RSDP.

In situations of mass influx, the principle of *non-refoulement* in both refugee and international human rights law may be obliged to grant some form of temporary protection, at least until the persons concerned can access the RSDP.

There are circumstances under which persons in need of protection fall outside the definition of refugee in the *Geneva Refugee Convention*.<sup>69</sup> These include people who are victims of the indiscriminate effects of violence in conflict

<sup>64</sup> *UNHCR Handbook, op. cit.*, para. 152. See also: *UNHCR Guidelines on Application of the Exclusion Clauses, op. cit.*, paras. 14–16; Recommendation Rec (2005) 6, CMCE, *op. cit.*, para. 1 (d). For the definition of "group" subject to persecution see: Recommendation Rec (2004) 9 of the Committee of Ministers to member states on the concept of "membership of a particular social group" (MPSG) in the context of the 1951 *Convention relating to the status of refugees*, adopted by the CMCE on 30 June 2004, at the 890<sup>th</sup> meeting of the Ministers' Deputies.

<sup>65</sup> See: *UNHCR Guidelines on Application of the Exclusion Clauses, op. cit.*, para. 15.

<sup>66</sup> *Ibid.*, para. 31.

<sup>67</sup> *Ibid.*, para. 31.

<sup>68</sup> *Ibid.*, para. 36 (emphasis in the original text).

<sup>69</sup> *Ibid.*, para. 2.

situations,<sup>70</sup> or persons who cannot be expelled from the country of destination in light of the international human rights law principle of *non-refoulement*, but who do not fall within the refugee definition. The UNHCR defines protection offered to people in these situations as “complementary forms of protection”.<sup>71</sup>

In some cases, however, persons are excluded from protection as refugees not by the *Geneva Refugee Convention* itself, but by restrictive interpretation of the Convention in the legislation or practice of the country of refuge.<sup>72</sup> In these cases, the UNHCR ExCom has held that people should be recognized as refugees under the *Geneva Refugee Convention* and that complementary forms of protection should not be used to undermine Convention protection.<sup>73</sup>

The interplay between international protection and purported international security concerns is to some extent addressed within the international protection system itself. As outlined above, there are situations linked to serious criminal offences that exclude the recognition of refugee status.<sup>74</sup> It is however important to stress again that the international human rights law-based principle of *non-refoulement* knows no exception to its application and therefore covers cases where the person represents a threat to security, however high.

The UN Security Council, in Resolution 1373 (2001), made it mandatory for all UN Member States to ascertain that a person is not involved in crimes of terrorism before he or she is granted asylum. This has been affirmed by the UN General Assembly<sup>75</sup> in respect of the UN Global Counter-Terrorism Strategy. It must be stressed however that the UN General Assembly has not taken an exclusively security-oriented approach. In 2008, for example, it urged “States to fully respect non-refoulement obligations under international refugee and human rights law and, at the same time, to review, with full respect for these obligations and other legal safeguards, the validity of a refugee status decision in an individual case if credible and relevant evidence comes to light that indicates that the person in question has committed any criminal acts, including terrorist acts, falling under the exclusion clauses under international refugee law.”<sup>76</sup>

## 2.5 The right to privacy and the right to family life

The right to privacy under article 17 ICCPR, the right to protection of the family under article 23 ICCPR, the right to respect for private and family life under article 8 ECHR, and similarly protected rights under international human rights law,<sup>77</sup> allow for restrictions to their enjoyment where they are in accordance

<sup>70</sup> See: *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, UNHCR, *op. cit.*, fn. 142, paras. 10–11.

<sup>71</sup> See: *Conclusion No. 103*, UNCHR, *op. cit.*, fn. 143.

<sup>72</sup> See: *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, UNHCR, Doc. EC/50/SC/CRP. 18, 9 June 2000, paras. 7–9. See also: Ruma Mandal, “Protection Mechanisms Outside of the 1951 Convention (‘Complementary Protection’)”, in UNHCR Legal and Protection Policy Research Series, Department of International Protection, UNCHR, UN Doc. PPLA/2005/02, June 2005, paras. 19–20, pp. 8–9.

<sup>73</sup> See: *Conclusion No. 103 (LVI) Provision on International Protection Including Through Complementary Forms of Protection*, ExCom, UNHCR, 56<sup>th</sup> Session, 2005, paras. (b) and (k).

<sup>74</sup> *Geneva Refugee Convention*, article 33.2.

<sup>75</sup> GA Resolution 60/288, Annex, para. II.7.

<sup>76</sup> GA Resolution 63/185, Protection of human rights and fundamental freedoms while countering terrorism, 2008, para. 9. See also: GA Resolution 64/168, Protection of human rights and fundamental freedoms while countering terrorism, 2009, para. 6h; GA Resolution 64/297, The United Nations Global Counter-Terrorism Strategy, 2010; GA Resolution 65/221, Protection of human rights and fundamental freedoms while countering terrorism, 2010; GA Resolution 66/171, Protection of human rights and fundamental freedoms while countering terrorism, 2011.

<sup>77</sup> ICCPR, articles 17 and 23; CRC, article 9; ECHR, article 8.

with the law, pursue a legitimate aim, are necessary in a democratic society, are proportionate to the aim pursued and are non-discriminatory. “Family life” is defined widely in international human rights law as not limited only to relationships based on marriage and irrespective of gender, sexual orientation or gender identity. Whether family life exists between partners, or between parents and children, depends principally on the factual nature and duration of the particular relationship at issue.<sup>78</sup>

Involuntary transfers, as potentially entailing an interference with the right to private and family life, must be in accordance with the law. This requires that they must:

- have a basis in domestic law;
- be accessible to the persons concerned;
- be sufficiently precise to enable those concerned to foresee, to a degree that is reasonable—and if necessary with appropriate advice—the consequences of their actions.<sup>79</sup>

The involuntary transfer must also pursue a legitimate aim. The “maintenance and enforcement of immigration control” is considered by itself to constitute a legitimate aim for restrictions to the rights of family and private life,<sup>80</sup> as are reasons of national security and public order. Merely asserting that these aims are pursued is not sufficient, however: the action must be shown to truly advance the aim and be necessary to reach it.<sup>81</sup>

The decision to expel must also be necessary in a democratic society, which requires that it be justified by a pressing social need, and proportionate to the aim pursued. The requirement of proportionality means that there must be relevant and sufficient reasons for the measure, that no less restrictive measure is feasible; that adequate safeguards against abuse should be in place; and that the measure should be imposed by way of a fair procedure.<sup>82</sup>

In cases where there is an intention to expel as a consequence of committing a criminal offence, the European Court of Human Rights has established guiding criteria to be considered in evaluating whether a measure of expulsion that interferes with private or family life, is necessary in a democratic society and proportionate to a legitimate aim pursued.<sup>83</sup> The Court considers that “the longer a person has been residing in a particular country, the stronger his or her

<sup>78</sup> *Ngambi and Nébol v. France*, CCPR, Communication No. 1179/2003, Views of 16 July 2004, para. 6.4. *Omur v. United Kingdom*, ECtHR Application No. 27319/07, Judgment of 27 February 2009, paras. 43–45; *Schalk and Kopf v. Austria*, ECtHR, Application No. 3014/04, Judgment of 24 June 2010, paras. 93–95.

<sup>79</sup> *Onur v. United Kingdom*, ECtHR, Application No. 27319/047, 27 February 2009, para. 48. See also: *Rubin Byahuranga v. Denmark*, CCPR, Communication No. 1222/2003, Views of 9 December 2004, para. 11.7; *Madafferi and Madafferi v. Australia*, CCPR, Communication No. 1011/2001, Views of 26 August 2004, para. 9.8; *Omojudi v. United Kingdom*, ECtHR, Application No. 1820/08, Judgment of 24 November 2009.

<sup>80</sup> *Nyanzi v. United Kingdom*, ECtHR, *op. cit.*, para. 76.

<sup>81</sup> *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, Case No. 15/1983/71/107–109, 24 April 1985, para. 78.

<sup>82</sup> *Rubin Byahuranga v. Denmark*, CCPR, *op. cit.*, para. 11.7; *Madafferi and Madafferi v. Australia*, CCPR, *op. cit.*, para. 9.8; *Omojudi v. United Kingdom*, ECtHR, *op. cit.*

<sup>83</sup> See: *Boultif v. Switzerland*, ECtHR, Application No. 54273/00, Judgment of 2 August 2001, para. 48. See also: *Hamidovic v. Italy*, ECtHR, Application No. 31956/05, Judgment of 4 December 2012. “[T]he factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged”, *A. A. v. the United Kingdom*, ECtHR, Application No. 8000/08, Judgment of 20 September 2011, para. 49.



ties with that country and the weaker the ties with the country of his or her nationality will be.”<sup>84</sup> The Court has indicated that special consideration should be given to situations where non-nationals have spent most, if not all, of their childhood in the host country and were brought up and received education there.<sup>85</sup> The Court has also found a violation of article 8 when the combined effect of expulsion and custody and access proceedings and the failure to co-ordinate them have prevented family ties from developing.<sup>86</sup>

## 2.6 Procedural rights

The prohibition of collective expulsion of any person is enshrined in article 4 of Protocol 4 ECHR. Furthermore, the Human Rights Committee has been clear that “laws or decisions providing for collective or mass expulsions” would entail a violation of article 13 ICCPR.<sup>87</sup> It is a corollary of this prohibition<sup>88</sup> that everyone, regardless of his or her status, is entitled to individual, fair and objective consideration be given to each case of transfer.<sup>89</sup> The transfer procedure must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account.<sup>90</sup>

In addition, where an individual has been threatened with a transfer that gives rise to a real risk of a serious human rights violation in the receiving State, there must be available an effective right to a remedy that is prompt, accessible, and conducted by an impartial and independent authority capable of reviewing and overturning the decision to expel.<sup>91</sup>

Remedies should generally be provided before a judicial body and, in cases involving gross or serious human rights violations, such as torture and ill-treatment or unlawful killing, equal access to an effective judicial remedy is essential and mandatory. These requirements are prescribed under international human rights treaties, such as the ICCPR<sup>92</sup> and the *Convention against Torture*.<sup>93</sup> They are also reflected in international standards governing the right to an effective remedy and reparation that have been agreed by all States, in particular

<sup>84</sup> *Üner v. the Netherlands*, ECtHR, Application No. 46410/99, 18 October 2006, para. 58; *Konstantinov v. the Netherlands*, ECtHR, Application No. 16351/03, 26 April 2007, para. 49.

<sup>85</sup> *Nasri v. France*, ECtHR, Application No. 19465/92, Judgment of 13 July 1995, paras. 41 and 46.

<sup>86</sup> *Ciliz v. the Netherlands*, ECtHR, Application No. 29192/95, 11 July 2000.

<sup>87</sup> CCPR, *General Comment No. 15*, *op. cit.*, para. 10.

<sup>88</sup> Protocol 4 to the ECHR, article 4; International Convention on the Rights of Migrant Workers and of the Members of Their Families, article 22.1; Human Rights Committee, *General Comment No. 15*, *op. cit.*, para. 10.

<sup>89</sup> The European Court of Human Rights has stated that “collective expulsion ... is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”, *Čonka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 59. See also: *Sultani v. France*, ECtHR, Application No. 45223/05, Judgment of 20 July 2007, para. 81.

<sup>90</sup> *Ahani v. Canada*, CCPR, Communication No. 1051/2002, Views of 15 June 2004, paras. 10.6–10.8; *Čonka v. Belgium*, ECtHR, *op. cit.*, para. 63; *Sultani v. France*, ECtHR, *op. cit.*, para. 81; *Hirsi Jamaa and others v. Italy*, ECtHR, GC, *op. cit.*, para. 184–186.

<sup>91</sup> See: ICJ, *Migration and International Human Rights Law*, *Practitioners Guide No. 6*, 2<sup>nd</sup> edition, pp. 166–171, for related comprehensive jurisprudence. A thorough analysis of the right to a remedy is to be found in, ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, *Practitioners’ Guide No. 2*, Geneva, December 2006.

<sup>92</sup> ICCPR, article 2.3. See also: Human Rights Committee (CCPR), *General Comment No. 31*, UN Doc. CCPR/C/21/Rev. 1/Add. 13, 26 May 2004.

<sup>93</sup> CAT, article 14. See also: Committee against Torture (CAT), *General Comment No. 3*, UN Doc. CAT/C/GC/3, 13 December 2012.



the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted unanimously by the UN General Assembly.<sup>94</sup> The *Basic Principles and Guidelines* assert that a “victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.”<sup>95</sup>

For a remedy to be effective it must have the power to bring about cessation of the violation and appropriate reparation (restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition), including, where relevant, to overturn the expulsion order, and must be independent and impartial.<sup>96</sup> The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.<sup>97</sup> In cases of *non-refoulement* where there is a risk of torture or ill-treatment, the decision to expel must be subject to close and rigorous scrutiny.<sup>98</sup>

The European Court of Human Rights has held that, in order to comply with the right to an effective remedy, a person threatened with an expulsion which risks leading to a violation of another Convention right must have:

- access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- where necessary, translated material and interpretation;
- effective access to legal advice, if necessary by provision of legal aid;<sup>99</sup>
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotypical decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.<sup>100</sup>

The right to an effective remedy also requires review of a decision to expel, by an independent and impartial appeals authority, which has competence to assess the substantive human rights issues raised by the case, to review the decision to expel on both substantive and procedural grounds and to quash the decision if appropriate. The European Court has held that judicial review by an independent and impartial tribunal constitutes, in principle, an effective remedy, provided that it fulfills these criteria.<sup>101</sup> The appeal procedure must be

<sup>94</sup> *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA Resolution 60/147 of 16 December 2005.

<sup>95</sup> *Ibid.*, article 12.

<sup>96</sup> See: ICJ, *Practitioners' Guide No. 2*, *op. cit.*, pp. 49–54.

<sup>97</sup> *Muminov v. Russia*, ECtHR, Application No. 42502, Judgment of 4 November 2010, para. 100; *Isakov v. Russia*, ECtHR, Application No. 14049/08, Judgment of 8 July 2010, para. 136; *Yuldashev v. Russia*, ECtHR, Application No. 1248/09, Judgment of 8 July 2010, paras. 110–111; *Garayev v. Azerbaijan*, ECtHR, Application No. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.

<sup>98</sup> *Agiza v. Sweden*, CAT, Communication No. 233/2003, Views of 24 May 2005, para. 13.8. *Jabari v. Turkey*, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, para. 39.

<sup>99</sup> *M. S. S. v. Belgium and Greece*, ECtHR, GC, *op. cit.*, para. 301.

<sup>100</sup> *Ibid.*, para. 302; *C. G. and others v. Bulgaria*, ECtHR, Application No. 1365/07, Judgment of 24 April 2008, paras. 56–65. See also: *Hirsi Jamaa and others v. Italy*, ECtHR, GC, *op. cit.*, paras. 202–204.

<sup>101</sup> *Vilvarajah and others v. United Kingdom*, ECtHR, Applications Nos. 13163/87–13164/87–13165/87–13447/87–13448/87, Judgment of 30 October 1991, para. 99; *Isakov v. Russia*, ECtHR, *op. cit.*, para. 137; *Yuldashev v. Russia*, ECtHR, *op. cit.*, para. 110–111; *Garayev v. Azerbaijan*, ECtHR, *op. cit.*, paras. 82 and 84; *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 133. See also: *C. G. and others v. Bulgaria*, ECtHR, *op. cit.*, para. 56.

accessible in practice, must provide a means for the individual to obtain legal advice, and must allow a real possibility of lodging an appeal within prescribed time limits.<sup>102</sup> In *non-refoulement* cases, an unduly lengthy appeal process may render the remedy ineffective, in view of the seriousness and urgency of the matters at stake.<sup>103</sup>

To provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards before the measure is executed.<sup>104</sup> A system where stays of execution of the expulsion order are at the discretion of a court or other body is not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.<sup>105</sup> In practice, this will also mean that authorities have an obligation to respect interim measures prescribed by a court or human rights authority enjoining the State to desist from expulsion or other transfer until the case can be decided on its merits, so as to prevent irreparable harm to the migrant.<sup>106</sup>

## 2.7 The role of international law in domestic law

The Constitutions and primary laws<sup>107</sup> of the Russian Federation,<sup>108</sup> Kazakhstan,<sup>109</sup> Kyrgyzstan,<sup>110</sup> Tajikistan,<sup>111</sup> Turkmenistan,<sup>112</sup> and Uzbekistan<sup>113</sup> consider international law as part of domestic law.

Under Russian law, courts are obliged to apply the State's international law obligations over conflicting domestic law<sup>114</sup> and to implement judgments of the European Court of Human Rights<sup>115</sup>. However, in recent years, State authorities and the judiciary have taken a different approach. In its ruling No. 21-П, dated 14 July 2015, the Constitutional Court held that the judgments of the European Court of Human Rights may be implemented only insofar as they do not contravene the Russian Constitution. As a result, the ability of Russian institutions to effectively execute the decisions of the European Court has been weakened, and it may ultimately have repercussions on the

<sup>102</sup> *M. S. S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 318.

<sup>103</sup> *Ibid.*, para. 320.

<sup>104</sup> See: ICJ, *Migration and International Human Rights Law*, *op. cit.*, p. 169 and fn. 602 for related comprehensive jurisprudence, in particular from CAT and CCPR.

<sup>105</sup> *Conka v. Belgium*, ECtHR, *op. cit.*, paras. 81–85; *De Souza Ribeiro v. France*, ECtHR, GC, Application No. 22689/07, Judgment of 13 December 2012, para. 82; *Hirsi Jamaa and others v. Italy*, ECtHR, GC, *op. cit.*, para. 206.

<sup>106</sup> See: *Mannai v. Italy*, ECtHR, Application No. 9961/10, Judgment of 27 March 2012, paras. 49–57, for an application of this principle to Italy. See: ICJ, *Migration and International Human Rights Law*, *op. cit.*, pp. 312–313 for related comprehensive jurisprudence.

<sup>107</sup> Civil Code of the Russian Federation, article 7, para. 1; Law of the Republic of Kazakhstan "On international treaties of the Republic of Kazakhstan", No. 54 of 30 May, 2005, article 20, para. 1; Law of the Kyrgyz Republic of 24 April 2014, No. 64, "On the international treaties of the Kyrgyz Republic" (as of 9 June 2015, No. 126, 27 March 2017, No. 51); Constitution of Turkmenistan, article 9; Code of Criminal Procedure of Turkmenistan, articles 1.3 and 2; Law of Turkmenistan "On International Treaties of Turkmenistan", articles 3, 17.1.

<sup>108</sup> See: Constitution of the Russian Federation, article 15.4; Criminal Procedure Code of the Russian Federation, article 1.3.

<sup>109</sup> Constitution of the Republic of Kazakhstan, article 4.1

<sup>110</sup> Constitution of the Kyrgyz Republic, article 6.3.

<sup>111</sup> Constitution of Tajikistan, article 10.

<sup>112</sup> Constitution of Turkmenistan, article 9.

<sup>113</sup> Constitution of Uzbekistan, Preamble.

<sup>114</sup> Civil Procedure Code of the Russian Federation, article 11, para. 1. See: Criminal Code of the Russian Federation, article 1, para. 2.

<sup>115</sup> Civil Procedure Code of the Russian Federation, article 392, para. 4.4.

compliance of laws and procedures, including in the extradition context, with the ECHR.

In Kazakhstan, the Constitution considers international law to be directly applicable and to supersede national legislation.<sup>116</sup> However, the role of the courts in its direct application is limited by a Normative Resolution of the Supreme Court of Kazakhstan<sup>117</sup> in a series of cases, including cases of extradition and administrative offences. Importantly, the Resolution states that courts, where necessary, must be guided by the norms of the ICCPR.<sup>118</sup>

In Kyrgyzstan the most recent amendments to the Constitution<sup>119</sup> removed from the Constitution a provision stipulating that international treaty provisions concerning human rights took precedence over other international treaty provisions. It also removed the domestic obligations of the Kyrgyz Republic to take steps to remedy human rights violations identified by an international human rights body.<sup>120</sup>

Tajikistan incorporates international law most fully into its legal system as compared to other States in the region. The Constitution expressly asserts the priority of international law over domestic law.<sup>121</sup> The same priority is accorded in primary legislation<sup>122</sup> and courts are expressly entrusted with its direct application.<sup>123</sup>

In Turkmenistan, the law entrusts State bodies, which include the judiciary, with the responsibility to enforce international human rights treaties.<sup>124</sup>

In Uzbekistan, there is no clear legislative provision on the direct applicability of international law but in practice the Plenum of the Supreme Court of Uzbekistan has referred to the CAT Convention to define the term “torture”<sup>125</sup> and referred to the ICCPR when speaking about the need to guarantee the presumption of innocence.<sup>126</sup>

By contrast, in the EU Member States under consideration, international law obligations are not always made applicable without legislation, but courts have

<sup>116</sup> Constitution of the Republic of Kazakhstan, article 4.3. See also, to the same extent: CPC, article 557.3, and the Normative Resolution of the Supreme Court No. 1 dated 10 July 2008 “On application of international treaties of the Republic of Kazakhstan” (amended on 30 December 2011); and in accordance with the Ruling of the Constitutional Council of Kazakhstan dated 6 March 1997, No. 3, concerning interpretation of article 4.1 of the Constitution of Kazakhstan. Normative resolutions of the Supreme Court summarizing case law of courts and explaining the application of relevant laws form part of the law of Kazakhstan and are binding on lower instance courts. Law of the Republic of Kazakhstan “On international treaties of the Republic of Kazakhstan”, No. 54 of 30 May 2005, article 20, para. 3, specifies that the President and the Government of Kazakhstan take measures to implement international treaties.

<sup>117</sup> On the application of the norms of international treaties of the Republic of Kazakhstan, the Normative Resolution of the Supreme Court of the Republic of Kazakhstan of 10 July 2008, No. 1b.

<sup>118</sup> *Ibid.*, para. 11.

<sup>119</sup> Entered into effect on 15 January 2017.

<sup>120</sup> Repealed article 6.

<sup>121</sup> Constitution of Tajikistan, article 10. The Law of the Republic of Tajikistan “On Normative Legal Acts”, of 18 May 2017, No. 397, article 10.

<sup>122</sup> Code of Criminal Procedure of the Republic of Tajikistan, article 1.3; Law of the Republic of Tajikistan “On Normative Legal Acts”, 18 May 2017, No. 397, article 10.

<sup>123</sup> Constitutional Law of the Republic of Tajikistan “On Courts of the Republic of Tajikistan”, article 3.

<sup>124</sup> Law of Turkmenistan “On International Treaties of Turkmenistan”, article 19.

<sup>125</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan of 19 December 2003, No. 17, “On the practice of courts applying laws providing the suspect, accused with the right to defense”.

<sup>126</sup> Resolution of the plenum of the Supreme Court of the Republic of Uzbekistan of 2 May 1997, No. 2, “On the judicial sentence”.

been incrementally invoking international law in their decisions. In Germany, international human rights law is directly applicable when sufficiently precise, and often only insofar as it provides for the same level or a higher level of human rights protection as the German Constitution (*Grundgesetz*)<sup>127</sup>. The Italian Constitutional Court follows roughly the same doctrine.<sup>128</sup> In France, the ECHR is directly applicable by courts, as it is in Spain.<sup>129</sup> The UK has remained a predominantly dualist system where international law requires statutory transposition to be directly implemented by courts. However, the Human Rights Act 1998 has allowed persons under its jurisdiction the possibility to claim violations of their rights under the ECHR directly before UK courts. In all EU Member States assessed in this report, in extradition cases, national legislation applies only when international extradition treaties do not apply.<sup>130</sup>

Regardless of the domestic system of implementation of international law, it is important to note that the basic principle reflected in article 27 of the *Vienna Convention on the Law of Treaties* remains operative, namely that States “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

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<sup>127</sup> See: Constitutional Court, judgment No. BVerfGE 37, 271, 29 May 1974; judgment No. BVerfGE 73, 339, 22 October 1986.

<sup>128</sup> See: Constitutional Court, judgment No. 238, 22 October 2014. See also: Constitution of Italy, article 117.

<sup>129</sup> Constitution of Spain, articles 10.2 and 96.1; French Constitution, article 55.

<sup>130</sup> See, for example: Law 4/1985 of 21 March 1985, de Extradición Pasiva, article 1; or, in Italy, article 696 of the Criminal Procedure Code gives pre-eminence over national law to the provisions enshrined in the ECE and to other international treaties binding on Italy as well as general international law. National law is applied only residually. Article 1.3 of the Act on International Cooperation in Criminal Matters of Germany gives pre-eminence to international law.

### III. Extradition

An extradition is a formal legal process through which one country (the requesting State) seeks from another (the executing State) the transfer of a person to its jurisdiction for the purpose of criminal prosecution or to serve a criminal sentence.<sup>131</sup> Extradition is particularly important in relation to certain crimes related to gross human rights violations, such as torture, enforced disappearance, crimes against humanity and war crimes, where there may be an obligation for a State to prosecute, or extradite for prosecution, an accused person.

Extradition arrangements are undoubtedly intended to foster international co-operation as regards criminal justice. Human rights protection is central to the extradition process. The formalization of legal procedures aims at ensuring the protection of the human rights of the individual.<sup>132</sup>

It is however not mandatory under international law to have an extradition treaty in order for the international transfer of a person to take place; arrangements for extradition can be made between States on an ad hoc bases, as long as they conform with other international legal obligations.<sup>133</sup> Under international human rights law, there is no right not to be extradited<sup>134</sup> nor is there a specific universally prescribed procedure to be followed during extradition processes.<sup>135</sup> Nonetheless, a transfer will need to comply with the existing States' obligations under international law, in particular under international human rights law and refugee law.<sup>136</sup>

Ordinarily, extradition processes remain the primary means to transfer persons suspected of having committed offences that impact on national security, among other offences. This inter-State cooperation system has been in place for at least the last two centuries. Nonetheless, as discussed below, the implementation of extradition procedures, both legally and in practice, does give rise, in the countries examined, to human rights concerns and, at times, violations. In addition, States sometimes bypass these formal extradition arrangements with other procedures.

The bypassing of formal extradition arrangements is discussed in Chapters IV and VI. In this Chapter, the extradition systems of the Russian Federation and Central Asian States will be compared with selected, representative systems of European Union Member States governed by the civil law system, in particular

<sup>131</sup> The UNODC Model Law on Extradition defines "extradition" as "the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence". UNODC, *Model Law on Extradition*, Part 1, Section 1.

<sup>132</sup> Dr Helen McDermott, *Extraterritorial abduction under the framework of international law: does irregular mean unlawful?*, Phd Thesis, Irish Centre for Human Rights, School of Law College of Business, Public Policy and Law, National University of Ireland, Galway, p. 41.

<sup>133</sup> While the UNODC Model Law privileges treaty-based extraditions, it allows for it to "be granted by virtue of comity or where, on the basis of assurances given by the competent authorities of the requesting State, it can be anticipated that this State would comply with a comparable request of [country adopting the law], or where it is otherwise deemed in the interests of justice to do so."

<sup>134</sup> *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 129; *Soering, op. cit.*, para. 85; *Parlanti v. Germany*, ECtHR, Application No. 45097/04, Admissibility Decision, 26 May 2005.

<sup>135</sup> *Ibid.*, para. 129. See also: *Ramirez v. France*, in which the European Commission on Human Rights did not find that a "disguised extradition" could *per se* breach the ECHR unless it did so because of certain aspects of its execution taken by themselves, *Illich Sanchez Ramirez v. France*, European Commission on Human Rights, Application No. 28780/95, Decision of 24 June 1996.

<sup>136</sup> *Ibid.*, para. 130.

France, Germany, Spain and Italy. This comparative assessment is aimed at identifying legal gaps that must be filled to ensure an effective discharge of human rights obligations in the all legal systems examined.

### 3.1 The international framework of criminal justice cooperation and extradition

#### 3.1.1 Extradition in UN criminal justice cooperation

Extradition plays a central part in the UN framework of criminal cooperation among Member States.<sup>137</sup> The efforts of the international community to foster cooperation in criminal matters have typically focused on transnational criminal offences such as terrorist activities, drug trafficking and human trafficking. They also concern offences that, regardless of their transnational nature, are considered to be of such negative impact on humanity as a whole as to make their perpetrators or accomplices *hostis humanitatis* (the enemy of humanity). These are crimes under international law including slavery, genocide, crimes against humanity, war crimes, torture, and enforced disappearance.

The international terrorism conventions concluded in the framework of the United Nations have confirmed and followed the traditional UN General Assembly's choice,<sup>138</sup> in terms of extradition, to consider the rule of *aut dedere aut iudicare* (prosecute or extradite) as the main framework for criminal cooperation in counter-terrorism.<sup>139</sup>

The UN Security Council, after the attacks in the US of 11 September 2001 obliged States to "deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens."<sup>140</sup> It further excluded the application of the political offence exception for these offences (see below in Section 3.4.1.).<sup>141</sup>

<sup>137</sup> Criminal cooperation is part of the purposes and principles of the UN. See: *UN Charter*, article 1.

<sup>138</sup> The UN General Assembly began in 1979 to call upon Member States to enhance their cooperation on extradition or prosecution of "international terrorists" (GA Resolution 34/145, para. 11; GA Resolution 38/130 (1983), para. 6; GA Resolution 40/61 (1985), para. 8. More vaguely, GA Resolution 50/53 (1996), para. 5 ; GA Resolution 54/164, Preamble; GA Resolution 56/160, Preamble and para. 7) or, more technically, "perpetrators of terrorist act" (GA Resolution 42/159 (1987), para. 5.b-c; GA Resolution 44/29 (1989), para. 4.b-c ; GA Resolution 46/51 (1991), para. 4.b-c. See: *UN Declaration on Measures to Eliminate International Terrorism*, GA Resolution 49/60 (1995), article 5.b-c. Reiterated in article 6, and *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, in GA Resolution 51/210, Preamble and article 5).

<sup>139</sup> 1963 *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, article 6.1; 1997 *International Convention for the Suppression of Terrorist Bombings*, article 19; 1999 *International Convention for the Suppression of the Financing of Terrorism*, article 21; 2005 *Amendments to the Convention on the Physical Protection of Nuclear Material*, new article 2.4; 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, new article 2 bis.1; 2005 *Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf*, new article 2 bis.1; 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*, article 4. Note, practically all Conventions confirm Member States' other obligations under international law.

<sup>140</sup> UN SC Resolution 1566 (2004), para. 2 (emphasis added). It is a binding resolution issued under Chapter VII. Previously called for in a high level meeting in UN Resolution 1456 (2003), Annex, para. 3. Reiterated in Resolution 1624 (2005), Preamble and others. See: previous resolutions, Resolution 1269 (1999), para. 4; Resolution 1368 (2001), paras. 3-4; Resolution 1189 (1998), paras. 3-5 (after the attacks to the US embassies in Nairobi and Dar es Salaam; UN SC Resolution 1373 (2001), para. 2.c. Recalled in the Declaration approved by Resolution 1377 (2001).

<sup>141</sup> *Ibid.*, para. 3.

The 2006 UN Global Counter-Terrorism Strategy, regularly revised and renewed, calls on States to cooperate fully in the fight against terrorism, in accordance with obligations under international law, “in particular human rights law, refugee law and international humanitarian law”.<sup>142</sup> It stresses, in particular, the conclusion of extradition agreements “on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations.”<sup>143</sup>

The United Nations has consistently prioritized extradition as a means of fostering cooperation with regard to the transfer of persons suspected or convicted of a crime. No UN document has advocated the use of other transfer measures in this field. This is because court-ordered extradition is best placed to ensure respect for the human rights of the suspect. The UNODC advocates for the use of extradition as the only method of transfer and stresses that, whatever the means of transfer, it “will have to be carried out in full conformity with due process requirements, and in accordance with relevant international human rights law”.<sup>144</sup>

### **3.1.2 Extradition within the Council of Europe**

The duty to prosecute or extradite terrorist suspects and the exclusion of the political offence exception for terrorism offences are also enshrined in the Council of Europe’s *European Convention on the Suppression of Terrorism*.<sup>145</sup> The same approach is applied to other transnational offences in the Council of Europe’s *Convention against Cybercrime*,<sup>146</sup> *Convention on Action against Trafficking in Human Beings*,<sup>147</sup> *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*<sup>148</sup> and *Convention against Trafficking in Human Organs*.<sup>149</sup>

A particular mention must be reserved for the Council of Europe’s *Convention for the Prevention of Terrorism* 2005 that includes as extraditable offences, public provocation to commit a terrorist offence, recruitment for terrorism, training for terrorism, and ancillary acts of participation, organization or contribution.<sup>150</sup>

<sup>142</sup> GA Resolution 60/288, Annex, para. II.2–3. Resolution 68/276, para. 22.

<sup>143</sup> *Ibid.*, para. IV.2.

<sup>144</sup> UNODC, *Model Law against Terrorism*, Chapter V, Section 1. The UNODC *Model Law against Terrorism* (Chapter V, Section 1) states that “[e]xtradition is the only channel envisaged in these Model Provisions for the surrender of individuals to a foreign country for the purpose of trial or servicing a sentence. Other forms of surrender are not dealt with or encouraged. In any case, it is submitted that the use by States of alternative forms of transfer will have to be carried out in full conformity with due process requirements, and in accordance with relevant international human rights law.”

<sup>145</sup> *European Convention on the Suppression of Terrorism*, Strasbourg, 27.I.1977, articles 6–7. The Convention has been ratified by all Council of Europe Member States, apart from Andorra. Several States, however, attached to their ratification declarations that wholly or partly allow them discretion to decide whether one of the listed offences is a political offence or not, thereby defying the object and purpose of the Convention.

<sup>146</sup> For the offences of “illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography, offences related to copyright, and their attempt and/or aiding and abetting” (article 24). The Convention is widely ratified. All Council of Europe Member States, with the exception of Andorra, Greece, Ireland, Monaco, Russia, San Marino and Sweden, have ratified, and are joined by Australia, Canada, the Dominican Republic, Israel, Japan, Mauritius, Panama, Sri Lanka, and the USA. It is therefore good evidence of *opinio iuris*.

<sup>147</sup> Article 31.3, 46 ratifications.

<sup>148</sup> Articles 25.7 and 38.3.

<sup>149</sup> Articles 10.1 and 17.

<sup>150</sup> Article 19.



All parties are subject to the obligation to extradite or prosecute, if they have criminal jurisdiction.<sup>151</sup>

### **Box 1: The Council of Europe Convention on the Transfer of Prisoners**

The Council of Europe's *Convention on the Transfer of Sentenced Persons* of 1983 created the first legal framework for the transfer of persons convicted and sentenced in a foreign State to serve their sentence in the State of their nationality. The transfer must be consented to by the sentenced person and by both the transferring State and the State of destination. Either State may request a transfer be triggered. A transfer is permitted only where the convicted offence, or a similar offence, exists in both criminal justice systems, and where the remaining term of imprisonment is more than six months. Communications take place through the respective Ministries of Justice. The process may consist of the direct enforcement of the foreign sentence or in its judicial reversion based on the State of nationality's criminal law. However, in either case, the resulting sentence "shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State".<sup>152</sup> A 1997 Additional Protocol included the possibility for a State that had sentenced a national of another State, who had been evading a sentence in the State of nationality, to ask the State of nationality to execute the sentence in its stead. In such cases, consent of the sentenced person is not necessary.<sup>153</sup>

This Convention has been widely ratified, including by non-Council of Europe States. It constitutes an important aid to assist in the interpretation of other international criminal cooperation agreements.<sup>154</sup>

### **3.1.3 Criminal cooperation within the CIS: the Shanghai Cooperation Organization**

Extradition is an important element of work that takes place under the auspices of the Shanghai Cooperation Organization (SCO). All Central Asian States (apart from Turkmenistan), the Russian Federation and the People's Republic of China have signed and ratified the *Shanghai Convention on Combating Terrorism, Separatism and Extremism* of 2001. This treaty is aimed at strengthening their cooperation, and, in particular joint exercises and exchange of information, in preventing, identifying and suppressing terrorism, separatism and extremism.<sup>155</sup>

The Convention defines 'terrorism' as any one of the offences included in the UN anti-terrorism Conventions,<sup>156</sup> as well as:

<sup>151</sup> Article 18.

<sup>152</sup> Council of Europe's *Convention on the Transfer of Sentenced Persons* of 1983, article 10.2.

<sup>153</sup> It has been ratified to date by 37 States Members of the Council of Europe.

<sup>154</sup> See: *Vienna Convention on the Law of Treaties on the use of other international agreements binding upon the Parties of another treaty for the latter's interpretation*, article 31.3.

<sup>155</sup> *Shanghai Convention on Combating Terrorism, Separatism and Extremism*, 2001, Preamble.

<sup>156</sup> Listed in its Annex A, see at [http://www.mid.ru/sanhajskaa-organizacia-sotrudnicestva-sos-/-/asset\\_publisher/0vP3hQoCPRg5/content/id/579790](http://www.mid.ru/sanhajskaa-organizacia-sotrudnicestva-sos-/-/asset_publisher/0vP3hQoCPRg5/content/id/579790).

*"other act(s) intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict or to cause major damage to any material facility, as well as to organize, plan, aid and abet such act, when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act, and prosecuted in accordance with the national laws of the Parties."*<sup>157</sup>

The definition of "terrorism" is supplemented by the *SCO Convention against Terrorism* of 2009. In that instrument, terrorism is defined as

*"an ideology of violence and practice of affecting the decision-making of the authorities or international organizations through the commission or the threat of committing of violent and (or) other criminal acts intimidating the population and aimed to cause damage to individuals, society and State".*<sup>158</sup>

It further defined a "terrorist act" as

*"an act or the threat of committing the act intimidating the population, endangering human life and health, aimed at causing significant property damage, or ecological disaster, or other serious consequences with the objective of influencing the decision-making of authorities or international organizations and achieving political, religious, ideological, or other ends."*<sup>159</sup>

Finally, it defines "a terrorist organization" as:

- a) "criminal groups, illegal armed units, gangs or criminal communities created to commit crimes under this Convention and (or) those that have already committed such crimes;
- b) a legal entity in whose name, at whose direction or in whose interests one of the offenses covered by this Convention is planned, organized, prepared or committed."<sup>160</sup>

"Separatism" is considered as "any act intended to violate territorial integrity of a State including by annexation of any part of its territory or to disintegrate a State, committed in a violent manner, as well as planning and preparing, and abetting such act, and subject to criminal prosecution in accordance with the national laws of the Parties."<sup>161</sup> "Extremism" is defined as "an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties."<sup>162</sup>

The *Shanghai Convention* obliges all State Parties to cooperate in the prevention, identification and suppression of these offences, which are considered equally serious to those enshrined in the Convention itself. Indeed, the Convention mandates States to make all of these offences extraditable

<sup>157</sup> *Shanghai Convention 2001, op. cit.*, article 1.1 (official translation of the Ministry of Foreign Affairs of the Russian Federation).

<sup>158</sup> *SCO Convention against Terrorism 2009*, article 2.1.2 (unofficial translation).

<sup>159</sup> *Ibid.*, article 2.1.3.

<sup>160</sup> *Ibid.*, article 2.1.4.

<sup>161</sup> *Shanghai Convention 2001, op. cit.*, article 1.2.

<sup>162</sup> *Ibid.*, article 1.3.

among the State Parties.<sup>163</sup> While the Convention does not provide a specific extradition and criminal assistance procedure, it affirms that State Parties must use domestic and international law procedures in place between themselves to ensure extradition and legal assistance in the prosecution of these offences.<sup>164</sup> With regard to the Russian Federation and the Central Asian republics, this would mean the use of the *Minsk* and *Chisinau Convention*, as well as the *Ashgabat Agreement*. These instruments will be described in the next Chapter.

The strengthening of criminal cooperation for these kinds of very vaguely defined criminal offences is of particular concern because the 2001 Convention, unusually for a treaty in the field of criminal law, provides that these terms — “terrorism”, “separatism” and “extremism” are to be interpreted broadly.<sup>165</sup> This provision raises a serious conflict with the principle of legality, a general principle of law that requires that legal obligations be defined with precision. As regards criminal law, it is important for individuals to know precisely what conduct is proscribed in order to allow them to bring their conduct in conformity with the law. This obligation is reflected in article 15 ICCPR and article 7 ECHR.

Finally, the Convention obliges States to enact legislation so as to avoid justification for these offences “based upon exclusively political, philosophical, ideological, racial, ethnic, religious or any other similar considerations and that they should entail punishment proportionate to their gravity.”<sup>166</sup> This requirement is at odds with the clause, traditional in international treaties, that the Convention must not “affect the rights and obligations of the Parties under other international treaties to which they are Parties.”<sup>167</sup> As outlined in Section 3.2, most international extradition conventions as well as international human rights law provide for exceptions to extraditions and any other kind of transfer with regard to the situations contemplated above. The concerns about this clause are further heightened by the vagueness of the definition of the criminal offences contained therein. Indeed, the provisions are open to abuse in order to suppress the exercise of freedom of expression, association and assembly, protected under international law, including the ECHR and the ICCPR.

The *SCO Convention against Terrorism* of 2009 obliges State parties to establish criminal territorial and personal jurisdiction for the prosecution of the offences of terrorism within its scope.<sup>168</sup> It also allows, permissively, States to establish passive personal jurisdiction, when the State’s property or interests have been attacked.<sup>169</sup> Importantly it requires State Parties to extradite or prosecute all such offences.<sup>170</sup>

The *SCO Convention* mandates State Parties to establish the following as criminal offences in domestic law:

<sup>163</sup> *Ibid.*, article 2.

<sup>164</sup> *Ibid.*, article 2.3.

<sup>165</sup> *Ibid.*, article 1.2

<sup>166</sup> *Ibid.*, article 3.

<sup>167</sup> *Ibid.*, article 17.

<sup>168</sup> *SCO Convention against Terrorism 2009, op. cit.*, article 5. It also includes flag jurisdiction on vessels.

<sup>169</sup> *Ibid.*, article 5.

<sup>170</sup> *Ibid.*, articles 5.3 and 11.

- A terrorist act;
- Terrorist offences proscribed under counter-terrorism treaties to which all SCO State Parties are party;
- The creation or use of a legal entity to pursue a terrorist offence; or of a criminal group, as defined above;
- Public incitement or public justification of terrorism;<sup>171</sup>
- Recruitment to participate in or commit one of the treaty's criminal offences;
- Training, assisting or committing one of the treaty's criminal offences;
- Participation in a terrorist organization;
- Financing of terrorism;
- Provision of weapons, explosives or other means to commit terrorist offences;
- Provision of assistance, such as financing, for the purpose of shielding from prosecution or false testimony persons suspected of having committed one of criminal offences within the scope of the treaty.<sup>172</sup>

All of these offences are extraditable.<sup>173</sup> The principle of double criminality (see Section 3.3.3) applies irrespective of the category of crime within which the act falls under domestic law, or of the title of the offence.<sup>174</sup>

The UN Human Rights Committee has expressed concern at the vagueness of the definitions of criminal offences in the SCO system. With regard to Kazakhstan, it found that "the broad formulation of the concepts of 'extremism', 'inciting social or class hatred' and 'religious hatred or enmity' under the State party's criminal legislation and the use of such legislation on extremism to unduly restrict freedoms of religion, expression, assembly and association."<sup>175</sup> In relation to Uzbekistan, the Committee pointed to "the overly broad definition of terrorism and terrorist activities that is reportedly widely used to charge and prosecute members or suspected members of banned Islamic movements."<sup>176</sup> Likewise, regarding Turkmenistan, it expressed concern at "the excessively broad definition of extremism under the State party's legislation, which leads to arbitrary and disproportionate restrictions of the rights in the Covenant in practice."<sup>177</sup>

### 3.2 Extradition treaties in Europe and the CIS

The *UN Model Treaty on Extradition*, approved by the General Assembly, and the *UN Model Laws on Extradition and on Terrorism*, produced by the UN Office on Drugs and Crime (UNODC), are the current most complete attempt at harmonizing extradition procedures across the globe and have heavily influenced

<sup>171</sup> This is defined as "spreading messages to abet others to commit at least one of the crimes indicated in subparagraph 1 to 3 and 5 to 10 of this Paragraph, or openly advocating of recognition of terrorism needing support and imitation", *Ibid.*, article 9.1.4.

<sup>172</sup> *Ibid.*, article 9.

<sup>173</sup> *Ibid.*, article 11.

<sup>174</sup> *Ibid.*, article 11.5.

<sup>175</sup> *Concluding Observations on Kazakhstan*, CCPR, UN Doc. CCPR/C/KAZ/CO/2, 9 August 2016, para. 13.

<sup>176</sup> *Concluding Observations on Uzbekistan*, CCPR, UN Doc. CCPR/C/UZB/CO/4, 17 August 2015, para. 11.

<sup>177</sup> *Concluding Observations on Turkmenistan*, CCPR, UN Doc. CCPR/C/TKM/CO/2, 20 April 2017, para. 14.

the drafting of international and national law on the issue. The 1957 Council of Europe *European Convention on Extradition* (ECE) currently brings together all the Member States of the Council of Europe, as well as Israel, the Republic of Korea and South Africa and constitutes the common denominator of all Council of Europe Member States with regard to extradition.<sup>178</sup>

The main regional extradition treaty among CIS countries remains the *CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* 1993, as amended by the Protocol to that Convention of 28 March 1997 ("the *Minsk Convention*"). It contains an obligation to extradite persons within a State's territory for offences that are considered as crimes and are punishable by at least one year's imprisonment.<sup>179</sup> It details the requirements for requests for extradition<sup>180</sup> and the extradition procedure, including temporary extradition and transit through a Member States' territory of persons extradited between two other Member States.<sup>181</sup> However, in respect of grounds for refusal of extradition, the *Minsk Convention* provides for no human rights safeguards. In particular, it contains no *non-refoulement* protection from risk of return to torture or ill treatment, imposition of the death penalty or other violations of human rights, or other generally recognized bars to extradition.<sup>182</sup>

The *CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* 2002 ("the *Chisinau Convention*") provides a more extensive list of grounds for a refusal to extradite a person, which includes, among other provisions, a threat to sovereignty or to the security of the requested State party, serious reasons to believe that the request is related to persecution of a person on the basis of race, gender, religion, ethnic background or political convictions, where a person has been granted asylum on the territory of the requested State party, or where there are other reasons enshrined in an international treaty to which the requesting and requested States are parties.<sup>183</sup>

Within the European Union, the European Arrest Warrant (EAW) establishes a legal framework for extradition as between its Member States. Its principal aim is to divest executive authorities of any competences in extradition proceedings and to transfer such competences to the judiciary. It establishes a system of direct communication between national courts for this purpose. The EAW is a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."<sup>184</sup> The EAW is based on mutual confidence or, as characterized in the Framework Decision, a "high level of confidence" among Member States with regard to their criminal justice systems' compliance—substantially and

<sup>178</sup> *European Convention on Extradition* (ECE), article 28. The ECE supersedes all previous bilateral and multilateral treaties among them and allows successive agreements to be only supplementary and not contradictory to its provisions.

<sup>179</sup> *Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, 1993, article 36.

<sup>180</sup> *Ibid.*, article 58.

<sup>181</sup> *Ibid.*, article 70.

<sup>182</sup> *Ibid.*, article 57, containing grounds for extradition.

<sup>183</sup> *Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, 2002, article 89.

<sup>184</sup> *Council Framework Decision No. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (EAW Framework Decision), article 1.1

procedurally — with human rights obligations under national and international law.<sup>185</sup>

Assessments by various authorities as to the operation of the EAW have demonstrated that mutual confidence in the equivalence of guarantees among legal systems is not fully justified. EU institutions have identified various failings in the implementation of the EAW: a lack of proportionality assessments regarding decisions to request extradition, where certain States have requested extradition for minor offences;<sup>186</sup> the absence of harmonized remedies to challenge the EAW on human rights grounds; a lack of regular review of the alerts in the SIS and INTERPOL (see Section 3.4.5); vagueness in the definition of the extraditable crimes; a disproportionate use for minor offences; absence of minimum harmonized standards on pre-trial detention; presence of conditions of detention at odds with human rights law in certain Member States; a lack of legal representation for those subject to arrest in both issuing and executing States; and the non-uniform use of proportionality checks by the issuing States.<sup>187</sup>

Research carried out by civil society has also identified other problems such as differences in prison conditions and the presence in some countries of trial in absentia without effective guarantees of retrial. In particular, a report by JUSTICE stressed that “there remain many concepts in criminal procedure which are not shared between member states and which cause conflict in the blind application of the principle of mutual recognition. From a defence perspective, this causes a lack of trust and generates opposition to surrender on the basis of the criminal procedure in other member states.”<sup>188</sup>

The concept of mutual confidence has been tempered and limited in application by the judiciaries both at the EU and national levels. In 2016, the Grand Chamber of the Court of Justice of the EU rejected the automatic application of the mutual confidence principle and held that its blind application does not comply with the EU Member States’ obligations under the *Charter of Fundamental Rights*. It ruled that “the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and

<sup>185</sup> These presumptions, may be “suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in article 6(1) of the Treaty on European Union, determined by the Council pursuant to article 7(1) of the said Treaty ...” i.e. the mechanism to suspend the voting rights of a Member State, which has never been used, although it was threatened in relation to Austria during the Haider’s election and is currently under examination with regard to the rule of law crisis in Poland. The threshold for suspension of the mechanisms of EU-intra-transfers is therefore extremely high, Recital 10, *EAW Framework Decision*, *op. cit.* See: *Jeremy F. v. Premier Ministre*, CJEU, Case C-168/13 PPU, 30 May 2013, para. 50. See also: *Pál Aranyosi and Robert Căldăraru*, CJEU, Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016, para. 77–78. See: European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), Thursday, 27 February 2014, Strasbourg, A.

<sup>186</sup> See: European Commission, *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, EU Doc. COM/2011/0175 final; Council of the EU, *Issues of proportionality and fundamental rights in the context of the operation of the European Arrest Warrant*, EU Doc. 9968/14, 20 May 2014, p. 2. See: Gisele Vernimmen-Van Tiggelen, Laura Surano and Anne Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, Institut d’Etudes Européennes, Université de Bruxelles, 2009, p. 121.

<sup>187</sup> EP Resolution 2013/2109 (INL), *op. cit.*, F; European Commission, *EAW Implementation report*, *op. cit.*

<sup>188</sup> *European Arrest Warrants, Ensuring an effective defence, a JUSTICE Report*, 2012, p. 35. JUSTICE is the UK Section of the International Commission of Jurists. See also: pp. 8, 23–24 and 36. See also: Gisele Vernimmen-Van Tiggelen, Laura Surano and Anne Weyembergh, *op. cit.*, pp. 132, 145, 422, 434.

properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.”<sup>189</sup>

The German Constitutional Court has held that mutual confidence “does not release the legislature from reacting, in cases in which such confidence in the general conditions of procedure in a Member State has been profoundly shaken.”<sup>190</sup> Indeed “putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights . . . .”<sup>191</sup> The Italian Court of Cassation has ruled that the “enhanced level of trust” among Member States “does not eliminate, but implies the need for a ‘sufficient control’ by the judicial authority of the executing State.”<sup>192</sup>

The shortcomings of the system have also triggered a reaction from the executive and legislative authorities. The European Commission has stressed the importance of giving due consideration to the principle of proportionality before issuing a EAW, even though this element is not explicitly mentioned by the Framework Decision.<sup>193</sup> The Council of the EU in its Handbook on the implementation of the EAW has made similar arguments.<sup>194</sup> It considered that the following aspects should be taken into account: the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the arrested person and the executing State, a cost/benefit analysis, the possibility of the suspect being detained, the effective protection of the public and the interests of the victims of the offence.<sup>195</sup>

Findings of a lack of respect for human rights within the system have led to a series of EU laws aimed at harmonizing the procedural rights of persons subject to a EAW, as well as of suspects and accused persons generally, across EU Member States. These include, *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*,<sup>196</sup> *Directive 2012/13/EU on the right to information in criminal proceedings*,<sup>197</sup> *Directive 2013/48/EU on the right of access to a lawyer*, *Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused in criminal proceedings*<sup>198</sup> and *Directive (EU) 2016/343 on the presumption of innocence and the right to be present at trial*.<sup>199</sup>

<sup>189</sup> Pál Aranyosi and Robert Căldăraru, CJEU, *op. cit.*, para. 94.

<sup>190</sup> German Constitutional Court, *Judgment of 18 July 2005*, 2 BVR 2236/04, B, I, para. 80.

<sup>191</sup> German Constitutional Court, *Judgment of 18 July 2005*, *op. cit.*, para. 120 (official translation).

<sup>192</sup> Court of Cassation, United Sections, 30 January 2007, *Judgment No. 4614* (unofficial translation).

<sup>193</sup> European Commission, *EAW Implementation report*, *op. cit.*

<sup>194</sup> Council of the EU, *Revised version of the European handbook on how to issue a European Arrest Warrant*, EU Doc. 17195/1/10 rev. 1, 17 December 2010.

<sup>195</sup> It is of interest that the same Supreme Court of the UK found, by referring to EAW requests from Poland, that the “scheme of the EAW needs to be reconsidered in order to make express provision for consideration of proportionality.” *Julian Assange v. Swedish Prosecution Authority* [2012] UKSC 22, 30 May 2012, para. 90.

<sup>196</sup> *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*, article 2.7.

<sup>197</sup> *Directive 2012/13/EU on the right to information in criminal proceedings*, articles 1 and 5.

<sup>198</sup> *Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused in criminal proceedings*, articles 2.2, 2.3.

<sup>199</sup> *Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, Recital 9.



### Box 2: The Ablyazov case (France)

Mukthar Ablyazov, a Kazakh national, political figure and banker, is currently sought by Kazakhstan, the Russian Federation and Ukraine on charges of fraud and other financial crime charges. He contests that these charges are unfair and amount to persecution.

A recognized refugee in the UK, Mukthar Ablyazov was arrested in France on 31 July 2014 based on international warrants issued by Ukraine and the Russian Federation. Ukraine's request is currently inactive.

The Lyon Court, the first instance court, ruled that the extradition of Mukthar Ablyazov was lawful provided that the Russian Federation guaranteed that it would not transfer, expel or extradite him to a third country without the authorization of French authorities and that, after having been tried and, if convicted, served his sentence, he would be free to leave the Russian Federation.<sup>200</sup>

The Court of Cassation, in its ruling of 4 March 2015, considered that accomplices in the alleged acts of which Mr Ablyazov was accused received fair trials and reasonable sentences in the Russian Federation and that none of them had been transferred to Kazakhstan. It also held that the Russian Federation was a party to the *European Convention on Human Rights* and respected its articles 5 and 6 (rights to liberty and a fair trial). The Court added that the fact that the Russian Federation had been held responsible by the European Court of Human Rights for human rights violations in individual cases and had been the object of criticism by international governmental and non-governmental organizations "does not mean that it is possible to extend and make systematic [these] fears of shortcomings in the particularly publicized and followed case of [Ablyazov]." <sup>201</sup> The Court further held that it was not possible to rule that his fair trial rights would not be respected in Russia, considering that the Russian authorities had agreed to let French diplomatic authorities visit him during his detention in Russia.<sup>202</sup> The same approach was taken with regard to allegations and reports that conditions in the prisons system of the Russian Federation were in breach of ECHR rights, in particular because the publicity surrounding the case of Mukthar Ablyazov would provide a form of protection, specifically the fact that he would purportedly have the attention of international governmental and non-governmental organizations following the case.

On 9 December 2016, however, the Council of State, the highest administrative court, annulled the extradition order of Prime Minister Manuel Valls to the Russian Federation. The Council of State ruled that the extradition was in breach of article 3.2 of the *European Convention on Extradition* that

<sup>200</sup> See: summary in Cour de Cassation, Chambre Criminelle, 4 March 2015, *Judgment No. 14-87.380*.

<sup>201</sup> *Ibid.*, (unofficial translation).

<sup>202</sup> *Ibid.* (unofficial translation). On 9 September 2016, the Constitutional Council had, in both proceedings for extradition brought by Ukraine and the Russian Federation, ruled that the right to liberty and freedom of movement were respected by the Code of Criminal Procedure provisions related to extradition detention, as they allowed for sufficient guarantees and avenues for challenging the lawfulness of one's detention, and they allowed the judge to order one's release. With regard to the length of extradition detention, the Constitutional Council did not find the lack of a time limit contrary to the Constitution but it held that the judiciary had the role when called upon to assess whether the length was reasonable and, if not, to order one's release.

prohibits extraditions based on prosecution aimed at punishing a person on grounds of race, religion, nationality, or political opinion and was therefore null for abuse of law.

The Council of State found that Mr Ablyazov had refugee status in the UK as a political opponent to the current Kazakh government, that it appeared that Kazakh authorities had tried to press the Russian authorities to request the extradition from France, that they had closely followed the extradition procedure and had coordinated with the Russian authorities.<sup>203</sup>

### 3.3 Scope and general principles of extradition

#### 3.3.1 When is extradition allowed?

It is a general principle in international extradition law that extradition should not be used for the prosecution of trivial or low level criminal offences.<sup>204</sup> The *UN Model Treaty* and the *UN Model Law* on extradition suggest a default punishment threshold of one or two years of imprisonment for an offence to be extraditable, and of six months in case of a sentence to be served, totally or partially.<sup>205</sup> This approach is followed in the *Minsk*<sup>206</sup> and the *Chisinau Conventions*.<sup>207</sup> As a consequence, these rules of applicability are enshrined in the Criminal Procedure Codes (CPCs) of the Russian Federation,<sup>208</sup> Kazakhstan,<sup>209</sup> Kyrgyzstan,<sup>210</sup> and Uzbekistan.<sup>211</sup> No similar thresholds are contained in the CPCs of Tajikistan and Turkmenistan; thresholds established by international agreements to which they are party would therefore apply in these States.

In the *European Convention on Extradition* these requirements are for one year of imprisonment or more, in case of extradition of a criminal suspect, or at least four months, in case of a convicted person, unless a Contracting Party explicitly excludes one or more offences, under risk of reciprocal exclusion by other Contracting Parties of these offences.<sup>212</sup> This approach has been followed with regard to all extraditions in Germany<sup>213</sup> and Spain.<sup>214</sup> In France, the punishment must be a minimum of two years of imprisonment for suspected persons or two months for sentenced convicts. Extradition is always granted for serious criminal offences (“*crimes*”), regardless of the sentencing threshold.<sup>215</sup> In Italy, in the case of suspects, it is necessary that there are serious

<sup>203</sup> See: Council of State, *Decision of 9 December 2016*, M. O.

<sup>204</sup> As explained in para. 16 of the *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* of UNODC, the “threshold should be high enough that extradition is not invoked in *de minimis* cases, yet is available for a wide range of more serious conduct.”

<sup>205</sup> *UN Model Treaty on Extradition*, article 2.1; *UN Model Law on Extradition*, Part 2, Chapter 1, Section 3.

<sup>206</sup> *Minsk Convention*, *op. cit.*, article 56.

<sup>207</sup> *Chisinau Convention*, *op. cit.*, article 66.

<sup>208</sup> Criminal Procedure Code (CPC) of the Russian Federation, article 462.3.

<sup>209</sup> CPC of Kazakhstan, article 579.1.

<sup>210</sup> CPC of the Kyrgyz Republic, articles 433.1, 433.2 and 433.3.

<sup>211</sup> CPC of Uzbekistan, article 599.

<sup>212</sup> ECE, article 2.

<sup>213</sup> *Act on International Cooperation in Criminal Matters of Germany*, *op. cit.*, Sections 3 and 5.

<sup>214</sup> Law No. 4/1985 of Spain, articles 1.2 and 2

<sup>215</sup> CPC of France, article 696-3. French criminal law distinguishes between three degrees of criminal offences, from the most to the least serious: crimes, délits, contraventions. The latter are of a more administrative nature.

grounds to believe that a suspect has committed an offence and, in the case of convicted persons, that the judgment is final.<sup>216</sup> In Germany, courts must, in “special circumstances”, assess whether there are reasonable grounds to believe that the suspect has committed the offence and seek from the requesting State evidence of “probable cause”.<sup>217</sup>

### 3.3.2 The rule of specialty

An important requirement in extradition law is the rule of specialty, according to which a State can only proceed against, sentence, detain, restrict the personal liberty or re-extradite a person to a third State for the offence for which he or she was extradited and that was committed prior to the extradition. Sending States can renounce the application of this rule. Generally, concerned individuals may also expressly renounce the application of the rule of specialty,<sup>218</sup> or they may be deemed to have relinquished its application if they had the possibility to leave the country to which they were extradited within 30 or 45 days and did not do so.<sup>219</sup>

The *European Convention on Extradition* incorporates this rule and adopts the 45 day waiver deadline.<sup>220</sup> The *Minsk* and *Chisinau Conventions* have opted for the 30 day rule.<sup>221</sup> The latter is applied and can be waived only with the State’s consent in Kazakhstan,<sup>222</sup> Kyrgyzstan,<sup>223</sup> Tajikistan<sup>224</sup> and Uzbekistan.<sup>225</sup> The Turkmen CPC does not limit the rule of specialty by any period nor does it specify the possibility of a waiver.<sup>226</sup> The Russian Federation follows the ECE’s approach.<sup>227</sup>

French extradition law permits the rule’s waiver only with the consent of the person, given before a judicial authority, or the consent of the State.<sup>228</sup> In Germany it may be waived by the consent of the State or if the person has not left the State within one month from when he or she had the opportunity or has returned or been sent back to Germany by a third State.<sup>229</sup> Italy applies the ECE’s 45 day rule and waiver by consent of the State.<sup>230</sup> The same applies in Spain.<sup>231</sup>

The approach to the rule of specialty by national jurisdictions does not vary considerably in substance. However, it is striking that neither the Russian Federation nor any Central Asian State, in contrast to several EU Member States, permit waiver of the rule of specialty by the consent of the person to be extradited.

<sup>216</sup> CPC of Italy, article 705.1.

<sup>217</sup> *Act on International Cooperation in Criminal Matters of Germany*, *op. cit.*, article 10.2.

<sup>218</sup> *UN Model Law*, *op. cit.*, Section 27; *UN Model Treaty*, *op. cit.*, article 6.

<sup>219</sup> *UN Model Law*, *op. cit.*, Section 34; *UN Model Treaty*, *op. cit.*, article 14.

<sup>220</sup> ECE, article 14. See also: ECE, article 15.

<sup>221</sup> *Minsk Convention*, article 66; *Chisinau Convention*, article 80.

<sup>222</sup> CPC of Kazakhstan, article 582.

<sup>223</sup> CPC of the Kyrgyz Republic, article 432.3.

<sup>224</sup> CPC of Tajikistan, article 481.

<sup>225</sup> CPC of Uzbekistan, article 600.

<sup>226</sup> CPC of Turkmenistan, article 551.

<sup>227</sup> CPC of the Russian Federation, article 461.

<sup>228</sup> CPC of France, article 696-6, read together with articles 696-28, 696-40 and 696-35.

<sup>229</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 11.

<sup>230</sup> CPC of Italy, articles 699 and 721.

<sup>231</sup> Law 4/1985 of Spain, article 21.

### 3.3.3 The double criminality principle

The double criminality principle requires that the criminal offence on which the extradition request is based be sanctioned in both the requesting and the executing States. What is important is that the conduct itself is criminalized and not the precise legal and formal definition and name of the criminal offence.<sup>232</sup> While the *Minsk Convention* does not enshrine this principle, it is included in the *Chisinau Convention*<sup>233</sup> and the ECE.<sup>234</sup>

The principle is contained in the Constitution and CPC of the Russian Federation<sup>235</sup> and in the CPCs of Kazakhstan,<sup>236</sup> Kyrgyzstan,<sup>237</sup> Tajikistan,<sup>238</sup> Turkmenistan<sup>239</sup> and Uzbekistan.<sup>240</sup> It is similarly applied in the legal practice and jurisprudence of Germany,<sup>241</sup> France,<sup>242</sup> Italy<sup>243</sup> and Spain.<sup>244</sup> Spanish law specifically refers to equivalence of criminalized acts and not criminal offences.

While it is notable that these principles of extradition law are generally reflected in the legislation of all States considered in this report, the Minsk Convention does not contain a principle of double criminality. This creates a risk that national law protections for persons subject to extradition will be undermined with regard to extraditions falling within the framework of this Convention. It is a further indication of the excessive reliance on mutual confidence of legal systems in the CIS framework. As has been shown in the system operating between the EU Member States, without proper human rights-centred harmonization of legal systems there is an increased risk of human rights violations resulting from transfers.

## 3.4 Obstacles to extradition

International law and legal traditions of domestic systems — in this case, of civil law systems — have developed certain grounds and conditions which may pose a bar to extradition. These include grounds which serve as an absolute bar to extradition, as well as grounds which may, on a discretionary basis, militate against this type of transfer. Both mandatory and discretionary obstacles impact on the rights of the concerned individual and, therefore, in those cases, the State's discretion must be limited in accordance with its obligations under international law.

### 3.4.1 The political offence exception

In international extradition law, the generally accepted rule is that a person should not be extradited for "political" offences. Numerous treaties recognize

<sup>232</sup> *UN Model Treaty*, article 2.2, and *UN Model Law*, Part 2, Chapter 1, Section 3, para. 3.

<sup>233</sup> *Chisinau Convention*, article 66.4.

<sup>234</sup> ECE, article 7.

<sup>235</sup> Constitution of the Russian Federation, article 63.2. CPC of the Russian Federation, article 464.1.6.

<sup>236</sup> CPC of Kazakhstan, article 579.1.

<sup>237</sup> CPC of the Kyrgyz Republic, article 434.1.3.

<sup>238</sup> CPC of Tajikistan, article 479.

<sup>239</sup> CPC of Turkmenistan, article 553.1.

<sup>240</sup> CPC of Uzbekistan, article 603.

<sup>241</sup> *Gisele Vernimmen-Van Tiggelen, Laura Surano and Anne Weyembergh, op. cit.*, p. 125. The rule is enshrined in Section 3.1 of the *Act on International Cooperation in Criminal Matters* stating that "Extradition shall not be granted unless the offence is an unlawful act under German law or unless *mutatis mutandis* the offence would also constitute an offence under German law."

<sup>242</sup> CPC of France, article 696-3.

<sup>243</sup> CPC of Italy, article 13.

<sup>244</sup> Law No. 4/1985 of Spain, article 2.

this rule either explicitly<sup>245</sup> or as a consequence of the application of the principle of *non-refoulement*.<sup>246</sup> The rule has been enshrined in the *UN Model Law*, the *UN Model Treaty*<sup>247</sup> and the *European Convention on Extradition*.<sup>248</sup> There is no political offence exception in the *Minsk* and *Chisinau Conventions*, although the *Chisinau Convention* does mention “political convictions” as one of the grounds for refusal to extradite.<sup>249</sup>

There is no universal definition under international law as to what constitutes a political offence.<sup>250</sup> However, the concept of political offence is frequently referenced in international law, particularly in the field of extradition and refugee law, in particular in relation to amnesties and sentencing.<sup>251</sup> The UNODC Manuals state that extradition “for a non-violent ‘pure’ political offence, such as prohibited criminal slander of the Head of State by a political opponent or banned political activity” and other non-violent “purely military or political offences” are commonly accepted as being political offences.<sup>252</sup>

Crimes such as the attempted murder of a Head of State,<sup>253</sup> crimes against humanity, war crimes,<sup>254</sup> genocide<sup>255</sup> and enforced disappearance,<sup>256</sup> even if committed for political reasons, are not deemed to be political offences for the purposes of extradition.

Similarly, a terrorist offence is generally not a political offence, irrespective of political motive, and designation as such does not prevent the suspect from

<sup>245</sup> *The Montevideo Treaty on International Penal Law of 1889* (article 23), the *Treaty on Extradition and Protection Against Anarchism*, adopted at the Second International American Conference in 1902 (article 2), the *Montevideo Convention on Extradition of 1933* (article 3), the *Caracas Convention on Territorial Asylum of 1954* (article 20), the *Montevideo Treaty on International Penal Law of 1939* (article 20), the *European Convention on Extradition of 1957* (article 3), the *Inter-American Convention on Extradition of 1981* (article 4) and the *Arab Charter on Human Rights 2004* (article 28).

<sup>246</sup> *European Convention on the Suppression of Terrorism*, article 5. See also: P. Weis, “Asilo y Terrorismo”, in *La Revista, International Commission of Jurists*, No. 18–19, 1977, p. 94 et seq.

<sup>247</sup> *UN Model Law*, Part 2, Chapter 2, Section 4.1. The application of the exception is however residual and can be disapplied in case of conflict with any other international treaty binding upon the concerned States, see: *UN Model Law*, Part 2, Chapter 2, Section 4.2.

<sup>248</sup> ECE, article 3. It is residual and does not apply in case of other conflicting obligations under international law.

<sup>249</sup> *Chisinau Convention*, article 89.1.e.

<sup>250</sup> In terms of defining what constitutes a political offence, international law relies on domestic legislation, although in some States the concept is not known. Criminal doctrine envisages several types: the political offence *stricto sensu*, the complex political offence and the ordinary offence committed on political grounds. However, the different schools of thought diverge on many points. Thus some of them stress the objective nature of criminal behaviour while others emphasize the political motivation or intention of the perpetrator. See, for example: the study by the International Commission of Jurists, *Aplicación de las declaraciones y convenciones internacionales referentes al asilo en América latina*, Geneva, September 1975, pp. 16–19; Georges Levasseur, *Justice et sûreté de l'Etat*, in *La revue de la Commission internationale de juristes*, winter 1964, vol. V, No. 2, pp. 280 et seq.; and Cherif Bassiouni, *International Terrorism and Political Crimes*, Charles C. Thomas Publisher, Springfield Illinois, uSDA, 1973. See, for a more in depth analysis of the concept of political offence: ICJ, *Legal Commentary to the ICJ Berlin Declaration*, p. 22 and following.

<sup>251</sup> See, for example: *Concluding Observations of the Human Rights Committee on Syrian Arab Republic*, 24 April 2001, CCPR/CO/71/SYR; Committee Against Torture, *Concluding Observations and Recommendations on China*, 26 June 1993, A/48/44, paras. 387–429.

<sup>252</sup> UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, 2002, para. 41.

<sup>253</sup> For example, the *European Convention on Extradition of 1957* (article 3.3) and the *Montevideo Convention on Extradition of 1933* (article 3).

<sup>254</sup> For example, the *Additional Protocol to the European Convention on Extradition* (article 1).

<sup>255</sup> For example, the *Convention on the Prevention and Punishment of the Crime of Genocide* (article VII) and the *Additional Protocol to the European Convention on Extradition* (article 1).

<sup>256</sup> The *Inter-American Convention on the Forced Disappearance of Persons* (article V) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (article 13).

being extradited.<sup>257</sup> The *UN Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* marked the disapplication of the political offence exception for terrorist offences.<sup>258</sup> The UN anti-terrorism conventions, as updated, the Council of Europe's *European Convention on the Suppression of Terrorism* of 1977 and the Council of Europe's *Convention for the Prevention of Terrorism* 2005<sup>259</sup> oblige Member States not to consider the offences therein contained as political offences for the purpose of extradition.<sup>260</sup>

The Constitution of the Russian Federation prohibits the extradition of persons persecuted for holding political opinions.<sup>261</sup> In Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan the law does not explicitly refer to this ground for denying extradition.

Extradition for political offences is prohibited in Germany,<sup>262</sup> Spain,<sup>263</sup> Italy<sup>264</sup> and France.<sup>265</sup> In Germany, political offences are excluded unless "the person sought is being prosecuted for or has been convicted of attempted genocide, genocide, aggravated murder or murder or because of his participation in such an offence."<sup>266</sup> In Spain, the law does not recognize as political offences terrorist acts, crimes against humanity, attempted murder of Heads of State or members of their families, rape, and offences under international law binding on Spain.<sup>267</sup>

It is notable that Central Asian States do not provide for a political offence exception in their CPCs. The Russian Federation, in common with the text of the *European Convention on Extradition* and the practice of other European countries, has inserted the political offence exception in its legislation. However, it is not clear that this concept has been fully applied by legal and administrative practitioners and officers.

<sup>257</sup> For example, the *International Convention Against the Taking of Hostages*, the *European Convention on the Suppression of Terrorism* (article 1), the *Inter-American Convention Against Terrorism* (article 11), the *International Convention for the Suppression of Terrorist Bombings* (article 11), the *International Convention for the Suppression of the Financing of Terrorism* (article 14) and the *International Convention for the Suppression of Acts of Nuclear Terrorism* (article 15). The *UN Model Law* recommends excluding from its application a set of offences: murder or manslaughter; inflicting serious bodily harm; kidnapping, abduction, hostage-taking or extortion; using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and related ancillary offences.

<sup>258</sup> *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, in GA Resolution 51/210, articles 6–7.

<sup>259</sup> *Council of Europe Convention for the Prevention of Terrorism* 2005, article 20. However, States may reserve their right to apply this clause on a case-by-case, hence discretionary, basis. Denmark, the Netherlands and Sweden have availed themselves of this exception. Denmark refuses extradition for the offence of public provocation.

<sup>260</sup> 1963 *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, article 13; 1997 *International Convention for the Suppression of Terrorist Bombings*, articles 5 and 11; 1999 *International Convention for the Suppression of the Financing of Terrorism*, articles 6 and 14; 2005 *Amendments to the Convention on the Physical Protection of Nuclear Material*, new article 11A; 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, new article 11 bis.; 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*, articles 6 and 15. See: *European Convention on the Suppression of Terrorism*, Strasbourg, 27.I.1977, article 1: offences within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; offences within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

<sup>261</sup> Constitution of the Russian Federation, article 63.2.

<sup>262</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 6.1.

<sup>263</sup> Law 4/1985 of Spain, article 4.

<sup>264</sup> CPC of Italy, article 698.1.

<sup>265</sup> CPC of France, article 696-4.

<sup>266</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 6.1.

<sup>267</sup> Law 4/1985 of Spain, article 4.



Military offences are generally excluded from extraditable offences both under international law<sup>268</sup> and the law of the States under consideration here.<sup>269</sup> Notable exceptions to this rule are extraditions under the *Minsk Convention* and under the *European Convention on Extradition*, which limits this exception to offences under military law that would not qualify as ordinary offences.<sup>270</sup>

### 3.4.2 Human rights grounds barring extradition

Human rights obstacles to extradition are contained in international human rights law, and the same *non-refoulement* prohibitions apply to extradition as to other forms of transfer. In States where international human rights law is directly applicable in national courts (see above in Chapter II), including the Russian Federation and Central Asian states, human rights grounds are also applicable in national courts.

#### 3.4.2.1 Discrimination and persecution

##### a) International extradition law

Several international law treaties prohibit extradition in cases where there are substantial grounds for believing that the request for extradition has been made in order to prosecute or punish someone on account of any of the listed discriminatory grounds or because that person's position may be prejudiced on this basis. These grounds, non-exhaustively, include race, religion, nationality, political opinion,<sup>271</sup> ethnic origin,<sup>272</sup> sex<sup>273</sup> or other status.<sup>274</sup> These exceptions exist to ensure coherence between extradition laws and refugee law, and with more recent international human rights law prohibitions on extradition and other transfers. It is worth noting that the *Minsk Convention* does not contain a discrimination exclusion. The *Chisinau Convention*, however, prohibits extradition when there are reasonable grounds to believe that the extradition request has been undertaken for the purpose of persecution of a person on grounds of race, sex, religion, ethnicity or political opinion,<sup>275</sup> or when the person has been granted international protection.<sup>276</sup>

<sup>268</sup> *UN Model Treaty*, article 3.f; *UN Model Law*, Section 10; ECE, article 4; *Chisinau Convention*, article 89.g. Several UN anti-terrorism conventions do not apply when the offences were committed in the context of an armed conflict inasmuch as this is governed by other rules of international law. See: 1963 *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, article 6.2; 1979 *International Convention against the Taking of Hostages*, article 12; 1997 *International Convention for the Suppression of Terrorist Bombings*, article 19; 2005 *Amendments to the Convention on the Physical Protection of Nuclear Material*, new article 2.4; 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, new article 11 ter.; 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, new article 2 bis.2; 2005 *Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf*, new article 2 bis.2; 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*, article 4.

<sup>269</sup> See: *Act on International Cooperation in Criminal Matters of Germany*, Section 7; Law 4/1985 of Spain, article 4; CPC of France, article 696-4; Criminal Code of Italy, article 13.

<sup>270</sup> ECE, article 4.

<sup>271</sup> These are the grounds of ECE, article 3, and 1977 *Convention on the Suppression of Terrorism*, article 5.

<sup>272</sup> Grounds covered by 2005 *Convention for the Prevention of Terrorism*, article 21.

<sup>273</sup> 1963 *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, article 14; 1979 *International Convention against the Taking of Hostages*, article 9; 1997 *International Convention for the Suppression of Terrorist Bombings*, article 12; 1999 *International Convention for the Suppression of the Financing of Terrorism*, article 15; 2005 *Amendments to the Convention on the Physical Protection of Nuclear Material*, new article 11B; 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*, article 16.

<sup>274</sup> *UN Model Treaty*, article 3b, and *UN Model Law*, Section 5, enshrine all the previously mentioned grounds.

<sup>275</sup> *Chisinau Convention*, article 89.1.e.

<sup>276</sup> *Ibid.*, article 89.1.f.

### *b) National laws and practices*

In the Russian Federation, the grounds for excluding extradition reflect the grounds for recognizing refugee status under the *Geneva Refugee Convention*, i.e. race, nationality, religion, political opinion, or membership of a particular social group, and the prohibition applies only if international protection has been granted.<sup>277</sup> Kazakhstan, Kyrgyzstan, Uzbekistan add ethnicity to this list<sup>278</sup> and refuse extradition if the person has been granted asylum.<sup>279</sup> No such provision exists in Turkmen legislation.

The ECE provision is reproduced in Spanish law.<sup>280</sup> German law adds to these grounds membership of a particular social group,<sup>281</sup> while Italian law adds language, sex and personal or social conditions.<sup>282</sup> However, regard should be had also to grounds for which refugee status is granted (Chapter V).

#### *3.4.2.2 Death penalty*

International treaties on extradition generally prohibit extradition for capital offences if there is a risk that the death penalty may be applied, the executing country does not apply the death penalty for the requested offence and effective assurances that the death penalty will not be applied or carried out are not provided for by the requesting State.<sup>283</sup> The *Chisinau Convention* prohibits extradition in death penalty cases if the death penalty is not applied in the State executing the extradition.<sup>284</sup> The *Minsk Convention* is silent on this issue. As outlined in the introduction, international human rights law prohibits the extradition, as well as any other transfer, of a person from a country that has abolished or suspended the death penalty to a country where the person would risk being subjected to it.<sup>285</sup> In any situation, it prohibits the transfer of a person if, while awaiting imposition of the death penalty, he or she would also be subject to the so-called “death row phenomenon” (see Chapter II).<sup>286</sup>

In three of the Central Asian States—Kyrgyzstan, Turkmenistan and Uzbekistan—the death penalty is prohibited by law. In Tajikistan, the death penalty has not been used since 2004, when a law introducing a moratorium was adopted.<sup>287</sup> In Kazakhstan, an indefinite moratorium on executions was issued by presidential decree in 2003.<sup>288</sup> The Russian Federation signed

<sup>277</sup> CPC of the Russian Federation, article 464.1.2.

<sup>278</sup> See: CPC of Kazakhstan, article 590.1.7; CPC of the Kyrgyz Republic, article 434.1; CPC of Uzbekistan, article 603.

<sup>279</sup> CPC of Kazakhstan, article 590.5.

<sup>280</sup> Law 4/1985 of Spain, article 5.1, according to which extradition cannot be granted if there are reasonable grounds to believe that it was requested, motivated for a ordinary offence, with the purpose to prosecute or punish someone for reasons of race, religion, nationality, or political opinion, or that the situation of the person risks being aggravated for these reasons.

<sup>281</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 6.2.

<sup>282</sup> CPC of Italy, article 698.1.

<sup>283</sup> ECE, article 11; *2005 Convention for the Prevention of Terrorism*, article 21. The *UN Model Treaty* and *Model Law* provide, as an optional ground for excluding extradition, the risk of the death penalty being applied.

<sup>284</sup> *Chisinau Convention*, article 81.

<sup>285</sup> *Al-Saadoon v. UK*, ECtHR, *op. cit.*

<sup>286</sup> *Soering v. UK*, ECtHR, *op. cit.*

<sup>287</sup> See: Law of 15 July 2014 “On Suspension of the Use of Death Penalty”.

<sup>288</sup> See: Kazakhstan profile at Hands Off Cain website: <http://www.handsoffcain.info/bancadati/asia-middle-east-australia-and-oceania/kazakhstan-30000016>.

Protocol 6 to the ECHR on the abolition of the death penalty in times of peace but never ratified it. In 1999, the Constitutional Court decided that the death penalty could not be applied until the introduction of jury trial across the whole of the Russian Federation; trial by jury was not then applicable in Chechnya.<sup>289</sup> In 2009, the Constitutional Court held that “an irreversible process is under way to abolish the death penalty”<sup>290</sup> thereby in practice proclaiming an indefinite moratorium.

The international law *acquis* on the death penalty is reflected in German law,<sup>291</sup> Italian law<sup>292</sup> and Spanish law,<sup>293</sup> and is implicit in French law through the prohibition on extradition for punishments contrary to French public order, given that the death penalty is outlawed in the country.<sup>294</sup>

### 3.4.2.3 Other human rights obstacles

#### a) International extradition law

Some international extradition treaties expressly incorporate some exceptions to extradition based on international human rights law, in particular prohibitions on the transfer of anyone where there are substantial grounds to believe that he or she would be subject to torture or cruel, inhuman or degrading treatment or punishment,<sup>295</sup> would not be provided with the minimum guarantees of the right to a fair trial in criminal proceedings,<sup>296</sup> or would be subject to life imprisonment without parole, if the executing State does not permit this and has not received guarantees that the person will not be subject to such a sentence.<sup>297</sup> The *UN Model Treaty* incorporates an exception based on generic humanitarian reasons.<sup>298</sup>

The *Chisinau Convention* prohibits extradition for any grounds enshrined in international treaties binding upon both the requesting and executing States.<sup>299</sup> This provision is not incorporated in the *Minsk Convention*. It is of concern that the *SCO Convention against Terrorism* of 2009 expressly states that State Parties must operate to prevent the recognition of refugee status for the offences covered by the Convention.<sup>300</sup>

<sup>289</sup> Resolution of the Constitutional Court of the Russian Federation of 2 February 1999, No. 3-P of 1 January 2010.

<sup>290</sup> Resolution of the Constitutional Court of the Russian Federation of 19 November 2009, No. 1344-O-R, St. Petersburg “On the clarification of paragraph 5 of the operative part of Resolution No. 3-P of the Constitutional Court of the Russian Federation of 2 February 1999 on the verification of the constitutionality of the provisions of article 41 and part three of article 42 of the Criminal Procedure Code of the RSFSR, paragraphs 1 and 2 of the Resolution of the Supreme Council of the Russian Federation of 16 July 1993 ‘On the Procedure for Enacting the Law of the Russian Federation ‘On Amendments and Additions to the Law of the RSFSR ‘Satisfaction of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR and the Code of the RSFSR on Administrative Offenses’”.

<sup>291</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 8.

<sup>292</sup> CPC of Italy, article 698.2.

<sup>293</sup> Law 4/1985 of Spain, article 4.

<sup>294</sup> CPC of France, article 696-4.

<sup>295</sup> *UN Model Law*, Section 6; *UN Model Treaty*, article 3; *2003 Amending Protocol to the 1977 Convention on Suppression of Terrorism*, article 5; *2005 Convention for the Prevention of Terrorism*, article 21.

<sup>296</sup> *UN Model Treaty*, article 3.f; *UN Model Law*, Section 7.1.

<sup>297</sup> *2003 Amending Protocol to the 1977 Convention on Suppression of Terrorism*, article 4.2; *2005 Convention for the Prevention of Terrorism*, article 21.

<sup>298</sup> *UN Model Treaty*, article 4.

<sup>299</sup> *Chisinau Convention*, article 89.1.l.

<sup>300</sup> *SCO Convention against Terrorism of 2009*, article 23.

### *b) National law of CIS States*

Russian law provides that a person's extradition must be blocked by a court if it is not in accordance with Russian legislation and international treaties to which the Russian Federation is party.<sup>301</sup> Comparable grounds exist in the CPCs of Kazakhstan<sup>302</sup> and Kyrgyzstan.<sup>303</sup> However, equivalent restrictions are absent from Tajikistan, Turkmenistan and Uzbekistan legislation.

In applying this prohibition, the Plenum of the Russian Supreme Court ruled that extradition should be refused if there were serious reasons to believe that the person being transferred might be subjected to torture or inhuman or degrading treatment in the requesting country, or if exceptional circumstances disclosed that it might entail a danger to the person's life and health on account of, among other things, his or her age or physical condition. The Court indicated that authorities dealing with an extradition case must examine whether there are reasons to believe that the person concerned might be sentenced to the death penalty, subjected to ill-treatment or persecuted because of his or her race, religious beliefs, nationality, ethnic or social origin or political opinions. Furthermore, they should assess both the general situation in the requesting country and the personal circumstances of the person whose extradition is being sought. They should take into account the testimony of the person concerned and that of any witnesses, any assurances given by the requesting country, and information about the country provided by the Ministry of Foreign Affairs, competent United Nations institutions and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>304</sup>

In Kazakhstan, extradition is forbidden when the subject of the extradition is at risk of torture,<sup>305</sup> violence or other cruel or degrading treatment or punishment or faces the imposition of the death penalty.<sup>306</sup> The Tajik CPC bans the extradition of a person when there is a risk of torture.<sup>307</sup> There are no specific provisions concerning the risk of torture or other human rights violations in the legislation of Kyrgyzstan, Turkmenistan or Uzbekistan. However, Kyrgyz<sup>308</sup> and Uzbek<sup>309</sup> legislation prohibit the extradition of persons who have been granted asylum and face persecution. Tajik legislation goes further by also incorporating asylum seekers in this category.<sup>310</sup> Turkmen law is silent on this matter.

### *c) National law of EU States*

The prohibition of extradition when there is a risk of torture or cruel, inhuman or degrading treatment or punishment is expressly provided for in Spanish<sup>311</sup> and Italian law.<sup>312</sup>

<sup>301</sup> CPC of the Russian Federation, article 464.1.5.

<sup>302</sup> See: CPC of Kazakhstan, article 590.1.11.

<sup>303</sup> CPC of the Kyrgyz Republic, article 434.1.

<sup>304</sup> Russian Supreme Court's Decision (Постановление Верховного Суда) No. 11 of 14 June 2012, Plenum.

<sup>305</sup> CPC of Kazakhstan, article 590.1.

<sup>306</sup> See: Criminal Code of Kazakhstan, article 9.3.

<sup>307</sup> CPC of Tajikistan, article 479.

<sup>308</sup> CPC of the Kyrgyz Republic, article 434.1.

<sup>309</sup> CPC of Uzbekistan, article 603.

<sup>310</sup> Law of the Republic of Tajikistan "On Refugees", article 14.1.

<sup>311</sup> Law 4/1985 of Spain, article 4. More specifically, when there are no guarantees that the person will not be subjected to punishment that constitutes a threat to his or her physical integrity or inhuman or degrading treatment.

<sup>312</sup> CPC of Italy, article 698.1.

In Spain the law also excludes extradition for offences committed in the exercise of one's freedom of expression or when the person is to be tried by a special court or was granted asylum in Spain.<sup>313</sup> Furthermore, a child (under 18 years of age) habitually resident in Spain cannot be extradited, if it would undermine his or her social integration.<sup>314</sup> In Italy, extradition is prohibited if the person risks being subjected to acts that amount to human rights violations (*diritti fondamentali della persona*).<sup>315</sup> In no case may the extradition be authorized if the trial has not or will not respect the person's fundamental rights, if the sentence imposed on the person to be extradited contains decisions contrary to the fundamental principles of the Italian legal system.<sup>316</sup> In France, extradition or other forms of criminal cooperation are prohibited if they run contrary to public order or the essential interests of the nation.<sup>317</sup> Likewise, a prohibition exists if the punishment is contrary to French public order or if the person is to be tried in the requesting State by a tribunal that does not provide fundamental procedural guarantees or protection of rights of defence.<sup>318</sup>

### **3.4.3 Conflicting jurisdiction and procedural rules**

#### *3.4.3.1 Extradition of nationals*

The prohibition on the extradition of a State's nationals originated in the extradition procedures of civil law countries, as an expression of sovereignty and of the link between the citizen and his or her own legal system. The rule also exists in international extradition law, albeit as a permissible rather than mandatory ground of refusal.<sup>319</sup> In order to avoid impunity, if the State refuses extradition on this ground, it generally remains bound by an obligation to prosecute its national for the contested criminal acts at the request of the other Contracting Party.<sup>320</sup> The prohibition is enshrined in both the *Minsk* and *Chisinau Conventions*.<sup>321</sup> All civil law States examined in this report apply this exception.<sup>322</sup> The German Constitutional Court has explained that it is linked to the right to liberty<sup>323</sup> and its purpose is "to ensure that citizens are not removed against their will from the legal system with which they are familiar".<sup>324</sup>

#### *3.4.3.2 Trial in absentia and respect for the right to a fair trial*

International standards prohibit the extradition of a person if the original trial in the requesting State was held *in absentia*, without sufficient guarantees to

<sup>313</sup> Law 4/1985 of Spain, article 4.

<sup>314</sup> *Ibid.*, article 5.2.

<sup>315</sup> CPC of Italy, article 698.1.

<sup>316</sup> CPC of Italy, article 705.2.

<sup>317</sup> CPC of France, article 694-4. See also: article 694-4-1.

<sup>318</sup> *Ibid.*

<sup>319</sup> ECE, article 6. Both the *UN Model Treaty* and the *UN Model Law* provide as optional grounds, being a national of the requested State with the corollary obligation to prosecute him or her.

<sup>320</sup> ECE, article 6.

<sup>321</sup> *Minsk Convention*, article 57.1a; *Chisinau Convention*, article 89.1.a.

<sup>322</sup> Constitution of the Russian Federation, article 61; Citizenship Act Russia, Section 4.4; CPC of the Russian Federation, article 464.1.1; Constitution of Kazakhstan, article 111; Criminal Code of Kazakhstan, article 9.1; CPC of the Kyrgyz Republic, article 434.1; CPC of Tajikistan, article 479; CPC of Turkmenistan, article 553.1; CPC of Uzbekistan, article 603; CPC of France, articles 696-2 and 4; Criminal Code of Italy, article 13; Law 4/1985 of Spain, article 3; Basic Law of Germany, article 16.2; and *Act on International Cooperation in Criminal Matters of Germany*, Section 2.3.

<sup>323</sup> German Constitutional Court, *Judgment of 18 July 2005*, No. 2 BVR 2236/04, B, I, para. 67 (official translation).

<sup>324</sup> *Ibid.*, para. 67 (official translation). See also: para 68 linking it to the "citizens' special association to the legal system that is established by them". It is a right that "ranks highly", see: para. 69.

enable the person's presence and with no possibility of retrial upon return.<sup>325</sup> Neither trial *in absentia* nor lack of fairness of trial proceedings are mentioned as grounds to prevent an extradition from the Russian Federation, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan or Uzbekistan.

The exception for trials in absentia is contained in Spanish law.<sup>326</sup> Germany incorporates a similar principle in its rule of specialty based on the fact that prosecution *in absentia* is not allowed in Germany.<sup>327</sup> No explicit *in absentia* prohibition is found in French or Italian legislation, although both countries prohibit extraditions where fair trial rights would be violated in the country of destination.<sup>328</sup> Italy allows for trials *in absentia* in its criminal law but with the right to a re-trial upon the return of the convicted person.

### 3.4.3.3 CIS-specific obstacles to extradition

The *Minsk* and *Chisinau Conventions* prohibit extradition if the criminal offence is initiated only via a private prosecution.<sup>329</sup> This restriction has no precedent in other instruments of international law. It is enshrined in Russian,<sup>330</sup> Kazakh<sup>331</sup> and Kyrgyz law.<sup>332</sup> It is omitted from the laws of Tajikistan, Turkmenistan and Uzbekistan.

The *Chisinau Convention* prohibits extradition where it is likely to prejudice the sovereignty or the security of the country.<sup>333</sup> This requirement is also enshrined in the *SCO Convention against Terrorism* of 2009.<sup>334</sup> Kazakhstan,<sup>335</sup> Kyrgyzstan,<sup>336</sup> Turkmenistan<sup>337</sup> and Uzbekistan<sup>338</sup> may also refuse extradition of a person if a crime for which extradition is requested was directed against their own interests. Tajik law does not contain such a provision.

Finally, the prohibition of extradition in cases of double jeopardy and when statutes of limitation have expired, are generally accepted in all countries examined under this report.<sup>339</sup>

### 3.4.4 Conclusion

Traditional prohibitions on extradition exist for all EU and CIS countries considered in this report, with the exception of prohibitions relating to political

<sup>325</sup> *UN Model Treaty*, article 3; *UN Model Law*, Section 8; Second Protocol to the ECE.

<sup>326</sup> Law 4/1985 of Spain, article 2.

<sup>327</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 11.

<sup>328</sup> CPC of France, article 696-4(7); CPC of Italy, article 705.2a.

<sup>329</sup> *Minsk Convention*, articles 57.1.d, and *Chisinau Convention*, article 89.1.d.

<sup>330</sup> CPC of the Russian Federation, article 464.2.4. Private prosecution is stipulated in articles 20.2 and 127 of the CPC and covers offenses under articles 115.1, 116.1 and 128.1.1 of the Russian Criminal Code.

<sup>331</sup> CPC of Kazakhstan, article 32, provides for three types of cases: public prosecution, public-private prosecution and private prosecution cases.

<sup>332</sup> CPC of the Kyrgyz Republic, article 434.1.

<sup>333</sup> *Chisinau Convention*, article 89.1.e.

<sup>334</sup> *SCO Convention 2009*, article 17.2.

<sup>335</sup> CPC of Kazakhstan, article 590.2. The "national interests" of Kazakhstan are listed in article 5 of the law "On National Security of Kazakhstan", dated 9 January 2012, No. 527-IV.

<sup>336</sup> CPC of the Kyrgyz Republic, article 434.1.

<sup>337</sup> CPC of Turkmenistan, article 553.1.

<sup>338</sup> CPC of Uzbekistan, article 603.

<sup>339</sup> First Protocol of ECE and article 10 ECE; *UN Model Treaty*, article 3.f; *UN Model Law*, Sections 8 and 9; *Minsk Convention*, articles 57.1.b–c; *Chisinau Convention*, articles 89.1.b–c; CPC of the Russian Federation, article 434.1.3–4; CPC of Kazakhstan, article 590.5–6; CPC of the Kyrgyz Republic, article 434.1; CPC of Tajikistan, article 479; CPC of Turkmenistan, article 553.1; CPC of Uzbekistan, article 603; Law 4/1985 of Spain, article 4; CPC of France, article 696-4.

offences. As set out above, CIS States do not include the political offence exception in their codes, apart from the Russian Federation, which is party to the *European Convention on Extradition*. This shortcoming can in part be offset by the possibility of requesting asylum on grounds of political persecution. However, such a claim requires a positive step by the person concerned and knowledge of the legal system, while the political offence exception would apply immediately to the extradition proceeding.

It is also notable that, in practice, a prohibition on transfers to countries that apply the death penalty exists in all countries examined. However, some of the CIS countries enshrine this prohibition through jurisprudence and a moratorium on their own use of the death penalty. A specific prohibition on such transfers should be incorporated in the laws and Constitutions of these countries to ensure that this restriction not dependant on the political climate.

Exceptions to extradition based on grounds under international law, in particular international human rights law, are not uniformly included in the legislation of all the examined countries. This is sometimes compensated for by the fact that national courts or other authorities may apply international law barriers to extradition directly (see Introduction). In the Russian Federation, Kazakhstan and Kyrgyzstan this is required by the CPCs. Nonetheless, a lack of clarity or of express and detailed prohibitions enshrined in criminal procedure law and/or extradition law make it more difficult for national courts, in particular in civil law countries, to apply these exceptions in line with the State's obligations under international law. Often, international jurisprudence in this domain risks being ignored based on the unfortunate supposition that it is not self-executing or directly applicable. The ICJ considers that restrictions predicated on international law must be clearly provided for in the countries' CPCs.

### **Box 3: The EU–US Extradition Treaty**

The *Agreement on extradition between the European Union and the United States of America* constitutes the minimum standard for all extradition treaties between EU Member States and the US. The EU must make sure that the many standards of this agreement are applied in the bilateral treaties.<sup>340</sup>

Article 4 of the agreement introduces the rule that all offences punishable with at least one year of imprisonment are extraditable. It further imposes an understanding of the principle of double criminality based on substance rather than formal definition of a criminal offence. Article 5 opts for transmission of information via diplomatic channels. These provisions are mandatory for all EU Member States. In the absence of different agreements, requests for provisional arrests may be made via diplomatic channels and/or INTERPOL.<sup>341</sup>

Interestingly, article 10 of the agreement, which must be applied by all EU Member States, equates a US international warrant with a European Arrest Warrant in terms of the priority of execution.<sup>342</sup>

In the absence of a different agreement, "Member States may authorise transportation through its territory of a person surrendered to the United

<sup>340</sup> EU–US Extradition Treaty, article 3.1.

<sup>341</sup> *Ibid.*, article 6.

<sup>342</sup> *Ibid.*, article 10.2.



States of America by a third State, or by the United States of America to a third State.”<sup>343</sup>

The provision prohibiting extradition in cases in which the death penalty applies, unless guarantees against its order or use are provided, is not a mandatory requirement for all EU Member States, even if this treaty supersedes existing agreements.<sup>344</sup>

### 3.5 Procedures to request extradition

Extradition is initiated in order to pursue criminal investigations or prosecution when a suspect is abroad. As described above, extradition arrangements have been established between States to ensure that borders do not give rise to impunity for serious criminal conduct. To that end, procedures have been established to enable an investigative authority, such as the police, the public prosecutor or another authority, depending on the legal system, to request assistance from the authorities of another State, directly or through diplomatic channels.

The procedure and its human rights implications as regards the requesting State are relatively straightforward as compared with the complexities that may arise when a sending State decides whether to execute an extradition request. This is particularly so because in the latter case, the impact of the suspect’s human rights is particularly wide, ranging from possible breaches of fair trial rights to unlawful deprivation of liberty. However, the requesting State may in certain circumstances be complicit in human rights violations that take place while the suspect is still in the sending State.<sup>345</sup> For example, this would arise if the requesting State triggers the extradition process arbitrarily — when no evidence exists pointing to the person’s alleged criminal liability — thereby subjecting him or her to the extradition procedure and detention abroad without cause.

The greatest challenges States have encountered in extradition proceedings have been the speed of communications and the effective execution of extradition decisions. For these reasons, they have created organizations, communication systems or databases to facilitate these processes. However, their impact on the human rights of suspects have long been ignored and are only recently beginning to be considered.

#### 3.5.1 Domestic procedures to request extradition

The extradition procedures of the Russian Federation and Central Asia States are similar, reflecting the similarity of their overall legal systems. Requests for extradition are prepared by a prosecutor in charge of a particular case and made through a General Prosecutor’s Office.<sup>346</sup> Once a prosecutorial or judicial authority considers that there are reasonable grounds to believe that the suspect is present in a foreign State, the authorities may address an extradition request to that State’s authorities, provided that an international (multilateral or bilateral) agreement exists between them or compatible national laws of

<sup>343</sup> *Ibid.*, article 12.

<sup>344</sup> *Ibid.*, article 13 read together with article 3.

<sup>345</sup> See: *ILC Articles on State Responsibility*, article 16.

<sup>346</sup> While judicial authorisation is not required for the extradition request, it is always possible for the person being extradited to appeal against it to a court.

both States permit extradition without a specific extradition treaty in place. In such cases, the authorities of the requesting State issue what is generally known as an “international arrest warrant”.<sup>347</sup> Additional information may be included, if required by applicable international treaties.<sup>348</sup>

In France, extradition requests with an arrest warrant originate from the investigative judge but are channelled through the Ministry of Justice.<sup>349</sup> In Italy, it is the Minister of Justice that requests extradition at the instigation of the general prosecutor upon approval by a court of appeal. However, the Minister may also request extradition *proprio motu*.<sup>350</sup> In Spain, prosecutors ask the competent courts to request that the Minister of Justice issue the extradition request.<sup>351</sup>

The main apparent difference between the procedures to request extradition in the Russian Federation and Central Asia States on the one hand, and in the EU Member States examined on the other, is the decisive role played by the judiciary in the procedures in EU Member States. This role appears to be absent in the CIS countries examined, where the system relies on the actions of public prosecutors. In the EU States examined, while the Ministries of Justice formally transmit extradition requests, they must always be authorized by a court.

### **3.5.2 The place and role of INTERPOL regarding requests for extraditions**

The International Police Organization (INTERPOL) Criminal Information System is the global system used to request a search for a wanted person. It is used on a regular basis by the Russian Federation and Central Asian States,<sup>352</sup> as well as by EU Member States.

#### **3.5.2.1 The organization**

INTERPOL is an intergovernmental organization composed of 190 Member States. Within it, the States’ delegates, usually selected from among national police forces,<sup>353</sup> gather annually in a General Assembly that determines the policy, resources, working methods, finances, activities and programmes of the organization.<sup>354</sup> An Executive Committee supervises the work of the organization, which is carried out by a General Secretariat.

One important activity of INTERPOL is the issuance of “notices” and “diffusions”. “Notices” are requests “for international cooperation or any international alert . . . sent to all the Organization’s Members”.<sup>355</sup> “Diffusions” are similar to Notices but are requests sent directly to States through “one or several

<sup>347</sup> CPC of Kazakhstan, article 580.1; CPC of the Russian Federation, article 460; CPC of the Kyrgyz Republic, article 431; CPC of Tajikistan, article 478.1; CPC of Turkmenistan, article 550; CPC of Uzbekistan, article 599.

<sup>348</sup> See, for example: CPC of the Kyrgyz Republic, article 431.5.

<sup>349</sup> CPC of France, articles 694 and 131.

<sup>350</sup> CPC of Italy, article 720.

<sup>351</sup> CPC of Spain (Ley de Enjuiciamiento Penal), article 824.

<sup>352</sup> See the work and cases of Fair Trials International on this at <https://www.fairtrials.org/campaigns/interpol-campaign/>. Resolution AGN/65/RES/12 called on INTERPOL Members “to do their utmost to ensure [...] that international instruments on extradition are applied effectively and that INTERPOL channels are used as often as possible for the transmission of requests for provisional arrests and any other documents relating to extradition requests.”

<sup>353</sup> INTERPOL Constitution, articles 4 and 7.

<sup>354</sup> *Ibid.*, article 8.

<sup>355</sup> Resolution III/IRPD/GA/2011 (2014), article 1.13.

National Central Bureaus or to one or several international entities, and simultaneously recorded in a police database of the Organization".<sup>356</sup> "Red Notices" are particular kinds of Notices published at the request of a National Central Bureau (NCB). NCBs are domestic bodies, designated by and under the authority of the State, which are empowered to investigate and prosecute criminal offences, and are usually composed of prosecutors or police officers. Red Notices are issued to seek the location and arrest of a suspect.<sup>357</sup> They cannot be issued for non-serious offences.<sup>358</sup> The offence for which the person is sought must be subject at least two years imprisonment, as maximum punishment, or six months if the request is made in order to secure the serving of a sentence.<sup>359</sup> Diffusions can be issued on the same basis as Notices and are subject to the same procedure<sup>360</sup> and restrictions.<sup>361</sup>

Within INTERPOL, the entity primarily responsible for the filtering of information, providing regular review and, therefore, for the application of safeguards, including "obligations under international law",<sup>362</sup> are the NCBs.<sup>363</sup> The INTERPOL General Secretariat retains a screening role, with the duty to provide a preliminary review and supervision of Red Notices.<sup>364</sup> The Secretariat publishes Notices and Diffusions that are in compliance with INTERPOL's rules.<sup>365</sup> In case of recurring breaches, the Secretariat may request a NCB to apply corrective measures or terminate its access to INTERPOL databases.<sup>366</sup> It has the power to terminate "any non-compliant processing of data"<sup>367</sup> and can delete data of its own initiative if it considers it in breach of the Organization's principles.<sup>368</sup>

### 3.5.2.2 Restrictions and safeguards

According to INTERPOL's Constitution, Member States must "do all within their power, in so far as is compatible with their own obligations, to carry out" the organization's decisions.<sup>369</sup> This means that their action is constrained by both their internal laws, including their Constitutions, and by other bodies of international law. INTERPOL must operate "in the spirit of the Universal Declaration of Human Rights".<sup>370</sup> This should encompass the duty of INTERPOL to assess potential breaches of the principle of *non-refoulement* under article 3 of the CAT and international human rights law jurisprudence under other treaties. However, there does not appear to be publicly accessible information on whether such assessments take place. Another limitation on INTERPOL's actions is

<sup>356</sup> *Ibid.*, article 1.14.

<sup>357</sup> *Ibid.*, article 82.

<sup>358</sup> *Ibid.*, article 83.1.a.1: "controversial issues relating to behavioural or cultural norms; offences relating to family/private matters [or] originating from a violation of laws or regulation of an administrative nature or deriving from private disputes, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime."

<sup>359</sup> *Ibid.*, article 83.1a-b.

<sup>360</sup> *Ibid.*, article 97

<sup>361</sup> *Ibid.*, article 99.2.d

<sup>362</sup> *Ibid.*, article 34.3.e

<sup>363</sup> *Ibid.*, article 9.4, article 10.3, article 11.2, article 21.2.b, article 17.2-4, article 34.1-2

<sup>364</sup> *Ibid.*, article 86, article 22.5

<sup>365</sup> *Ibid.*, article 74. "Data is kept for an initial period of maximum five years, renewable for a further five years if the reasons for the retention are provided by the NCB" (articles 49-50).

<sup>366</sup> *Ibid.*, articles 123.4, 131

<sup>367</sup> *Ibid.*, article 17-5-6

<sup>368</sup> *Ibid.*, articles 24.1.b, 51, 81.

<sup>369</sup> INTERPOL Constitution, articles 9 and 31.

<sup>370</sup> *Ibid.*, article 2.

that it is not permitted “to undertake any intervention or activities of a political, military, religious or racial character,” under article 3 of its Constitution (the principle of “neutrality”).<sup>371</sup>

Article 3 covers “offences of a predominantly political, racial or religious character . . . even if—in the requesting country—the facts amount to an offence against the ordinary law”.<sup>372</sup> The General Assembly of INTERPOL has identified the following offences as falling under article 3: “membership of a prohibited organization, the expression of certain prohibited opinions, offences involving the press, insulting the authorities, offences against the internal or external security of the State, desertion from the armed forces, treason, espionage, practising a prohibited religion, recruitment or propaganda for particular religions, membership of a racial association.”<sup>373</sup> The General Assembly has also pointed to “acts committed by politicians in connection with their political activities, even if those concerned are prosecuted after their fall from power and, in some cases, after they have fled abroad. The situation is different in the case of an offence committed by a politician acting as a private individual.”<sup>374</sup>

Since 2014, INTERPOL has had a policy regarding refugees, which has been partially disclosed to the public. According to information publicly available, any Red Notice against a refugee will be assessed by the General Secretariat and the Commission for the Control of Files (CCF) on a case-by-case basis. The Red Notice will not be processed if the status of the refugee or asylum seeker is confirmed, the Notice has been requested by the persecuting State and the granting of refugee status is not based on “political grounds” against the requesting State. If refugee status is revoked, the processing of the Red Notice can continue.<sup>375</sup> The same limitations on its actions—human rights, neutrality and national order—are identified in INTERPOL’s Rules on the Processing of Data.<sup>376</sup>

Despite these restrictions at the national level, in several countries, Red Notices appear to be perceived as mandatory orders of arrest that cannot be challenged.<sup>377</sup> An INTERPOL commissioned research paper in 2011 found that the “system [put] in place by INTERPOL to guarantee observance of these rules is in fact based on a distribution of responsibilities in the form of a multi-level

<sup>371</sup> *Ibid.*, article 3.

<sup>372</sup> Resolution No. AGN/53/RES/7, 2. If some countries do not execute the extradition request based on article 3, INTERPOL Constitution, “this is reported to the other NCBs in an addendum to the original notice indicating that the offender has been released”, (para. 9) but it does not invalidate the request *per se*.

<sup>373</sup> *Ibid.*, II.1.

<sup>374</sup> *Ibid.*, II.2. However, “When offences are committed by persons with definite political motives but when the offences committed have no direct connection with the political life of the offenders’ country or the cause for which they are fighting, the crime may no longer be deemed to come within the scope of article 3” (III.3–4). It found that “a valid criterion [to assess whether article 3 of the Constitution is applicable] is whether or not there is anything to connect the victims directly or indirectly with the aims or objectives pursued by the offenders, and with the countries in the conflict area or with the relevant political situation.” Resolution No. AGN/53/RES/7, II.5.

<sup>375</sup> Summary provided by Fair Trials International, <https://www.fairtrials.org/wp-content/uploads/INTERPOL-TEXT-ON-REFUGEE-POLICY.pdf>.

<sup>376</sup> Resolution III/IRPD/GA/2011 (2014), articles 2, 5.2, 5.3, 11.1.

<sup>377</sup> In resolution AG-2011-RES-06, the General Assembly called on “all National Central Bureaus, if permitted under their national laws and in accordance with applicable international treaties, to take the necessary steps to encourage the appropriate authorities in their countries to recognize the red notice as a valid request for provisional arrest pending extradition or to enable similar lawful actions to be taken on the basis of a red notice.”

accountability system".<sup>378</sup> It appears that in some instances responsibility for ensuring respect for human rights is passed from one authority to another, e.g. a NCB to the Secretariat or vice-versa.

#### **Box 4: Politics and Red Notices — an example**

A worrying example of the political influence that can be exercised over INTERPOL is the case of Kazhegeldin. The International Federation for Human Rights (FIDH) protested against the Red Notice issued against the former Prime Minister of Kazakhstan, Kazhegeldin, by his own country. He had been convicted there *in absentia*. The Kazakh authorities subsequently requested his arrest by means of an international arrest warrant through INTERPOL.

Following FIDH's request, INTERPOL's international secretariat revoked the Red Notice on the basis of it being in breach of the principle of political neutrality of the organization (article 3 of its Statute). The Kazakh authorities appealed against this decision. Despite its confirmation by the Executive Committee, the General Assembly of INTERPOL revoked the decision and reinstated the Red Notice by a 46–38 majority with 23 abstentions.<sup>379</sup>

This case is an example of how, despite the best efforts of the INTERPOL secretariat and governing body, the decision-making process may be politicized.

In order to ensure a minimum level of surveillance, a Commission for the Control of Files (CCF) is entrusted with ensuring "that the processing of personal information by the Organization is in compliance with the regulations the Organization establishes in this matter".<sup>380</sup> The CCF has the duty to ensure that the work of the Organization complies with the *Universal Declaration on Human Rights* and the principle of neutrality.<sup>381</sup> It also has the competence to deal with individual complaints, since the INTERPOL Rules on the Processing of Data entitle persons subject to the international police cooperation system to access to their data, albeit on a limited basis.<sup>382</sup> The CCF itself has however outlined the limits of its competence "which ... does not extend to the possibility of recommending that a national authority cancel an arrest warrant or halt proceedings; only the national judicial or police authorities concerned may do so."<sup>383</sup> According to INTERPOL's commissioned research, this system does not provide "a proper means of legal redress against the Organization."<sup>384</sup>

In a detailed research report, Fair Trials International found that "INTERPOL's cardinal rule — its neutrality principle — is not functioning as it should [and there

<sup>378</sup> Florence de VILLENFAGNE and Claire GAYREL, *DATA PROTECTION AT ICPO-INTERPOL ASSESSMENT, ISSUES AND OUTLOOK*, CRIDS Centre de Recherche Information, Droit et Société (Information, Law and Society Research Centre) Notre Dame de la Paix University Namur, Belgium, 29 April 2011, pp. 26–27.

<sup>379</sup> Rutsel Silvestre J. Martha, *The Legal Foundations of INTERPOL*, Hart Publishing, 2010, p. 64.

<sup>380</sup> INTERPOL Constitution, article 36; *Rules on the Control of Information and Access to INTERPOL's Files*, article 1.

<sup>381</sup> *Rules on the Control of Information and Access to INTERPOL's Files*, article 1.

<sup>382</sup> *Ibid.*, article 18.

<sup>383</sup> *Annual Activity Report of the CCF for 2012*, para. 95.

<sup>384</sup> Florence de VILLENFAGNE and Claire GAYREL, *op. cit.*, p. 54.

are cases showing] that NCBs will not refrain from issuing INTERPOL alerts against political opponents, in breach of INTERPOL's rules, in the first place".<sup>385</sup> The report documented that "the Russian Federation implements its devolved responsibilities by a set of instructions to law enforcement agents agreed by various agencies including the Federal Security Service (FSB), the former KGB, which simply reiterates that 'the international search for persons alleged to have committed crimes of a political, military, religious or racial character is not performed.' [However], this has not stopped Russia seeking to abuse INTERPOL's system."<sup>386</sup>

Fair Trials International considered the "CCF's role of handling individual requests [to be] a source of significant concern"<sup>387</sup> as its procedure "lacks transparency and essential indicators of procedural fairness. There are also doubts as to whether this procedure is equipped to perform the task incumbent upon it, particularly when political abuse is alleged."<sup>388</sup> Furthermore, the CCF "does not have the benefit of external judicial review"<sup>389</sup> and the requirement to give reasons is not adhered to by the CCF, whose decisions are not published.<sup>390</sup> There is no mechanism to ensure the timeliness and efficiency of the procedure nor are its decisions binding on INTERPOL.<sup>391</sup>

Recent initiatives by INTERPOL are aimed at increasing the speed of circulation of Red Notices. "I-link" has allowed for the online submission of Notices and Diffusions by the NCB directly, which can be immediately visible to all other NCBs before any central screening.<sup>392</sup> More recently, the General Assembly authorized the beginning of an "e-Extradition" programme.<sup>393</sup>

At its 85<sup>th</sup> General Assembly, in November 2016, INTERPOL approved a major reform to the system.<sup>394</sup> The decisions of the CCF are now final and binding "with regard to requests for access to, or correction and/or deletion of, data processed in the INTERPOL Information System".<sup>395</sup> The CCF also has the power to rule on its own competence (*Kompetenz-Kompetenz*)<sup>396</sup> and may issue provisional measures.<sup>397</sup> Decisions must be "reasoned and shall contain, *inter alia*, a summary of the proceedings, the submissions of the parties, a statement of the facts, the application of INTERPOL's rules, an analysis of legal arguments, and operative parts"<sup>398</sup> and the CCF can decide on remedies for violations of

<sup>385</sup> *Fair Trials International, Strengthening respect for human rights, strengthening INTERPOL*, November 2013, paras. 76 and 79.

<sup>386</sup> *Ibid.*, para. 135.

<sup>387</sup> *Ibid.*, para. 190.

<sup>388</sup> *Ibid.*, para. 207.

<sup>389</sup> *Ibid.*, para. 219.

<sup>390</sup> *Ibid.*, paras. 221–223.

<sup>391</sup> *Ibid.*, paras. 225–226.

<sup>392</sup> After international criticism and the recommendations of the CCF, "the General Secretariat informed all the NCBs that, as of 1 September 2014, when a request for a person's arrest, whether through a Red Notice or a Diffusion, is submitted via I-link, the file will no longer be automatically visible in e-ASF, pending compliance checks by the General Secretariat. NCBs were informed that the file's e-ASF visibility will only be activated, with respect to possible restrictions, once a compliance check has been conducted by the General Secretariat and no compliance issues are identified." *Annual Activity Report of the CCF for 2014*, Reference: CCF/92/12/d461, para. 25.

<sup>393</sup> Resolutions AG-2013-RES-09 and AG-2014-RES-20.

<sup>394</sup> With Resolution No. 6 AG-2016-RES-06. <https://www.interpol.int/News-and-media/News/2016/N2016-148>.

<sup>395</sup> Statute of CCF, entered into force on 11 March 2017, articles 3.2.c and 38.1.

<sup>396</sup> *Ibid.*, article 28.1.a.

<sup>397</sup> *Ibid.*, article 37.1.

<sup>398</sup> *Ibid.*, article 38.2.

the applicant's rights, so far as these violations pertain to the competences of INTERPOL.<sup>399</sup>

The CCF is now composed of a Supervisory and Advisory Chamber, which has an advisory capacity, and a Requests Chamber, deputized to deal with individual complaints.<sup>400</sup> The expertise and membership of the Requests Chamber has also been enhanced in terms of their legal and human rights capacity.<sup>401</sup>

The procedure is more transparent in that the applicant is informed of both the procedure and the timeline for the decision.<sup>402</sup> The timeframes are set in the Statute.<sup>403</sup> There is a possibility for having the decision reviewed by the CCF itself.<sup>404</sup>

Although these moves towards a stronger and more transparent complaint mechanism are welcome, concerns remain. As Fair Trials International has pointed out, it is "still not possible to appeal against decisions made by the CCF either internally, or through an external judicial mechanism" and it remains to be seen how effectively the new rules will be applied in practice.<sup>405</sup>

Finally, another problem with INTERPOL procedures remains the lack of transparent mechanisms to ensure that breaches of the principle of *non-refoulement* under international refugee and human rights law do not take place through the facilitation provided by INTERPOL. No public information is currently available on the existence of such a prevention mechanism.

### 3.5.3 The CIS Information System

The CIS Member States have a regional system to search for wanted persons, the Interstate wanted persons database, to which they resort when searching for persons among the CIS countries. The database was created by the *CIS Agreement for Inter-State Search of Wanted Persons*.<sup>406</sup> It sets up a system to locate, arrest and detain persons for the purpose of extradition, criminal prosecution or to serve a criminal sentence,<sup>407</sup> as well as ensuring cooperation, including information sharing and "coordinated operative-search activities."<sup>408</sup>

The practice in the examined States is that the database is operated by the Ministries of Interior of the CIS States as authorized entities. The central repository of the database is located in the Ministry of the Interior of the Russian Federation, as part of the Interstate Data Bank, and the Ministry is responsible for its management.<sup>409</sup>

<sup>399</sup> *Ibid.*, article 39.

<sup>400</sup> *Ibid.*, article 6.

<sup>401</sup> *Ibid.*, article 8. This also concerns the Secretary of the Committee, see: *Ibid.*, article 15.

<sup>402</sup> *Ibid.*, article 31.1.

<sup>403</sup> *Ibid.*, article 40.

<sup>404</sup> *Ibid.*, article 42.

<sup>405</sup> See: Fair Trials International recommendations at <https://www.fairtrials.org/fair-trials-recommendations-inform-major-interpol-reforms/>.

<sup>406</sup> *CIS Agreement for Inter-State Search of Wanted Persons*.

<sup>407</sup> *Ibid.*, article 1.b.

<sup>408</sup> *Ibid.*, article 3.

<sup>409</sup> *Ibid.*, article 7. *CIS Regulation on bodies competent to carry out inter-state search for wanted persons* (Регламент компетентных органов по осуществлению межгосударственного розыска лиц), article 1.2. The *CIS Regulation on bodies competent to carry out inter-state search for wanted persons* were adopted on 30 October 2015 by the Decision of the Heads of Governments of CIS States on the Rules for authorized bodies on conducting the Interstate search for wanted persons, at the Dushanbe Summit of CIS States. The official text of the Rules is available at <http://bkbopcis.ru/assets/files/vsyo.pdf>.



Within the framework of the CIS Interstate wanted persons database, law enforcement bodies should send requests in writing. Requests may also be oral if they are confirmed in writing within three days.<sup>410</sup>

The wanted person may be arrested and detained pending disposition of his or her case and while waiting for the requesting authorities' instructions, even if no judicial authorization for pre-trial detention is issued.<sup>411</sup> This procedure may also apply in cases where the search has been initiated in non-criminal matters. Likewise, a request can be made in relation to persons who cannot communicate his or her identity.<sup>412</sup> In cases where an authorization for pre-trial detention has been issued for a wanted person, the authorities of the State that apprehended the wanted person should request supporting documentation from the requesting State. This documentation is necessary to serve as the grounds for his/her continued detention in line with the legislative procedures of the State that carried out the arrest and detention.<sup>413</sup> No complaint mechanism is contemplated in the recently adopted working rules of the CIS database.

The implementation of a request "may be suspended or refused where the competent body of the requested Party finds that such implementation may infringe on sovereignty, security, public safety or any other material interests of the State or is in conflict with the national laws or international law obligations of the Party."<sup>414</sup> However, no human rights consideration is expressly recognized in the rules of this CIS database system.

Under the CIS framework it is possible to set up joint search operations. During these operations, visiting officers from the requesting State may "stay in the territory of the requested State Party or ... attend operative and search activities in respect of the wanted person".<sup>415</sup> The requesting State must respect the CIS rules and the laws of the host State and their attendance at operations "may be terminated pursuant to a well-reasoned decision of the receiving unit of the competent body, subject to notification of the central offices of the competent bodies of the interacting Parties".<sup>416</sup>

If the person sought is arrested, the "visiting staff [must] present procedural and any other documents justifying the detention of this person."<sup>417</sup>

### **Box 5: European Union – the Schengen Information System**

Within the EU, the corresponding system is the Schengen Information System II (SIS II), a database at the central and national levels, similar to the INTERPOL database system, which collects alerts on European Arrest Warrants (EAWs) by national judicial authorities.<sup>418</sup>

The information entered in the SIS II database is restricted to names, surnames, aliases, "any specific, objective, physical characteristics not

<sup>410</sup> *Ibid.*, article 5.2.

<sup>411</sup> *CIS Regulation on bodies competent to carry out inter-state search for wanted persons*, 30 October 2015, articles 25–32.

<sup>412</sup> *Ibid.*

<sup>413</sup> *Ibid.*, article 26.

<sup>414</sup> *CIS Agreement for Inter-State Search of Wanted Persons*, article 6.4.

<sup>415</sup> *Regulation on bodies competent to carry out inter-state search for wanted persons*, article 40 and 48.

<sup>416</sup> *Ibid.*, article 49.

<sup>417</sup> *Ibid.*, articles 50 and 26.2.

<sup>418</sup> See: *Council Decision 2007/533/JHA*. It also encompasses refusals of entry or other situations. See: *SIS II Regulation*, article 24. It was already created by the *Schengen Implementation Convention of 1995*. Currently it is based on the *Schengen Information System II Regulation* (article 1.2).

subject to change, place and date of birth, sex, photographs, fingerprints, nationalities, whether the person concerned is armed, violent or has escaped",<sup>419</sup> reason and authority for and reference to the decision for the alert, actions to be taken and links with other SIS II alerts.

EAWs must be added to the SIS II Database by judicial authorities<sup>420</sup> and must contain a copy of the original EAW<sup>421</sup> possibly with translations. The SIS II database can be used as a means of communication for judicial authorities when they need to request further clarifications under the Framework Decision's rules. Extradition requests not falling under the EAW FD may also be sent to States that are party to the ECE.<sup>422</sup>

The right to access this information can be exercised by border and custom authorities and "by national judicial authorities, including those responsible for the initiation of public prosecutions in criminal proceedings and for judicial inquiries prior to charge, in the performance of their tasks, as provided for in national legislation, and by their coordinating authorities".<sup>423</sup> EUROPOL and EUROJUST can access EAW alerts.<sup>424</sup>

Persons subject to SIS II are entitled to privacy and data protection rights<sup>425</sup> in line with EU privacy law, which requires that the concerned person must have access to the data processed, the origin and recipient(s) of the data, the purpose of the data processing and its legal basis. They can have inaccurate data corrected and unlawfully processed data deleted and have the right to access an effective remedy before a court or tribunal or a data protection authority. They can also claim damages or other forms of compensation.

Third country nationals are entitled to be informed of their rights to privacy and data protection but this may be excluded, *inter alia*, when "national law allows for the right of information to be restricted, in particular in order to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences."<sup>426</sup>

Alerts are reviewed every three years to assess whether they should be maintained or erased.<sup>427</sup>

### 3.5.4 Conclusions

The establishment of international organizations and databases for sharing information regarding criminal cooperation, as well as for communication and collaboration in criminal investigations, is an important tool in ensuring the effective administration of justice for crimes worldwide, including crimes that amount to violations of human rights.

<sup>419</sup> *SIS II Regulation and Council Decision 2007/533/JHA*, article 20.2.

<sup>420</sup> *Ibid.*, article 26.

<sup>421</sup> *Ibid.*, article 27.

<sup>422</sup> *Ibid.*, article 31.

<sup>423</sup> *Ibid.*, articles 27.2 R and 40.

<sup>424</sup> *Ibid.*, articles 41–42.

<sup>425</sup> *Regulation (EU) 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)*, articles 40 and following.

<sup>426</sup> *Ibid.*, article 42.2(c).

<sup>427</sup> *Ibid.*, article 29; *Council Decision 2007/533/JHA*, article 44.

Nevertheless, such systems can become vehicles for human rights violations when they blindly, or with only superficial scrutiny, rely on mutual confidence that each of its member States' legal system is in compliance with international law, in particular international human rights, international humanitarian and refugee law.

As indicated, this has been a long-standing concern with regard to INTERPOL and its Red Notice system, which has been demonstrated to have been used for abusive practices of persecutions. However, as a result of civil society initiatives and INTERPOL's implementation of such recommendations, reforms are gradually being undertaken to create a complaints mechanism. That said, a mechanism that would prevent the issuance of Red Notices in breach of human rights has yet to be seriously contemplated.

The CIS Inter-State system raises even greater concerns as it lacks any possibility to complain or demand the delisting of an individual, or any standard that obliges the administrator of the database to ensure that human rights law is respected, unlike in INTERPOL's Statute. For the system to be human rights compliant, action is needed both at the international level, to develop such mechanisms and procedural safeguards, and nationally, to ensure that the system is implemented in accordance with States' obligations under international human rights law.

#### **Box 6: Other forms of criminal cooperation – "Hot Pursuit"**

The formal and informal practice of criminal cooperation includes the notion of "hot pursuit". In lay terms, this is the situation in which the pursuit of a suspect with the intention of his or her arrest is expressly or tacitly allowed to continue in the territory of another State. Such practices can be unlawful, as they may constitute an encroachment on the territorial sovereignty of another State. However, "hot pursuit" is not always unlawful. The modalities and consequences of the "hot pursuit" may vary depending on international law or established practices. This is an area where, depending also on the degree of infiltration into the foreign territory, practice plays an important role.

Within the EU space, the *Schengen Implementation Convention* of 1995 permits "hot pursuits" to be carried out among Contracting Parties, without prior authorization, for the following offences:

*"an individual caught in the act of committing or of participating in ... murder, manslaughter, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, kidnapping and hostage taking, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste..."*

Hot pursuit is allowed under Schengen when, due to the urgency of the situation, it is not possible to provide prior notification or to wait for the arrival of the competent State authorities. The same applies when the person being pursued has escaped from provisional custody or while serving

a sentence involving deprivation of liberty. However, minimal procedural obligations to respect State sovereignty remain: the pursuing officers must make contact with the other State's competent authorities immediately after crossing the border and the latter retain competence to order a halt of the pursuit and to interrogate the suspect if arrest is requested.<sup>428</sup> Indeed, the pursuing officer does not have the right to capture the fugitive, and may only do so temporarily until the local authorities are able to make the arrest and take custody of the fugitive.<sup>429</sup>

### 3.6 Procedures to execute extradition requests

#### 3.6.1 International human rights law

Procedural guarantees of the right to a fair hearing apply to extradition proceedings pursuant to article 14 of the ICCPR. Such guarantees include the right to be equal before courts and tribunals under article 14.1 of the ICCPR.<sup>430</sup> This right entails the right to "equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination".<sup>431</sup> Consequently, parties must enjoy the right to legal assistance, including, when needed, free legal aid.<sup>432</sup>

According to the European Court of Human Rights, fair trial rights as applied to extradition proceedings are narrower in scope than in criminal cases<sup>433</sup> and States are not required to establish a *prima facie* case before authorizing the extradition.<sup>434</sup> If, however, the extradition request is formulated in such a way as to presume the guilt of the person, it would be in breach of the right to be presumed innocent and to not be the subject of incriminatory statements by public officials before a court verdict is pronounced.<sup>435</sup>

As mentioned above, the principle of *non-refoulement* is equally applicable to extradition proceedings as to any other kind of transfer out of the jurisdiction of the Contracting Party.<sup>436</sup> In case of multiple extradition requests, the possibility of prosecution in one country instead of another requesting country is relevant in the assessment of respect for the principle of *non-refoulement* and "to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case".<sup>437</sup>

#### 3.6.2 International law on extradition

International law and standards identify a central role for the judiciary in the admissibility of extradition requests and the assessment of whether the extradition interest still stands, and provide for the right to appeal this judicial

<sup>428</sup> EU-US Extradition Treaty, article 41.

<sup>429</sup> *Ibid.*, article 41.6.

<sup>430</sup> See: Human Rights Committee (CCPR), *General Comment No. 32*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 17.

<sup>431</sup> *Ibid.*, para. 8.

<sup>432</sup> *Ibid.*, para. 10.

<sup>433</sup> *H v. Spain*, ECommHR, Application No. 10227/82. See: Human Rights Committee (CCPR), *General Comment No. 32*, UN Doc. CCPR/C/GC/32, 23 August 2007.

<sup>434</sup> *Kirkwood v. UK*, ECommHR, Application No. 10479/83.

<sup>435</sup> *Ismoilov and others v. Russia*, ECtHR, Application No. 2947/06, Judgment of 24 April 2008. See also: *Eshonkulov v. Russia*, ECtHR, Application No. 68900/13, 15 January 2015, paras. 73–76.

<sup>436</sup> *Babar Ahmad and others v. United Kingdom*, ECtHR, *op. cit.*, para. 168.

<sup>437</sup> *Ibid.*, para. 175.

decision.<sup>438</sup> States may only resort to a simplified procedure with the consent of the person to be extradited.<sup>439</sup>

The 1993 *Minsk Convention* provides little guidance as to extradition procedure. It provides for the application of one country's domestic law,<sup>440</sup> and fixed time limits for the request of additional information.<sup>441</sup> The *Chisinau Convention* is more detailed in this regard. It affirms that requests for legal assistance, including extraditions, are to be implemented by competent judicial authorities.<sup>442</sup> If the extradition request is accompanied by an arrest warrant, the authorities of the executing State will search for the suspect.<sup>443</sup> The request for extradition is considered within 30 days of receipt by the judicial authority of the executing country, unless its domestic law states otherwise. In case of requests for additional information, delays of 30 days may be allowed.<sup>444</sup> The *SCO Convention against Terrorism* of 2009 provides that in urgent cases an extradition request may be transmitted orally but must be confirmed in writing within 72 hours.<sup>445</sup>

### 3.6.3 National laws and practices

In the Russian Federation, as well as in most of the Central Asian States, national law constitutes the legal framework for extradition where there is an absence of multilateral or bilateral agreements. This approach is generally followed in civil law countries. One exception in the region is that of Tajikistan, the criminal procedure code of which makes extradition contingent on the existence of a treaty between the States concerned. Consequently, extradition is predominantly regulated by multilateral and bilateral instruments.<sup>446</sup>

The Russian Federation and Central Asian State have tasked the General Prosecutor's Office of each State with deciding on extradition requests. It is this body that must assess the circumstances of, and obstacles to, the execution of the request.<sup>447</sup> The person to be extradited is informed in writing of the decision and of his or her right of appeal against the decision, as is the requesting State.<sup>448</sup> In Tajikistan, this right of information is not regulated in the CPC and depends therefore on the specific international agreement at issue. In Turkmenistan the right is not incorporated in national law, but may be provided for by international agreement.<sup>449</sup>

With regard to the right to challenge the extradition order, the Russian Constitution ensures the right of everyone to resort to courts against the

<sup>438</sup> *UN Model Law*, Section 25.

<sup>439</sup> *Ibid.*, Section 27; *UN Treaty Law*, article 6.

<sup>440</sup> *Minsk Convention*, article 8.1.

<sup>441</sup> *Ibid.*, article 58–59.

<sup>442</sup> *Chisinau Convention*, article 61.

<sup>443</sup> *Ibid.*, article 69.

<sup>444</sup> *Ibid.*, article 71.

<sup>445</sup> *SCO Convention against Terrorism of 2009*, article 16.1–2.

<sup>446</sup> CPC of Tajikistan, article 478.2.

<sup>447</sup> CPC of the Russian Federation, article 462.7. See: Prosecutor General of the Russian Federation in his instruction No. 32/35 "On the procedure for consideration of extradition requests of foreign states in view of the entry into force of the Criminal Procedure Code of the Russian Federation", dated 20 June 2002. See: B. T. Bezlepkin, *Commentary to the Criminal Procedure Code of the Russian Federation (itemized)*, 13<sup>th</sup> edition, Moscow, 2015, p. 1106).

<sup>448</sup> CPC of the Russian Federation, article 267; CPC of Kazakhstan, article 591.2; CPC of the Kyrgyz Republic, article 433.3; CPC of Tajikistan, article 481.1; CPC of Uzbekistan, article 601; CPC of Turkmenistan, article 552. See also: ECE, article 18.4. See: A. Smirnov, K. Kalinovskiy, *Commentary to the Criminal Procedure Code of the Russian Federation*, 6<sup>th</sup> edition, 2012.

<sup>449</sup> CPC of Turkmenistan, article 552.

actions of the authorities in breach of their rights.<sup>450</sup> In the Russian Federation, Kazakhstan, Kyrgyzstan and Uzbekistan, the extradition decision made by the Prosecutor General may be challenged before a competent court by the concerned person directly or through his/her legal representative within 10 days of its receipt.<sup>451</sup> The judicial review proceedings have a suspensive effect on the execution of the extradition until a final decision is issued.<sup>452</sup>

In the Russian Federation and Kazakhstan, the criminal procedure codes provide that, if the person is detained, the administration of the detention facility is obliged to refer the matter to the competent court immediately and to inform a prosecutor.<sup>453</sup> The judicial review is limited to an assessment of whether the extradition order was made in accordance with the procedure set out in applicable international and domestic law.<sup>454</sup> The court can annul or ratify the extradition decision. If it is annulled, the person to be extradited must be released from detention.<sup>455</sup>

In Tajikistan, while the CPC does not expressly provide for the right of the person whose extradition is sought to appeal the transfer decision in a court of law, there is a general right for participants in criminal proceedings to appeal decisions by judicial and prosecutorial bodies.<sup>456</sup> In Turkmenistan, the CPC does not expressly provide for a judicial appeal procedure applicable in extradition cases. While there is general language permitting appeals against procedural decisions<sup>457</sup> the CPC establishes a procedure whereby the decisions of prosecutors are appealable “to the superior prosecutor”<sup>458</sup> rather than to a court, which *de facto* and *de jure* excludes extradition-related decisions from the scope of judicial review.

In Germany, the ordinary procedure requires the admissibility of the extradition to be determined by a court (*Oberlandsgericht*).<sup>459</sup> The court must rule on “any objections raised by the person sought against the extradition arrest warrant or against its execution”.<sup>460</sup> It may hold oral hearings.<sup>461</sup> The person whose extradition is sought is entitled to a lawyer and has a right to a court-appointed lawyer, if it is in a situation of need.<sup>462</sup>

In Spain, the investigative judges of the Central Criminal Court (*Audiencia Nacional*)<sup>463</sup> must assess the lawfulness of extradition requests. While a decision to deny extradition is binding on the Government, approval of the extradition request does not bind the Government to execute the transfer, as it retains sovereign discretion with no opportunity to appeal.<sup>464</sup>

<sup>450</sup> Constitution of the Russian Federation, article 46.

<sup>451</sup> CPC of the Russian Federation, article 463.1; CPC of Kazakhstan, articles 591–592 and Instruction of GPO No. 166 of Kazakhstan, paras. 53 and 55; CPC of Uzbekistan, article 601.

<sup>452</sup> CPC of the Russian Federation, article 462.6; CPC of Kazakhstan, article 591.4; CPC of the Kyrgyz Republic, article 433.3.7; CPC of Uzbekistan, article 602.

<sup>453</sup> CPC of the Russian Federation, article 463.2; CPC of Kazakhstan, article 592.2.

<sup>454</sup> CPC of the Russian Federation, article 463.6; CPC of Kazakhstan, article 592.6.

<sup>455</sup> CPC of the Russian Federation, article 463.7–8; CPC of Kazakhstan, article 592.7.

<sup>456</sup> CPC of Tajikistan, article 23.1. This right is reiterated in article 47.4 of the CPC with specific respect to the accused.

<sup>457</sup> CPC of Turkmenistan, article 29.

<sup>458</sup> *Ibid.*, article 113.

<sup>459</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 12.

<sup>460</sup> *Ibid.*, Section 23.

<sup>461</sup> See: *Ibid.*, Sections 29, 30, 31.

<sup>462</sup> *Ibid.*, Section 40.

<sup>463</sup> See: Organic Law of Judicial Power (LOPJ) of Spain, article 88.

<sup>464</sup> Law 4/1985 of Spain, article 6.

In Italy, extradition requires the authorization of a court of appeal, unless the subject of the extradition expressly consents to his or her transfer.<sup>465</sup> The hearing before the court of appeal is not public.<sup>466</sup> If the court authorizes extradition, the Minister of Justice decides whether or not to execute the extradition request.

In France, an extradition hearing before the court of appeal (*Chambre d'instruction de la cour d'appel*) is always public, unless a public hearing would be contrary to the interests of justice, of third parties or of the dignity of the person to be extradited. The presence of a lawyer is guaranteed, as is that of an interpreter, if needed.<sup>467</sup> Extradition is refused if the legal requirements are not fulfilled or if there is a manifest error. If the extradition is denied, the ruling is final and the suspect must be freed.<sup>468</sup> However, if the transfer is not executed within a month, the concerned person can no longer be extradited for the same conduct.<sup>469</sup>

### 3.6.4 Practice in selected CIS states

The European Court of Human Rights has underlined in several extradition cases that Russian courts, in authorizing extradition, have not taken into account all available material, including reports by international organizations and NGOs, and instead have qualified them as mere "opinions".<sup>470</sup>

In Kazakhstan, human rights groups have reported that fair trial concerns in proceedings to challenge extraditions are routinely ignored by courts.<sup>471</sup> For example, in the case of the extradition of 29 Uzbeks in 2011 (see Box No. 7 below), whose appeals against extradition were rejected by the first instance and appeal court, the UN Committee Against Torture indicated that Kazakhstan "has not provided evidence neither in writing nor orally refuting the complainants' claims that their extradition proceedings did not satisfy minimum fair trial requirements and that there was no individualized risk assessment of each complainant's personal risk of torture upon return to Uzbekistan". The CAT noted that the first instance court had not carried out an individualized risk assessment of the risk of torture upon return or the *non-refoulement* principle.<sup>472</sup> This position was similarly stressed in Concluding Observations.<sup>473</sup> The UN Human Rights Committee has found in respect of Kazakhstan that "individuals have been improperly extradited under bilateral or multilateral extradition agreements, in violation of the principle of *non-refoulement* [and the] use of diplomatic assurances in the context of removals of foreign individuals is not accompanied by sufficient safeguards against a real risk of exposing such individuals to treatment contrary to the right to life or the prohibition of torture and other cruel, inhuman or degrading treatment or punishment."<sup>474</sup>

<sup>465</sup> CPC of Italy, article 701.

<sup>466</sup> *Ibid.*, article 704.

<sup>467</sup> CPC of France, article 696-13.

<sup>468</sup> *Ibid.*, article 696-17.

<sup>469</sup> *Ibid.*, Article 696-18.

<sup>470</sup> See: *Case of Azimov v. Russia*, ECtHR, Application No. 67474/11, 18 April 2012.

<sup>471</sup> Amnesty International, *Eurasia: Return torture—Extradition, forcible returns and removals to Central Asia*, *op. cit.*, p. 22.

<sup>472</sup> See: *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*, para. 13.9.

<sup>473</sup> *Concluding Observations on Kazakhstan*, CAT, UN Doc. CAT/C/KAZ/CO/3, 12 December 2014.

<sup>474</sup> *Concluding Observations on Kazakhstan*, CCPR, 2016, *op. cit.*, para. 43.



### Box 7: The 29 Uzbeks Case

The case of the extradition from Kazakhstan to Uzbekistan of 29 persons,<sup>475</sup> on 29 June 2011, is well-known in Central Asia and led to condemnation by the UN Committee against Torture and a determination that Kazakhstan had breached its obligations under the Convention.

The persons concerned were wanted in Uzbekistan, according to the Kazakh Government, on charges of “terrorism, establishment and membership of religious, extremist, separatist, fundamentalist and other prohibited organizations, murder, membership of criminal organizations and other crimes.”<sup>476</sup>

Twelve of those sought for extradition had been recognized as refugees by the UNHCR since 2005. In 2010, with the enactment of a new Law on Refugees that gave exclusive competence to the State authorities to determine refugee status, the 29 persons applied for refugee status. They were interviewed in May 2010 without lawyers or translators.

Days later, between 9 and 11 June 2010, all 29 persons were arrested by the Kazakh authorities without being promptly shown an arrest warrant.<sup>477</sup> In August 2010, their asylum applications were rejected on the grounds that they had been “guilty of acts contrary to the purposes and principles of the United Nations”.<sup>478</sup>

On 8 September, the Almaty prosecutor’s office ordered the extradition of all 29 persons to Uzbekistan under the *Minsk Agreement* and the *Shanghai Cooperation Convention* of 2001.<sup>479</sup> Meanwhile, the rejection of their refugee status was confirmed by first instance and Cassation courts as were their challenges against the extradition order. The Almaty prosecutor’s office received written diplomatic “assurances” by the Uzbek authorities that they would not be tortured or ill-treated, as requested by Kazakh authorities on 6 September.

The UN Committee against Torture, pursuant to a communication by the applicants, had repeatedly<sup>480</sup> issued interim measures requesting Kazakhstan not to extradite them until it had heard the case. They were nonetheless extradited to Uzbekistan on 29 June 2011.

In its final decision in the case, the Committee against Torture ruled that, by extraditing persons that were subject to interim measures of the

<sup>475</sup> Toirjon Abdussamatov, Faizullohon Akbarov, Akmaljon Shodiev, Suhrob Bazarov, Ahmad Boltaev, Shuhrat Botirov, Mukhitdin Gulamov, Shukhrat Holboev, Saidakbar Jalolhonov, Abror Kasimov, Olimjon Kholturaev, Sarvar Khurramov, Oybek Kuldashiev, Kobiljon Kurbanov, Bahridin Nurillaev, Bahtiyor Nurillaev, Ulugbek Ostons, Otabek Sharipov, Tursunboy Sulaimonov, Abduazimhuja Yakubov, Uktam Rakhmatov, Alisher Khoshimov, Oybek Pulatov, Maruf Yuldoshev, Isobek Pardaev, Ravshan Turaev, Dilbek Karimov, Sirojiddin Talipov and Fayziddin Umarov.

<sup>476</sup> *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*, para. 8.1.

<sup>477</sup> *Ibid.*, para. 2.6.

<sup>478</sup> *Geneva Refugee Convention*, article 1F.c.

<sup>479</sup> It had received written guarantees from the Prosecutor General’s Office of Uzbekistan that the complainants’ rights and freedoms would be respected after the extradition and that they would not be subjected to torture or ill-treatment. The Uzbek authorities also assured the Committee that international organizations, such as the International Committee of the Red Cross (ICRC), the World Health Organization (WHO) and a number of international human rights organizations, would have free access to monitor detention facilities and to carry out interviews with detainees.

<sup>480</sup> On 24 and 31 December 2010 and 21 January 2011 and on 6 May 2011 and 9 June 2011

Committee, Kazakhstan had breached the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment* (article 22).<sup>481</sup>

The Committee repeated its concern “about forcible returns to Uzbekistan in the name of regional security, including the fight against terrorism, to unknown conditions, treatment and whereabouts”.<sup>482</sup> It found that Kazakhstan had violated its obligation not to transfer persons to countries where they would be at real risk of torture (article 3 CAT) and that diplomatic assurances “cannot be used as an instrument to avoid the application of the principle of non-refoulement”.<sup>483</sup>

As regards respect for procedural rights in practice, human rights organizations monitoring court extradition proceedings have reported situations in which individuals were barely given five minutes to present their case before the presiding judge. In several cases, it has been reported that judges have refused to accept written evidence of torture alleged to have occurred in other Central Asian countries. In Uzbekistan, among other countries, interpretation has not automatically been provided, where necessary, or has been of poor quality.<sup>484</sup>

In Kyrgyzstan, despite the existence of procedural safeguards, there have been instances where the courts have failed to exercise them (even though they are mandatory). For instance, in a decision, the UN Human Rights Committee concluded that the court in Kyrgyzstan did not review the lawfulness of detention of a person who had been provisionally arrested in Kyrgyzstan based on a warrant by an Uzbek prosecutor.<sup>485</sup> A warrant issued by a foreign State was deemed sufficient, even where the requesting state has a poor human rights record.

In this case, the Prosecutor-General’s Office of the requested State (Kyrgyzstan) “received assurances from the Uzbek Prosecutor General’s Office that a full and objective investigation would be carried out into the authors’ cases, and that none of them would be persecuted for political reasons or subjected to torture”. However, no consideration was given as to the enforceability of these assurances. As the UN Human Rights Committee subsequently found, the assurances received “contained no concrete mechanism for their enforcement, [and were] insufficient to protect against such risk [of torture]”.<sup>486</sup> The Committee added “that at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation”.<sup>487</sup>

In Tajikistan, the Human Rights Committee expressed concern, in relation to extradition decisions, at “the lack of sufficient time and clear procedures to challenge such decisions, and about the State party’s overreliance on diplomatic assurances”.<sup>488</sup>

<sup>481</sup> *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*, para. 1.3.

<sup>482</sup> *Ibid.*, para. 13.7.

<sup>483</sup> *Ibid.*, para. 13.8.

<sup>484</sup> Amnesty International, *Eurasia: Return torture—Extradition, forcible returns and removals to Central Asia*, *op. cit.*, p. 23.

<sup>485</sup> *Zhakhongir Maksudov and others v. Kyrgyzstan*, CCPR, *op. cit.*, para 2.7.

<sup>486</sup> *Ibid.*, para 8.7.

<sup>487</sup> *Ibid.*, para 12.5.

<sup>488</sup> *Concluding Observations on Tajikistan*, CCPR, UN Doc. CCPR/C/TJK/CO/2, 22 August 2013, para. 12.

### **Box 8: A case of extradition from Kyrgyzstan to Uzbekistan**

Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov, all Uzbek nationals, were arrested on 16 June 2005 in Kyrgyzstan pursuant to an extradition request by Uzbekistan under the *Minsk Agreement*. Yakub Tashbaev was charged with terrorism and the others with premeditated murder and terrorism in Uzbekistan, and the request sent by the Uzbek Prosecutor General designated them as “terrorists”. Neither a prosecutor nor any judicial authority initially assessed the lawfulness of their detention pending extradition.

Before being arrested the four men had applied for international protection but their applications were dismissed under article 1F-b of the *Geneva Refugee Convention* for having committed a serious non-political crime. UNHCR however granted them refugee status under its mandate.

All court appeals against these asylum decisions were dismissed.

The four men complained to the UN Human Rights Committee, which issued interim measures requesting Kyrgyzstan not to transfer them to Uzbekistan while the case was pending before the Committee. The Kyrgyz authorities extradited them regardless on 9 August 2006.

The UN Human Rights Committee held that Kyrgyzstan committed a grave breach of the Optional Protocol to the *International Covenant on Civil and Political Rights* by disregarding the Committee’s interim measures.<sup>489</sup>

The Committee further found that the four men were at real risk of being subject to torture or other ill-treatment and faced a threat to their lives in Uzbekistan in breach of articles 6 and 7 of the ICCPR. The Committee indicated that no effective remedy was available in Kyrgyzstan against these violations because “Kyrgyz laws do not allow for judicial review of the General Prosecutor’s extradition decisions before the extradition takes place and that in the case of the authors these decisions were implemented the following day”.<sup>490</sup> The Committee found that their detention was unlawful under article 9 of the ICCPR.<sup>491</sup>

### **3.6.5 Diplomatic assurances**

A State will sometimes seek to discharge — or effectively circumvent — its obligations of *non-refoulement* by using diplomatic assurances, pursuant to which the transferring State requests and receives written guarantees from the authorities of the destination State undertaking that the person to be sent will not be subject to certain practices. The use of diplomatic assurances in this context is highly contested. Many international legal experts, and most human rights organizations, consider the use of assurances to be ineffective and unprincipled. The States that resort to them of course contend otherwise.

Diplomatic assurances range from simple undertakings by the receiving State that the individual concerned will not be subjected to torture or ill-treatment or to other violations of human rights, to more elaborate agreements,

<sup>489</sup> *Zhakhongir Maksudov and others v. Kyrgyzstan*, CCPR, *op. cit.*, para. 10.2.

<sup>490</sup> *Ibid.*, para. 12.7.

<sup>491</sup> *Ibid.*, para. 12.4.

including arrangements for the monitoring of the transferred person in custody. Diplomatic assurances are typically regarded as an acceptable means to avert a risk of the imposition of the death penalty, when they are verifiable and provided by a reliable government authority. However, such assurances are considerably more problematic when they are used to justify deportation or extradition to countries where there is a risk of torture or other ill-treatment, given that torture is almost always an illicit and clandestine practice and is virtually impossible to monitor even if there were the resources, appropriate independent agents, and the political will to do so effectively and continuously. The efficacy of these assurances must also be called into question by the fact that they are never enforceable, as they do not typically have legal effect and are not justiciable. They are normally sought from States which necessarily disregard even binding legal obligations to prevent torture and ill-treatment.<sup>492</sup>

International human rights authorities, including the UN General Assembly,<sup>493</sup> UN Treaty Bodies, the UN High Commissioner for Human Rights and independent expert mechanisms of the UN Human Rights Council have stated that diplomatic assurances purporting to ensure protection from torture or other ill-treatment cannot relieve States of their *non-refoulement* obligations, and thus cannot be presumed to permit a transfer that would otherwise be prohibited.<sup>494</sup>

The European Court of Human Rights has repeatedly held that such assurances are highly unlikely to provide a sufficient guarantee that the individuals concerned will be protected against the risk of prohibited treatment sufficient to allow a transfer to countries where there are reliable reports that the authorities resort to or tolerate torture or other ill-treatment.<sup>495</sup> Theoretical exceptions have been envisaged only for strong and independent monitoring systems.<sup>496</sup>

<sup>492</sup> See: Manfred Nowak, UN Special Rapporteur on Torture, *Annual Report to the General Assembly*, UN Doc. A/60/316, 30 August 2005 (Nowak Report 2005); UN High Commissioner for Human Rights, Louise Arbour, *Statement to the Council of Europe's Group of Experts on Human Rights and the Fight against Terrorism*, 29–31 May 2006; EU Network of Independent Experts on Fundamental Rights, *The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe* (Extraordinary Renditions), Opinion No. 3-2006, Doc. No. CFR-CDF. Opinion 3.2006, 25 May 2006; European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, 14 February 2007, Resolution No. P6\_TA (2007) 0032; *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion No. 363 / 2005, CoE Doc. CDL-AD (2006) 009, 17 March 2006; Council of Europe Commissioner for Human Rights, Thomas Hammarberg, *Viewpoint: 'The protection against torture must be strengthened'*, 18 February 2008; CPT, *15th General Report*, 22 September 2005, paras. 38–40.

<sup>493</sup> GA Resolution 62/159, Preamble.

<sup>494</sup> *Concluding Observations on France*, CCPR, CCPR, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, para. 20; *Concluding Observations on Russia*, CCPR, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 17. The Committee against Torture has categorically stated that "under no circumstances must diplomatic guarantees be used as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return", *Concluding Observations on Spain*, CAT, UN Doc. CAT/C/ESP/CO/5, 9 December 2009, para. 13; *Saadi v. Italy*, ECtHR, *op. cit.*, paras. 147–148; *M. S. S. v. Belgium and Greece*, ECtHR, *op. cit.*, paras. 353–354; *Sidikovy v. Russia*, ECtHR, Application No. 73455/11, Judgment of 20 June 2013, para. 150.

<sup>495</sup> *Saadi v. Italy*, ECtHR, *op. cit.*, paras. 147–148; *Ryabikin v. Russia*, ECtHR, Application No. 8320/04, Judgment of 19 June 2008, para. 119; *Gafarov v. Russia*, ECtHR, Application No. 25404/2009, Judgment of 21 October 2010; *Ben Khemais v. Italy*, ECtHR, Application No. 246/07, Judgment of 24 February 2009, para. 61; *Ismoilov and others v. Russia*, ECtHR, *op. cit.*, para. 127; *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, para. 74; *Makhmudzhhan Ergashev v. Russia*, ECtHR, Application No. 49747/11, 16 October 2012, paras. 74–76.

<sup>496</sup> *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, *op. cit.*, para. 189.

The UN Human Rights Committee and the UN Committee against Torture have repeatedly cast doubt on the use of diplomatic assurances and rejected diplomatic assurances in all the cases it has considered.<sup>497</sup> The ICJ opposes all use of diplomatic assurances against torture or other ill-treatment and considers them to be inherently incompatible with the *non-refoulement* principle.<sup>498</sup>

In the extradition context, the use of diplomatic assurances has become common among States in the CIS region, in particular as regards ill-treatment of certain categories of “fugitives” from Central Asian States accused of membership in or affiliation with “radical Islamist religious groups” that are listed as “terrorist or extremist” in their countries of origin.<sup>499</sup> In Central Asian States, such assurances are usually issued by the Prosecutor General’s Office.<sup>500</sup> There is no official format for diplomatic assurances in the region<sup>501</sup> but a mutually accepted and somewhat uniform format has developed. Commonly, assurances reiterate the countries’ common principles and rules on extradition, namely, double criminality and the rule of specialty. They often contain “guarantees” against the risk of torture or ill-treatment, as well as commitments that rights of defence or more broadly a fair trial, will be secured. The assurances may also sometimes include a statement that the prosecution of the individual concerned is not being sought on political grounds. They may provide for some limited monitoring mechanism. However, in extraditions to Central Asian States, this mechanism is usually limited to monitoring by diplomatic staff of the sending country and does not envisage the establishment of any independent monitoring system.<sup>502</sup> While diplomatic assurances are less common in the context of expulsions (see, Chapter IV), the *non-refoulement* principle applicable to extradition applies to them equally.

In the face of the existence of a real risk of torture or other ill-treatment, it has been the consistent approach of both the European Court of Human Rights and UN Treaty Bodies in extradition cases from the Russian Federation to Central Asian States to refuse to accept as sufficient safeguard against *refoulement* mere references to diplomatic assurances, or to the purported adherence to

<sup>497</sup> *Alzery v. Sweden*, CCPR, Communication No. 1416/2005, Views of 10 November 2006, para. 11.5; *Zhakhongir Maksudov and others v. Kyrgyzstan*, CCPR, *op. cit.*, paras. 12.5–12.6; *Concluding Observations on Denmark*, CCPR, UN Doc. CCPR/C/DNK/CO/5, 16 December 2008, para. 10. It indicated that, to be acceptable, a monitoring mechanism would, at a minimum, have to a) begin to function promptly after the arrival of the concerned person in the destination State; b) allow private access to the detainee by an independent monitor; and c) allow for the availability of independent forensic and medical expertise, at any moment. See also: *Pelit v. Azerbaijan*, CAT, Communication No. 281/2005, Views of 29 May 2007, para. 11; *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*; *Nowak Report 2005*, *op. cit.*, para. 32.

<sup>498</sup> See: ICJ, *Assessing Damage, Urging Action, Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, pp. 104–106 and 118–119; ICJ, *Legal Commentary to the ICJ Berlin Declaration*, 2008, pp. 100–104. See ICJ submissions on this topic available at <https://www.icj.org/wp-content/uploads/2017/04/Universal-NGO-submission-UN-Cmt-Torture-Advocacy-Legal-submissions-2017-ENG.pdf> and <https://www.icj.org/wp-content/uploads/2012/04/Denmark-Diplomatic-assurances-against-grave-violations-of-human-rights-Open-letters-2008.pdf>.

<sup>499</sup> See: Amnesty International, *Return to Torture*, *op. cit.*, p. 23.

<sup>500</sup> In Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, Turkmenistan, Belarus and Ukraine.

<sup>501</sup> However, the Russian Supreme Court in its guidance on the application of article 462 of the CPC by courts has indicated in its interpretation of the provisions of article 462(3) that the assurances have to be indicated in the extradition request itself. The absence of such guarantees (assurances) is a barrier to granting a decision to extradite the wanted person (Bulletin of the Supreme Court of the Russian Federation, 2006, No. 4, p. 23), as cited in B. T. Bezlepkin, *Commentary to the Criminal Procedure Code of the Russian Federation (itemized)*, 13<sup>th</sup> edition, Moscow, 2015, p. 1106.

<sup>502</sup> See e.g. assurances issued by Kyrgyzstan to the Russian Federation in case of *Khamrakulov v. Russia*, ECtHR, Application No. 68894/13, 16 April 2015; assurances issued by Uzbekistan to Kazakhstan in case *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*

international treaties prohibiting torture, or to the existence of domestic mechanisms established to protect human rights.<sup>503</sup>

### **Box 9: Comparative examples of diplomatic assurances**

In each of the following cases the European Court of Human Rights and the Human Rights Committee, respectively, have found the diplomatic assurances insufficient to address the risk of the breach of the principle of *non-refoulement*.

#### **The Savridding Dzhurayev case (transfer from the Russian Federation to Tajikistan)**

Statement by the Deputy Prosecutor General of Tajikistan:

*"We guarantee that in accordance with the norms of international law [the applicant] will be provided with all opportunities to defend himself in the Republic of Tajikistan, including through the assistance of a lawyer. He will not be subjected to torture or cruel, inhuman or degrading treatment or punishment (European Convention for the Protection of Human Rights and Fundamental Freedoms, and relevant United Nations and Council of Europe conventions and protocols thereto).*

*The Criminal Code of Tajikistan does not provide for the death penalty in respect of the crimes imputed to [the applicant].*

*The Prosecutor General's Office of Tajikistan guarantees that the aim of the extradition request in respect of [the applicant] is not his persecution on political grounds, or for reasons of his race, religious beliefs, nationality or political opinions.*

*... Tajikistan undertakes to prosecute [the applicant] only for the crimes which constitute the basis of his extradition and that [the applicant] will not be handed over to a third State without the consent of the Russian Federation and will be free to leave the territory of the Republic of Tajikistan after having served his sentence."*<sup>504</sup>

#### **The Alzery case (transfer from Sweden to Egypt)**

Statement by the Government of Sweden:

*"It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom of Sweden that the wife and children of [another individual] will not in any way be persecuted or harassed by any authority of the Arab Republic of Egypt."*<sup>505</sup>

<sup>503</sup> See: *Rustamov v. Russia*, ECtHR, Application No. 11209/10, 3 July 2012; *Umirov v. Russia*, ECtHR, Application No. 17455/11, 18 September 2012; *Azimov v. Russia*, ECtHR, *op. cit.*, para. 133; *Khamrakulov v. Russia*, ECtHR, *op. cit.*; *Toirjon Abdussamatov and others v. Kazakhstan*, CAT, *op. cit.*; *Khairullo Tursunov v. Kazakhstan*, CAT, Communication No. 538/2013, 2015, para. 9.10.

<sup>504</sup> *Savriddin Dzhurayev v. Russia*, ECtHR, Application No. 38124/07, 17 December 2009, para. 21.

<sup>505</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, para. 3.6.



The Egyptian Government responded in writing:

*"We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates." (sic)*<sup>506</sup>

### 3.6.6 Comparative assessment

There are two notable differences from a comparative assessment of extradition procedures. The first is the reliance in the CIS States examined on public prosecutors, with the courts playing a supervisory role as regards the decision to execute extraditions. In Turkmenistan, even this role for judicial review is lacking. In the EU countries analysed, the judiciary appears to play a more active role in the procedure. It is positive that the courts are involved to some extent in the extradition procedures of almost all countries examined but this is where the similarities end.

Studies of courts' practices in the Russian Federation and Central Asian States have demonstrated that international law and standards are rarely applied and that courts often play a somewhat passive role in relation to public prosecutors. This tendency appears to be changing in the Russian Federation where, due to the pressure of judgments of the European Court of Human Rights, domestic courts have increasingly acted to stop extraditions, basing their decisions on human rights grounds. Central Asian judiciaries, however, have failed to act similarly.

Finally, all of the examined countries in the CIS region fall short of their human rights obligations, in that they automatically rely on patently ineffective diplomatic assurances with weak monitoring schemes to execute extraditions. The assurances are aimed at circumventing *non-refoulement* obligations of States in the region and should never be relied on where there is real risk of torture or ill-treatment or other serious human rights violations.

#### **Box 10: The other way: extradition from Kazakhstan to Russia**

A recent case before the UN Committee against Torture concerned a Russian national from Ingushetia who contested his extradition from Kazakhstan to the Russian Federation.

The complainant, who remained anonymous, was said to have been previously abducted and detained in 2012 by unknown people that beat him up to obtain information and killed one of his companions. He escaped after 28 days. He suspected that the kidnappers were linked to the Russian authorities.

On 23 April 2013, while he was in Kazakhstan, the complainant was charged by the Russian authorities with banditry and with illegal acquisition, transfer, selling, storage, transportation and carrying of firearms. He was arrested by the Kazakh authorities with a view to extradition on 26 April 2013 under the *Minsk Convention*.

<sup>506</sup> *Ibid.*, para. 3.7.



The complainant unsuccessfully appealed the order of extradition before the courts in West Kazakhstan, claiming, among other things, the risk of being subjected to torture if sent to the Russian Federation. His asylum application was rejected by the authorities.

While the Committee against Torture issued interim measures, communicated four times to the Government of Kazakhstan, asking that they not transfer him until the case could be heard on the merits, the Kazakh authorities ignored the interim measures and extradited him to the Russian Federation on 24 April 2014.<sup>507</sup> They communicated to the Committee that the maximum term for his detention pending extradition, of one year, had expired and that they had proceeded with extradition as the only viable alternative to release, which was not possible as "his release would pose a threat to national security".<sup>508</sup>

The UN Committee against Torture rejected this justification of the Kazakh authorities and found that they had violated the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* because the obligation of *non-refoulement* did not allow for any exception.<sup>509</sup>

The Committee found that "the pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in the north Caucasus region of the Russian Federation [had] been sufficiently established."<sup>510</sup>

The Committee also found that Kazakhstan was in breach of its obligations under article 3 of the CAT and held that Mr X ran a foreseeable, real and personal risk of torture if sent to the Russian Federation and that Kazakh "authorities failed in their duty to carry out a thorough and individualized risk assessment before returning the complainant to the Russian Federation".<sup>511</sup> It also rejected any reliance in the case on diplomatic assurances to bypass the principle of *non-refoulement*.

### 3.7 Detention pending extradition

#### 3.7.1 International human rights law

Detaining a person in the absence of a criminal conviction is generally contrary to international human rights law and may constitute an arbitrary deprivation of liberty in contravention of article 9 of the ICCPR. There are however narrow exceptions to this general prohibition. Detention in advance of extradition may be lawful if the detention period is brief, does not extend beyond the length strictly necessary to carry out the extradition, and there is continuous judicial review of the detention. Detention for these purposes must be provided for by law, must pursue a legitimate aim (in this case criminal cooperation), and must be necessary and proportionate to such aim.<sup>512</sup>

<sup>507</sup> See full statement of facts at *X v. Kazakhstan*, CAT, Communication No. 554/2013, Views of 9 October 2015.

<sup>508</sup> *X v. Kazakhstan*, CAT, *op. cit.*, para. 8.1.

<sup>509</sup> *Ibid.*, para. 10.3.

<sup>510</sup> *Ibid.*, para. 12.6.

<sup>511</sup> *Ibid.*, para. 12.7.

<sup>512</sup> See: Human Rights Committee (CCPR), *General Comment No. 35*, UN Doc. CCPR/C/GC/35, 16 December 2014.

The ECHR specifically refers to “the lawful arrest or detention of a person . . . against whom action is being taken with a view to . . . extradition” as a permissible form of deprivation of liberty under article 5.1.f. In accordance with the principle of legality, such detention must respect national and international law.<sup>513</sup> Detention with a view to extradition can be “justified only for as long as extradition proceedings are being conducted . . . with due diligence”, and even then must not be unreasonable nor excessive.<sup>514</sup>

Detention also must not be abused for purposes other than that of extradition.<sup>515</sup> In *Bozano v. France*, the European Court found that deportation from France to Switzerland (from where he was later extradited to Italy to serve a sentence decided in absentia) breached his right to liberty under article 5.1. of the ECHR because it “amounted in fact to a disguised form of extradition designed to circumvent the negative ruling [against his extradition], and not to ‘detention’ necessary in the ordinary course of ‘action . . . taken with a view to deportation’.”<sup>516</sup>

The European Court has not “read into Article 5 § 1 (f) of the Convention a requirement that there be a prima facie case before a person can be detained with a view to extradition”.<sup>517</sup> Nonetheless, the requirement may be incumbent pursuant to other legal obligations of the executing State, with consequences for the respect of the principle of legality in the deprivation of liberty.<sup>518</sup> It is the actual purpose of the detention and not the formal provision relied upon that matters.

A person subject to extradition always enjoys, under article 9.4 of the ICCPR and 5.4 of the ECHR, the right to take proceedings before a court in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.<sup>519</sup>

The reviewing court must have the power to order the release from unlawful detention.<sup>520</sup> The concerned person can exercise this right from the moment of the arrest and “has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise.”<sup>521</sup> These proceedings should be brought to “a court within the judiciary”.<sup>522</sup> Furthermore, “detainees should be afforded prompt and regular access to counsel. Detainees should be informed, in a language they understand, of their right to take proceedings for a decision on the lawfulness of their detention.”<sup>523</sup>

The European Court of Human Rights has found that, in these proceedings, the right to habeas corpus requires “[s]ome form of adversarial proceedings”,<sup>524</sup>

<sup>513</sup> *Quinn v. France*, ECtHR, Application No. 18580/91, 22 March 1995, para. 47 (in which the Court found that 18 months was an excessive time for extradition detention); *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 181.

<sup>514</sup> *Ibid.*, para 48.

<sup>515</sup> *Ibid.*, para 47 (a contrario).

<sup>516</sup> *Bozano v. France*, ECtHR, Application No. 9990/82, 2 December 1987, para. 60.

<sup>517</sup> *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 183.

<sup>518</sup> *Ibid.*, para. 190; *Scott v. Spain*, ECtHR, Application No. 21335/93, 18 December 1999, para. 60.

<sup>519</sup> CCPR, *General Comment No. 35*, *op. cit.*, paras. 39–40.

<sup>520</sup> *Ibid.*, para. 41.

<sup>521</sup> *Ibid.*, para. 42.

<sup>522</sup> *Ibid.*, para. 45.

<sup>523</sup> *Ibid.*, para. 47.

<sup>524</sup> *Calovskis v. Latvia*, ECtHR, *op. cit.*, para. 200; *Sanchez-Reisse v. Switzerland*, ECtHR, Application No. 9862/82, 21 October 1986, para. 51.

which may consist of giving written comments on the extradition decision or other submissions, or presence at a hearing.<sup>525</sup>

### **3.7.2 International extradition law**

The arrest of a person whose extradition is sought may be triggered either by receipt of the extradition request, via INTERPOL or otherwise, if the criteria of the extradition treaty are met or, if the criteria are not met, in cases when the extradition is for an extraditable offence and the person is a resident of the host country.<sup>526</sup> Under the UN Model Law a judicial authority plays a central role in the authorization of the detention.<sup>527</sup> The maximum length of detention is 40 days<sup>528</sup> under the *European Convention on Extradition*.<sup>529</sup>

Under the 1993 *Minsk Convention*, a request for extradition must be accompanied by a detention order or the final judgment with the sentence.<sup>530</sup> Once it has received the request, the executing State "must immediately take measures for detention of the person to be extradited, except in cases where the extradition may not be performed".<sup>531</sup> The Convention provides that a person whose extradition is sought may be arrested before receipt of a request for his or her extradition. In such cases a special request for arrest containing a reference to the detention order and indicating that a request for extradition will follow must be sent by mail, telegraph, telex or facsimile.<sup>532</sup> Provisional detention may also be ordered if the executing State suspects that the person has committed an offence in one of the other Contracting Parties. Following the arrest, the other Contracting Party must be notified and must confirm the suspicion.<sup>533</sup> In cases of provisional arrests based on special requests, the requesting State must confirm the extradition within 30 days, whereas in cases of provisional arrests based on the suspicion of the executing State the period for confirmation depends on the domestic law of the executing State.<sup>534</sup> If an extradition has been authorized but not executed within 15 days of the fixed transfer date, the concerned person must be released from detention.<sup>535</sup>

The *Chisinau Convention* provides that, upon receipt of the extradition request, immediate steps must be taken to transfer the wanted person into custody, unless the extradition cannot be carried out.<sup>536</sup> The rules on provisional detention reflect those of the *Minsk Convention*, apart from the requirement that the judicial decision of the requesting State authorizing detention must be referenced in the extradition request.<sup>537</sup> Detention must be based on a decision by a judicial authority, of either the requesting or executing State, as provided for by the executing State's domestic law.<sup>538</sup>

<sup>525</sup> *Sanchez-Reisse v. Switzerland*, ECtHR, *op. cit.*, para. 51.

<sup>526</sup> *UN Model Law*, Section 20.1. Same in the *UN Model Treaty*, article 3.a; ECE, article 16.

<sup>527</sup> *UN Model Law*, Section 25.

<sup>528</sup> *Ibid.*, Section 27; *UN Model Treaty*, article 6.

<sup>529</sup> ECE, article 16. In any case of provisional release, "the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought", ECE, article 16.4.

<sup>530</sup> *Minsk Convention*, article 58.

<sup>531</sup> *Ibid.*, article 60.

<sup>532</sup> *Ibid.*, article 61.1.

<sup>533</sup> *Ibid.*, article 61.2–3.

<sup>534</sup> *Ibid.*, article 62.

<sup>535</sup> *Ibid.*, article 67.

<sup>536</sup> *Chisinau Convention*, article 68.

<sup>537</sup> *Ibid.*, article 70.

<sup>538</sup> *Ibid.*, article 72.

The detainee must be released if so notified by the judicial authorities of the requesting State; if the complete extradition application is not submitted within 40 days of the arrest; or if the request for provisional arrest or additional information has not been sent within the deadline.<sup>539</sup> In such cases, however, the wanted person may be arrested when the formal requirements have been satisfied or a new application is filed.<sup>540</sup> The detainee has the same right to legal representation as nationals under domestic law and the right to challenge the lawfulness of the detention before a court.<sup>541</sup> If the extradition is authorized, it must be executed within 15 days of the fixed transfer date, or the concerned person must be released from detention.<sup>542</sup>

### **3.7.3 National Laws and practices**

The level of detail of national laws and practices in the CIS States examined in this report is uneven, with the Russian Federation providing the biggest wealth of extradition practice. This is because the Russian Federation, unlike Central Asian States, is a party to the ECHR and therefore subject to the jurisdiction of the European Court of Human Rights, which has ruled numerous times on Russia's extradition system. Furthermore, the Russian Federation is the largest recipient of Central Asian immigrants and therefore has a higher number of extraditions to execute than the other countries examined.

#### **3.7.3.1 The Russian Federation**

The Russian Constitution guarantees the right to liberty and stipulates that detention is subject to mandatory judicial review, within 48 hours of apprehension.<sup>543</sup> If an extradition request has not been accompanied by an arrest warrant approved by a court of the requesting State, a prosecutor must decide whether to detain the suspect based on the CPC. In 2012, the Supreme Court ruled that a person whose extradition was sought could be detained before the receipt of an extradition request only in instances specified in international treaties to which Russia is party, for example article 61 of the Minsk Convention.<sup>544</sup> Such detention can last only up to 48 hours without judicial authorization.<sup>545</sup> After 48 hours, detention must be authorized by a court, following a hearing held in the presence of the individual concerned and his or her legal counsel. The prosecutor has a responsibility to consider the factual and legal grounds for detention.<sup>546</sup> The Constitutional Court has held that the Minsk Convention may not be used as a basis on which to permit the detention of an individual for more than 48 hours without a decision by a Russian court.<sup>547</sup>

<sup>539</sup> *Ibid.*, article 75.

<sup>540</sup> *Ibid.*, article 83.

<sup>541</sup> *Ibid.*, article 76.

<sup>542</sup> *Ibid.*, article 82.

<sup>543</sup> Constitution of the Russian Federation, article 22. B. T. Bezlepkin, *Commentary to the Criminal Procedure Code of the Russian Federation (itemized)*, 13<sup>th</sup> edition, Moscow, 2015, p. 1115.

<sup>544</sup> See: *Decision of the Plenum of the Supreme Court No. 11*, dated 14 June 2012. See: A. Smirnov, K. Kalinovskiy, *Commentary to the Criminal Procedure Code of the Russian Federation*, 6<sup>th</sup> edition, 2012.

<sup>545</sup> CPC of the Russian Federation, article 466.1. See the *Decision No. 333-O-P of the Constitutional Court of the Russian Federation*, dated 1 March 2007 pointing at Chapter 13 (articles 97–110) of the Russian Criminal Procedure Code. A. Smirnov, K. Kalinovskiy, *op. cit.*, 2012.

<sup>546</sup> See: *Decision of the Plenum of the Supreme Court of the Russian Federation No. 22*, dated 29 October 2009 (Bulletin of the Supreme Court, No. 1, 2010), para. 34.

<sup>547</sup> *Decision of the Constitutional Court of the Russian Federation No. 333-O-P* dated 1 March 2007.

If an extradition request is accompanied by an arrest warrant authorized by a court of the requesting State, a prosecutor may remand the person in custody for up to two months without a Russian court's authorization.<sup>548</sup> The European Court of Human Rights has, in several cases,<sup>549</sup> noted that neither article 61 of the *Minsk Convention* nor article 466.2 of the CPC stipulate any rules of procedure to be followed when choosing a preventive measure in respect of a person whose extradition is sought, and that article 108.4 of the CPC expressly provides that detention is to be decided upon by a judge of a district or military court.<sup>550</sup> The European Court of Human Rights, in relation to extradition cases from Russia to Central Asian States, has raised concerns with the fact that the system that does not allow for any limits on the duration of detention.<sup>551</sup> More recently, the European Court of Human Rights found that, although the Russian Supreme Court issued a Directive on 14 June 2012 to clarify the legal basis for detention, this was not sufficient to satisfy Russia's obligations under article 5.1 ECHR. While all forms of detention pending extradition are subject to judicial authorization, including detention ordered by a foreign judicial authority, the European Court of Human Rights has not clarified on which legal basis this type of detention can be ordered consistent with ECHR obligations.<sup>552</sup>

Following authorization by a court, detention may not last more than two months.<sup>553</sup> A judge may subsequently extend this period by up to six months.<sup>554</sup> Further extensions of up to 12 months may only be granted if the person is charged with serious or particularly serious criminal offences.<sup>555</sup> In exceptional cases, including offences with a maximum penalty of more than 10 years imprisonment, a senior judge may extend detention by up to 18 months more.<sup>556</sup> In principle, no extension beyond eighteen months is permissible.<sup>557</sup> Hearings are public and the proceedings adversarial.

A custodial measure may be revoked or modified by a judicial decision if the measure is no longer considered necessary.<sup>558</sup> Russian law also provides for the possibility of urgent release from detention, including detention for extradition, if the concerned individual has a serious illness.<sup>559</sup> In the case of authorized extraditions, if the requesting party does not send an escort to transfer the

<sup>548</sup> CPC of the Russian Federation, article 466.2. The same interpretation and its constitutional legitimacy was confirmed by the Russian Constitutional Court in its *Decision No. 383-O-O*, dated 19 March 2009.

<sup>549</sup> E.g. *Elmuratov v. Russia*, ECtHR, Application No. 66317/09, 3 March 2011, and *Savridin Dzhrayev v. Russia*, ECtHR, *op. cit.*

<sup>550</sup> *Ibid.*, paras. 104 and 108, 109, and *Savridin Dzhrayev v. Russia*, ECtHR, *op. cit.*, paras. 73–74.

<sup>551</sup> The Court found on numerous occasions that the provisions of articles 108 and 109 of the CCP did not allow those detained with a view to extradition to initiate proceedings for examination of the lawfulness of the detention in the absence of a request by a prosecutor for an extension of the custodial measure (see e.g.: *Khaydarov v. Russia*, ECtHR, Application No. 21055/09, 20 May 2010, paras. 139–142, 20 May 2010; *Muminov v. Russia*, ECtHR, Application No. 42502, Judgment of 4 November 2010, para. 114; *Ismoilov and others v. Russia*, ECtHR, *op. cit.*, para. 151, and *Nasrulloev v. Russia*, ECtHR, Application No. 656/06, 11 October 2007, para. 88.

<sup>552</sup> *Kholkurudov v. Russia*, ECtHR, *op. cit.*, paras. 88–93.

<sup>553</sup> CPC of the Russian Federation, article 109.1. This period shall be counted from the moment of the factual detention and includes the duration a person has spent under house arrest or medical or psychiatric examination, if applicable.

<sup>554</sup> CPC of the Russian Federation, article 109.2.

<sup>555</sup> See: Criminal Code of the Russian Federation, article 15, punished with a maximum penalty of at least five years of imprisonment.

<sup>556</sup> CPC of the Russian Federation, article 109.4.

<sup>557</sup> See also: CPC of the Russian Federation, article 109.5.

<sup>558</sup> CPC of the Russian Federation, article 110.

<sup>559</sup> *Ibid.*, article 110.11, and the Federal Law No. 103-FZ "On detention of persons suspected and accused of committing crime", dated 15 July 1995.

extradited person and does not inform the Russian Federation within 15 days from the date that was indicated by the Russian Federation as the transfer date, the person may be released from detention.<sup>560</sup>

Detention in extradition proceedings can be challenged before a district court (*habeas corpus*).<sup>561</sup> Hearings are public and adversarial and courts need to ensure the presence of persons in detention during the hearings.<sup>562</sup> The court must consider the lawfulness and validity of the decision. The complaint may be lodged by the concerned individual or his or her legal counsel or legal representative. Hearings must be held in presence of the individual concerned, his or her legal counsel or legal representative and the prosecutor. The court's decision on extradition detention, including each of the decisions to extend the term of detention, may be challenged in a higher instance court.<sup>563</sup>

### 3.7.3.2 Kazakhstan

Detention in extradition proceedings in Kazakhstan are divided into three stages:

1. Preliminary detention after apprehension is permitted for a period of up to 72 hours and carried out by the detaining authority, without the need for a court order but with the obligation to notify the prosecutor,<sup>564</sup>
2. Temporary detention to allow the requesting State to provide the material necessary to support the extradition request is permitted for a period of up to 40 days with the authorization of an investigative judge;
3. Extradition detention is authorized by an investigative judge on the basis of the material necessary to support the extradition request for a period of up to one year, but can be extended further by the same judge up to the maximum term of imprisonment provided for by the law of the requesting State for the offence on which the extradition request is based.

In preliminary detention,<sup>565</sup> ordinary criminal procedure provisions on the rights of suspects apply,<sup>566</sup> supplemented by the right to an interpreter, if necessary.<sup>567</sup> If the prosecutor decides to proceed with the extradition, he or she makes a submission to the investigative judge justifying the request.<sup>568</sup> The investigative judge must establish the nationality of the detainee and whether the alleged

<sup>560</sup> CPC of the Russian Federation, article 267. The release after 15 days is discretionary, but a person must be in any case be released after 30 days.

<sup>561</sup> CPC of the Russian Federation, article 125. See: the *Decision of the Plenum of the Supreme Court of the Russian Federation No. 1, "On the practice of consideration of applications lodged under Article 125 of the Criminal Procedure Code of the Russian Federation"*, dated 10 February 2009.

<sup>562</sup> *Decision No. 1, "On the practice of consideration of applications lodged under Article 125 of the Criminal Procedure Code of the Russian Federation"*, dated 10 February 2009. The Supreme Court clearly indicated that this procedure covers complaints against prosecutors' decisions to use house arrest or detention as a restraint measure in extradition proceedings; and that hearings in this procedure are public and adversarial and made a special note that courts need to ensure the presence of persons in detention during the hearings to ensure their right to appear before court and defend their position.

<sup>563</sup> CPC of the Russian Federation, article 108.11. This is well illustrated in all cases concerning extradition from Russia that were adjudicated by ECtHR and were cited above (see e.g.: *Khamrakulov v. Russia*, ECtHR, *op. cit.*, para. 80; *Yefimova v. Russia*, ECtHR, Application No. 39786/09, 19 February 2013, paras. 289–294; *Mamedova v. Russia*, ECtHR, Application No. 7064/05, 1 June 2006, para. 96; *Abdulkhakov v. Russia*, ECtHR, Application No. 14743/11, 2 October 2012, paras. 196–202.

<sup>564</sup> CPC of Kazakhstan, article 131.4.

<sup>565</sup> *Ibid.*

<sup>566</sup> CPC of Kazakhstan, article 586 read together with article 131.

<sup>567</sup> *Ibid.*

<sup>568</sup> This institution was established as part of the 2014 justice sector reform. See: CPC of Kazakhstan, article 588.1–3.

offence is punishable by imprisonment,<sup>569</sup> but cannot examine the lawfulness of the decisions of the foreign authorities. If the person is not brought before a judge within 72 hours or the extradition becomes impossible, the person must be released immediately.<sup>570</sup> If the foreign State fails to submit the extradition request within 40 days from when they were notified of the temporary detention, the prosecutor must release the person from detention.<sup>571</sup> Such release, however, does not preclude the prosecutor's office from submitting a new request.<sup>572</sup>

Extradition detention can be used to detain a wanted person for a period of up to 12 months from the date of initial detention, but cannot exceed the length of imprisonment prescribed by the laws of the requesting State for the crime for which the person is sought.<sup>573</sup> Extradition detention can be extended further by a court, following a request from the prosecutor, to allow organization of the transfer of the extradited person to the territory of the requesting State or completion of appeal proceedings against the decision to grant extradition.<sup>574</sup> If the person whose extradition is sought is not transferred within this period, he or she must be released.<sup>575</sup>

Decisions on preliminary detention and extradition detention can be appealed to the regional court, which decides within three days on the lawfulness of the investigative judge's decision.<sup>576</sup>

Following recent reforms, the detained person has the right to appeal against the detention decision<sup>577</sup> to the investigative judge. However, the effective availability in practice of this remedy seems not to have been yet widely tested and is doubtful considering the concluding observations of the UN Committee against Torture that Kazakhstan "has not yet ensured the right of a detained person or his or her representative to petition a court to review the lawfulness of detention through a habeas corpus procedure".<sup>578</sup>

### 3.7.3.3 Kyrgyzstan

In Kyrgyzstan, provisional arrest of a person sought for extradition may be ordered based on an international request for extradition from any State.<sup>579</sup> Detention for more than 40 days requires a valid arrest warrant and a formal request to extradite. If these are not received within 40 days, the detained person is released. An arrest warrant issued by a foreign jurisdiction is considered sufficient to detain a requested person. Since the CPC requires only a warrant "by the authorized body," depending on the legislation of the requesting State, the warrant in question may not be a judicial warrant. Deprivation of liberty pending extradition is subject to the same set of safeguards as pre-trial detention.

Any procedural decision, including in relation to detention pursuant to extradition, be it by the investigator, prosecutor or the court, may be appealed to

<sup>569</sup> CPC of Kazakhstan, article 589.4.

<sup>570</sup> *Ibid.*, article 587.4.

<sup>571</sup> CPC of Kazakhstan, article 588.8, and *GPO Instruction No. 166*, para. 46.

<sup>572</sup> CPC of Kazakhstan, article 588.9, and *GPO Instruction No. 166*, para. 46.

<sup>573</sup> CPC of Kazakhstan, article 589.7.

<sup>574</sup> *Ibid.*, article 589.9.

<sup>575</sup> *Ibid.*, article 589.10–11.

<sup>576</sup> *Ibid.*, article 107.

<sup>577</sup> See: *Ibid.*, article 586.6.

<sup>578</sup> *Concluding Observations on Kazakhstan*, CAT, UN Doc. CAT/C/KAZ/CO/3, 12 December 2014.

<sup>579</sup> CPC of the Kyrgyz Republic, article 435.1.



a court of law.<sup>580</sup> In particular, judicial authorization of pre-trial detention may be appealed in court by the accused, the prosecutor or defence counsel.<sup>581</sup> Judicial review of the legality of detention is mandatory<sup>582</sup> and the judge can order the immediate release of the person if he or she has found the detention unlawful.<sup>583</sup> If, however, the detention is based on an arrest warrant issued by a foreign court or other judicial authority, no appeal is foreseen before the Kyrgyz courts.

#### 3.7.3.4 *Tajikistan*

In Tajikistan, provisional arrest is based on an international request for extradition and finds its legal basis in article 481 of the CPC. Detention requires a valid arrest warrant and a formal request to extradite. In the event that extradition does not take place within 30 days, the detained person may be released but only following a court ruling. The language of the provision (notably the apparent conflict between the word “subject” and the subsequent condition of release) is less than unequivocal and leaves room for interpretation. Deprivation of liberty pending extradition is subject to the same set of safeguards as pre-trial detention, as set out in article 481 of the CPC.

Pre-trial detention may only be imposed following judicial authorization. The judge is required to review the motion<sup>584</sup> and may order the person’s release.<sup>585</sup> A judicial authorization for detention may be appealed to the superior court.<sup>586</sup>

#### 3.7.3.5 *Turkmenistan*

In Turkmenistan, the CPC regulates what is called “custody pending extradition” separately from pre-trial detention. The CPC permits the authorities to take a person into custody pending extradition based either on a valid extradition request or on a request to provisionally arrest the person, with the Prosecutor General notifying the requested State that the extradition request must follow. Custody pending detention is subject only to prosecutorial authorization, with the authorizing prosecutor being required to immediately notify the Prosecutor General of the arrest made.<sup>587</sup> The person sought is informed of arrest by the authorizing prosecutor and is expected to confirm as such by signing the authorization. There is no requirement for judicial authorization of detention nor a mechanism for judicial review of custody pending extradition.<sup>588</sup>

In the event that the individual in question is taken into custody pending extradition, his or her transfer must take place within 30 days of the arrest. Failing this, the person whose extradition is sought must be released.<sup>589</sup> In the case of an arrest at the initiative of the authorities of Turkmenistan on suspicion of a person having committed an extraditable offence, the individual must be released if no extradition request or request for provisional arrest has been submitted within the term stipulated by law.<sup>590</sup> The person may not be rearrested

<sup>580</sup> *Ibid.*, article 25.

<sup>581</sup> *Ibid.*, article 109.4.

<sup>582</sup> *Ibid.*, article 110.

<sup>583</sup> *Ibid.*, article 110.5.

<sup>584</sup> CPC of Tajikistan, article 111.

<sup>585</sup> *Ibid.*, article 111.5.

<sup>586</sup> *Ibid.*, article 111.9.

<sup>587</sup> CPC of Turkmenistan, article 555.1.

<sup>588</sup> *Ibid.*

<sup>589</sup> *Ibid.*, article 555.3, i.e. presumably within three days.

<sup>590</sup> *Ibid.*

unless a valid extradition request or a request for provisional arrest is received.<sup>591</sup> While the maximum length of custody pending extradition is 30 days, this period may be extended even if no valid extradition request supported by an arrest warrant has been received provided the requesting State undertakes to submit such a request.<sup>592</sup> Extension of custody pending extradition is subject to authorization by the regional prosecutor and notification of the Prosecutor General. In “exceptional circumstances” the Prosecutor General may grant a further extension of up to three months.<sup>593</sup>

While the CPC includes a provision concerning “oversight of pre-trial detention to ensure that it is lawful and justified,”<sup>594</sup> the overseeing authority under the CPC is the same as the authorizing authority, i.e. the prosecutor. This creates a situation where the legality of pre-trial detention is virtually immune from review.

### 3.7.3.6 *Uzbekistan*

In Uzbekistan, the CPC permits the authorities to take a person into custody based on a request to extradite or “where there exist legitimate grounds to suspect that the person committed in the territory of a foreign State a crime that may entail extradition”.<sup>595</sup> The CPC also provides for provisional arrest if the authorized body of the requesting State indicates that it intends to submit an arrest warrant.<sup>596</sup> Once the person in question has been arrested, the prosecutor must ask the court to issue an arrest warrant in accordance with ordinary criminal procedure. Following approval of the extradition request,<sup>597</sup> the transfer must take place within 15 days of the agreed date. If not, the person subject to extradition must be released.<sup>598</sup>

Pre-trial detention may only be imposed on the order of a judge. The judge is required to review the application<sup>599</sup> and may order the person’s release.<sup>600</sup> The judge’s decision authorizing pre-trial detention may be appealed to the superior court.<sup>601</sup>

### 3.7.3.7 *National laws and practices of European Countries*

In Germany, detention for extradition may be granted only if there is a risk of flight or of obstruction of the investigation.<sup>602</sup> The rules governing detention are based on criminal procedure law.<sup>603</sup> Provisional detention — i.e. until receipt of the complete extradition request — may last up to two months for “European States” (*sic*)<sup>604</sup> and three months for non-European States.<sup>605</sup> The arrest and

<sup>591</sup> *Ibid.*

<sup>592</sup> *Ibid.*, article 555.4.

<sup>593</sup> *Ibid.*

<sup>594</sup> *Ibid.*, article 163.

<sup>595</sup> CPC of Uzbekistan, article 605. In the latter case, custody cannot exceed 72 hours in duration, unless a valid request to extradite is received in the meantime.

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*, article 607.

<sup>598</sup> *Ibid.*

<sup>599</sup> *Ibid.*, article 243.

<sup>600</sup> *Ibid.*

<sup>601</sup> *Ibid.*, article 241.

<sup>602</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 15.

<sup>603</sup> *Ibid.*, Section 27.

<sup>604</sup> This is the official translation into English of the *Act on International Cooperation in Criminal Matters of Germany*. It is not therein defined what a European State is.

<sup>605</sup> *Act on International Cooperation in Criminal Matters of Germany*, Section 16.

detention are ordered by a court.<sup>606</sup> The arrested person must be brought before a judge at the latest the day after the arrest<sup>607</sup> or, once the extradition has been approved, for the purpose of executing the extradition.<sup>608</sup> The justification and lawfulness of the detention is reviewed by a court every two months.<sup>609</sup>

In Spain, detention may be requested in urgent cases but the detainee must be brought before the investigative judge of the *Audiencia Nacional* within 24 hours. The investigative judge can authorize detention for a period of up to 40 days. The Judge can review the detention at any time, order the release of the detainee and impose restrictions on his or her freedom of movement instead.<sup>610</sup> If the requesting State has not formally requested extradition within the 40 days, the detainee must be released. Otherwise the term of detention can be extended for a further 40 days. The maximum limit must be interpreted in light of the equivalent provisions of the Criminal Procedure Code.<sup>611</sup>

In Italy, detention may be ordered in accordance with the ordinary rules of criminal procedure,<sup>612</sup> with particular emphasis on the need to prevent flight of the person sought for extradition. The general rule is that detention cannot last for more than one year in proceedings before the court of appeals, one and a half years if the matter is referred to the Cassation Court, with a possible extension for exceptional reasons of three months.<sup>613</sup> When the detention is ordered by a non-judicial authority, the President of the court of appeals must meet the detainee within five days of the arrest.<sup>614</sup> In case of any negative decision on the extradition request or the lack of a decision within the time frame, the concerned person must be released from detention.<sup>615</sup> An important safeguard in Italian law states that only the extradition procedure may be used for transfers involving deprivation of liberty.<sup>616</sup>

In France, the ordinary provisions on police custody for domestic investigations apply.<sup>617</sup> The person whose extradition is sought must be brought before a general public prosecutor within 48 hours, who must communicate to the concerned person his or her right to have and consult with legal counsel immediately, of the possibility to consent to the extradition or to waive the specialty rule, and of the legal consequences of doing so. Failure to notify the person of these rights nullifies the extradition proceedings.<sup>618</sup> Detention must be decided by the President of the court of appeal or a judge on his or her behalf, based on the validity of the extradition request. It is possible for the judge to order alternative measures, for example house arrest, or electronic surveillance, among others.<sup>619</sup> The detainee can always ask the competent court for release from detention through a habeas corpus procedure.<sup>620</sup> The judge can confirm the detention, order the release or commute it to an alternative

<sup>606</sup> *Ibid.*, Section 17.

<sup>607</sup> *Ibid.*, Sections 21–22.

<sup>608</sup> *Ibid.*, Section 34.

<sup>609</sup> *Ibid.*, Section 26.

<sup>610</sup> Law 4/1985 of Spain, article 8.

<sup>611</sup> *Ibid.*, article 10.

<sup>612</sup> CPC of Italy, articles 714–715.

<sup>613</sup> *Ibid.*, article 714.4.

<sup>614</sup> *Ibid.*, article 717.

<sup>615</sup> *Ibid.*, article 708.

<sup>616</sup> *Ibid.*, article 697.

<sup>617</sup> CPC of France, article 696-9.

<sup>618</sup> *Ibid.*, article 696-10.

<sup>619</sup> *Ibid.*, article 696-11.

<sup>620</sup> *Ibid.*, article 696-19.

measure.<sup>621</sup> In urgent cases, and if asked by the requesting State, it is possible to proceed with an arrest while awaiting the transmission of the full extradition request. All the guarantees of the extradition proceedings apply *mutatis mutandis*. The person must be released if the formal extradition request is not received within 30 days.<sup>622</sup>

### 3.7.4 Conclusions

When an individual is deprived of his or her liberty following an extradition request it is critical that he or she has access to full human rights protection and to the means to ensure such protection. This involves protection against arbitrary detention; the right to *habeas corpus*; judicial control over all detentions; and access to legal counsel, among other protections. Detention in a foreign country to answer charges filed in a second country makes it difficult for the person to access effective remedies.

The main problem identified in the laws and procedures of CIS countries is the reliance, seemingly without meaningful or independent review, on the validity of the requesting State's application to detain a person pending extradition, which bypasses the assessment of the courts. Even if envisaged by the *Minsk Convention*, human rights law does not permit judicial control and other human rights protections regarding respect for the right to liberty to be divested in this way. Any detention must have a precise legal basis in national law, according to articles 9.1 of the ICCPR and 5.1 of the ECHR. The European Court of Human Rights has highlighted the lack of such a legal basis with regard to the Russian Federation, and neither the legislature nor Russian courts have adopted the necessary measures to adequately address the deficiencies identified by the Court.

In Turkmenistan, courts are not involved at all in the decision to detain in execution of an extradition request. The lack of judicial involvement in such decisions is inconsistent with the rule of law.

The lack of respect for the principle of legality in detention is aggravated by the presumption in favour of detention in extradition cases in Russian and Central Asian criminal codes. Similar to the framework of the *Minsk* and *Chisinau Conventions*, detention seems to be the resorted to for any extradition procedure. As set out above, in the EU countries considered, other factors such as the seriousness of the offence or flight risk must be fulfilled.

Finally, legal provisions that exclude any assessment by judicial authorities when an international arrest warrant is received from foreign judicial authorities and the attitude of judges in extradition proceedings not to assess the human rights implications of extradition detention is highly problematic. This concern is aggravated by the failure of courts to assess the human rights risks arising from extradition in terms of the principle of *non-refoulement*. Since detention is based on the extradition request, any human rights shortcoming in this procedure impacts on the extradited person's right to liberty.

## 3.8 Conclusions

In the European and CIS extradition systems analysed above, both in terms of requests for and execution of extradition, procedures and practices are

<sup>621</sup> *Ibid.* Modifications of these measures may be requested using a similar procedure (see: article 696-20).

<sup>622</sup> *Ibid.*, articles 696-23, 24.

internationalized through the creation of organizations like INTERPOL or databases such as the CIS Inter-State Database, or through attempts to harmonize procedures such as the *Minsk* and *Chisinau Conventions* and the European Arrest Warrant system.

An analysis of both the CIS and EU systems marks a tendency of the reviewed States to ground their systems of transfer of criminal suspects on mutual confidence and the harmonization of criminal justice systems. There is a significant difference between the two regions however: the CIS countries all have a shared history and legal culture as former members of the Soviet Union. Although this has led to similar legal systems, it has not led to human rights compliance.

In contrast, the EU Member States considered have been historically divided for centuries and have different legal systems with their own peculiarities. The implementation of criminal cooperation based on mutual confidence—without a proper human rights-centred harmonization of the legal systems—is therefore likely to enhance the risk of human rights violations of persons subject to transfer.

In both regions, it is therefore time to reform these systems of criminal cooperation so as to ensure compliance with their human rights and refugee law obligations under international law. This is necessary both substantively, by inserting human rights protections, in particular prohibitions on extradition based on international law, expressly in their legislation (preferably their criminal codes), and procedurally. The EU has already begun a process of reform of both its law and EU Member States law, although it is not comprehensive. For the laws to be human rights compliant, it is necessary for national courts to be effective, impartial and independent and involved in all steps of the extradition procedure, including when the request is made, and by allowing judicial procedures for withdrawal of such requests. Equally, at the execution stage, the meaningful review of the merits of the extradition request and its compliance with human rights and refugee law must be assessed by courts. As regards detention, judicial control is imperative, as is protection of the right to challenge the lawfulness of the detention through habeas corpus or similar proceedings.

International organizations, such as INTERPOL and the authorities responsible for administering the CIS Inter-State wanted persons database and the Schengen Information System II, must ensure that their actions are human rights compliant, including by taking into consideration *non-refoulement* issues, and are not helping States to bypass their obligations under international law. Independent systems to prevent and redress human rights violations must be set up in both the INTERPOL and CIS system.

The main obstacle to fast and effective extradition procedures is the lack of compliance with human rights law in the requesting countries, and not the existence of mechanisms to ensure respect for these standards. It is essential that human rights law harmonization is undertaken by adopting international law and standards and not by adopting a lowest common denominator approach. If this can be achieved among the legal systems of the States considered above, criminal cooperation can be faster, fairer, and more effective.

## IV. Expulsions

### 4.1 Introduction

While the expulsion of foreign nationals may be undertaken for any number of reasons, reliance specifically on national security grounds as a basis for expulsion has increased around the world. Expulsion for national security reasons has been an element of the security arsenal of States for centuries. In the last decade in Europe, the use of expulsions has surged and has become one of the most visible aspects of security policies of national Governments. In some cases, these expulsions are based on criminal law, as an additional sanction, and in other cases on security or immigration laws. Although statistically national security expulsions are less common than other forms of involuntary transfer of migrants, their importance is not to be underestimated. They are openly promoted in the public sphere as effective anti-terrorism and security tools and, regrettably, are often an effective means of bypassing human rights guarantees.

For example, in 2015 the Italian Minister of Interior ordered 63 persons to be expelled, while 343 persons were rejected at the border on security grounds.<sup>623</sup> The Ministry stated that from 2001 to 2015, it implemented 228 expulsion orders on “international terrorism” grounds (57 of these were since February 2014). Italy also expelled 19 Imams without specifying the ground for expulsion. A further 48 persons were labelled “Islamist extremists” and expelled from December 2014 to the beginning of 2016. During a similar period there were 192 expulsions or “push backs” at the border.<sup>624</sup> In July 2016, the then Minister of Interior, Angelino Alfano, declared that, since January 2015, 102 persons had been expelled on national security grounds.

In France, on 7 March 2016, the then Minister of Interior, Bernard Cazeneuve, announced that, since the entry into force of the anti-terrorism law of 13 November 2014, 97 prohibitions of entry had been ordered and 54 persons “preaching hatred”<sup>625</sup> were expelled. In France, the Action Plan against Radicalization and Terrorism of 2016 affirms that, since January 2015, 99 prohibitions of entry to the territory were issued and, since April 2014, 64 expulsions were executed.<sup>626</sup>

The UK Home Office states that in “the year ending September 2016, provisional data show that 5,825 FNOs [i.e. foreign national offenders] were returned compared to 5,729 in the previous year (up two percent). This is the second highest number since the series began in 2009 and reflects increasing use of other forms of FNO returns, including those where an offence was committed outside the UK.”<sup>627</sup>

In 2015, Spain expelled 5,539 persons because they were said to be repeat offenders, responsible for violent or other serious acts, terrorists or convicted

<sup>623</sup> *Attività del Ministero dell'Interno 2015*, 22 December 2015, <http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/attivita-ministero-2015>.

<sup>624</sup> See all data at <http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/i-dati-sullattivita-antiterrorismo>.

<sup>625</sup> Unofficial translation. See, <http://www.interieur.gouv.fr/Archives/Archives-ministre-de-l-interieur/Archives-Bernard-Cazeneuve-avril-2014-decembre-2016/Interventions-du-ministre/07.03.2016-Moyens-mis-en-aeuvre-par-l-Etat-pour-lutter-contre-le-terrorisme-depuis-le-7-janvier-2015>.

<sup>626</sup> *Plan d'Action contre la radicalisation et le terrorisme*, 9 May 2016, p. 29.

<sup>627</sup> See statistics at <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2016/returns>.

persons whose sentence was substituted with expulsion, in preventive detention or as a post-sentence preventive measure. There were 6,557 such persons in 2014.<sup>628</sup>

As regards Central Asian States, publicly available statistics are scarce or non-existent. For example, in 2014, in Kyrgyzstan the number of removals was 310, while in Tajikistan in the first 10 months of 2013, the total number of removals was 419.<sup>629</sup> In the Russian Federation, courts delivered 45,227 decisions on expulsion orders in 2012. This number increased dramatically to 137,097 in 2013, 198,371 in 2014 and 177,821 in 2015. Ninety-eight percent of them were expulsions for having committed an administrative offence.<sup>630</sup>

## 4.2 International law

### 4.2.1 What is an expulsion?

According to the European Court of Human Rights, “[w]ith the exception of extradition, any measure compelling a foreign national’s departure from the territory where he or she was lawfully resident constitutes an ‘expulsion’.”<sup>631</sup> While the traditional understanding of an expulsion is that of a formal order and process positively carried out by the State authorities, it can also result from omissions by the State to protect someone from the behaviour of non-State actors that compels a person to leave the country.<sup>632</sup>

The current position in international law is that States are prohibited from resorting to expulsion procedures to circumvent an ongoing extradition procedure.<sup>633</sup> The prohibition however does not apply once the extradition procedure has been completed or abandoned.<sup>634</sup>

In all States, a variety of expulsion procedures may be administered under different names and in accordance with various legal bases or objectives. Common forms of expulsion include deportation, administrative removal and accompaniment to the border. For the sake of consistency, in this report the generic expression “expulsion” adopted by international law instruments will be used.

<sup>628</sup> Inmigración irregular, *Balance 2015 Lucha contra la inmigración irregular*, Ministerio del Interior, September 2016, p. 15, <http://www.interior.gob.es/es/prensa/balances-e-informes/2015>.

<sup>629</sup> These statistics are based on the information included in the *Annual Report of the Prosecutor General of Kyrgyzstan for 2014* and *Migration Profiles for Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan* developed as part of the Prague Process. Note that not all Migration Profiles include information on removals of aliens from the State in question (for instance, the Migration Profiles for Turkmenistan and Uzbekistan do not).

<sup>630</sup> Civil Assistance Committee, *Administrative Expulsions from Russia: Court proceedings or Mass expulsions?*, Moscow, 2016, pp. 11–12.

<sup>631</sup> *Nolan and K. v. Russia*, ECtHR, Application No. 2512/04, Judgment of 12 February 2009, para. 112. See: ICJ, *Migration and International Human Rights Law, Practitioners Guide No. 6*, 2<sup>nd</sup> edition, pp. 150–151 and its fn. 495 for related comprehensive jurisprudence.

<sup>632</sup> *ILC Articles on Expulsion of Aliens*, Commentary, p. 5, article 2, para. 4. Indeed the ILC stated that “the determining element in the definition of expulsion is that, as a result of either a formal act or conduct—active or passive—attributable to the State, the alien in question is compelled to leave the territory of that State. In addition, ... it is essential to establish the intention of the State in question, by means of that conduct, to bring about the departure of the alien from its territory.” Indeed, the ILC Articles prohibit ‘disguised expulsions’, i.e. “the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory, other than in accordance with the law.” (article 10.2). The rationale is that, through these practices, the person expelled is deprived of his or her human rights, in particular procedural rights linked to the expulsion procedure. *ILC Articles on Expulsion of Aliens*, Commentary, p. 16, article 10, para. 2.

<sup>633</sup> *ILC Articles on Expulsion of Aliens*, article 12.

<sup>634</sup> *Ibid.*, Commentary, p. 19, article 12, para. 1.



### 4.2.2 Human rights safeguards

The main international human rights and refugee law applicable to expulsion is the law applicable to all kinds of transfer of persons out of a State's jurisdiction. These have been considered above, in Chapter II. The human rights guarantees that are engaged as a result of the expulsion procedure stem, in particular, from the absolute prohibition of collective expulsion, the right to an effective remedy and the principle of *non-refoulement*.<sup>635</sup>

With regard to specific international human rights law provisions applicable exclusively to expulsion proceedings, the ICCPR and the ECHR do not provide for the full panoply of protections required, for example, in criminal trials, to expulsion proceedings. Nonetheless, they do provide specific procedural guarantees for non-nationals lawfully in the territory of a State, leaving undocumented migrants relatively unprotected.

Irrespective of context, expulsions must not discriminate in purpose or effect on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, sexual orientation or gender identity or other status.<sup>636</sup> Persons maintaining any of these statuses are entitled to equal protection under the law.

In addition, articles 22 and 23 of the *International Convention on the Rights of Migrant Workers and Their Families* (ICRMW) provide for universal and detailed guarantees pertaining to expulsion procedures, which apply to both regular and undocumented migrant workers.<sup>637</sup> The Convention creates binding obligations for two Central Asian countries, Kyrgyzstan and Tajikistan, although the two provisions may serve as a reference point when interpreting binding law from other sources. Article 22 contains a prohibition on collective expulsion.<sup>638</sup>

Guarantees under article 13 ICCPR and article 1 of Protocol 7 ECHR are excluded for migrants unlawfully present on the territory. Article 13 ICCPR applies to non-nationals "lawfully in the territory" of the State Party<sup>639</sup> and when the lawfulness of a non-national's presence on the territory is in dispute.<sup>640</sup> Rights under article 1 of Protocol No. 7 ECHR, apply only to non-nationals "lawfully resident" in the territory of the State Party. The notion of "lawful residence" is broader than that of physical presence on the State's territory.<sup>641</sup>

#### 4.2.2.1 Decision in accordance with law

The first condition for a permissible expulsion is that the decision to expel must be reached in accordance with law, consonant also with the general principle of

<sup>635</sup> See: Introduction, Section II for the principle of *non-refoulement*. See: ICJ, *Migration and International Human Rights Law, Practitioners Guide No. 6*, 2<sup>nd</sup> edition, Chapter III, Section II, Title 1.

<sup>636</sup> CCPR, *General Comment No. 15, op. cit.*, paras. 9–10. See: ICCPR, article 2.3 read together with article 13 and article 26; ICRMW, article 7 read together with article 22; ECHR, article 14 read together with ECHR, article 1 of Protocol 7, and, separately, ECHR, article 1 of Protocol 12). ICERD, articles 5(a) and 6 prohibit discrimination in expulsion proceedings on grounds of race, colour, descent, or national or ethnic origin (see: *Concluding Observations on Dominican Republic*, CERD, UN Doc. CERD/C/DOM/CO/12, 16 May 2008, para. 13). Discrimination on grounds of sex is specifically prohibited by ICCPR, article 3 read together with article 13, and CEDAW, article 15.1; and discrimination on grounds of disability by CRPD, article 5.

<sup>637</sup> See: Committee on Migrant Workers (CMW), *General Comment No. 2*, UN Doc. CMW/C/GC/2, 28 August 2013, paras. 49–58.

<sup>638</sup> ICRMW, article 22.1.

<sup>639</sup> CCPR, *General Comment No. 15, op. cit.*, para. 9. See also: *Kindler v. Canada*, CCPR, *op. cit.*, para. 6.6; *Nolan and K v. Russia*, ECtHR, *op. cit.*

<sup>640</sup> *Ibid.*, para. 9.

<sup>641</sup> *Ibid.*

legality.<sup>642</sup> This includes the need to provide for expulsion measures in domestic law as well as for the law to be accessible, foreseeable, and afford protection against arbitrary action by public authorities.<sup>643</sup> To be in accordance with law, an expulsion must comply with both the substantive and the procedural requirements of the law,<sup>644</sup> which must be interpreted and applied in good faith,<sup>645</sup> taking into account all the circumstances of the individual case.

#### 4.2.2.2 *Right to submit reasons against expulsion*

The person subject to expulsion has the right to make submissions against the expulsion.<sup>646</sup> As this right must be interpreted in a way that guarantees that it is practical and effective, it is essential that the reasons for expulsion be communicated to the person to be expelled to a degree of specificity sufficient to enable effective submissions against expulsion, in a language that he or she understands and in an accessible manner.<sup>647</sup>

#### 4.2.2.3 *Right to legal representation*

The right to representation before the authority competent to decide on the expulsion is specifically guaranteed.<sup>648</sup> States should grant “free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary”.<sup>649</sup> The time-limits for exercising a remedy against expulsion must not be unreasonably short, and “the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid”.<sup>650</sup>

#### 4.2.2.4 *Right to an appeal*

States must guarantee the right to an appeal against expulsion decisions before an independent authority.<sup>651</sup> The Human Rights Committee has found that

<sup>642</sup> ICCPR, article 13; ECHR, article 1 of Protocol 7, and ICRMW, article 22.2.

<sup>643</sup> *Lupsa v. Romania*, ECtHR, Application No. 10337/04, Judgment of 8 June 2006, para. 55; *Kaya v. Romania*, ECtHR, Application No. 33970/05, Judgment of 12 October 2006, para. 55; *C. G. and others v. Bulgaria*, ECtHR, *op. cit.*, para. 73. See also: *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925<sup>th</sup> meeting of the Ministers’ Deputies, Guideline 2.

<sup>644</sup> *Maroufidou v. Sweden*, CCPR, Communication No. 58/1979, Views of 8 April 1981, para. 9.3; *Bolat v. Russia*, ECtHR, Application No. 14139/03, 5 October 2006, para. 81. See also: *Lupsa v. Romania*, ECtHR, *op. cit.*, paras. 56–61; *Kaya v. Romania*, *op. cit.*, paras. 56–61.

<sup>645</sup> *Ibid.*, para. 10.1.

<sup>646</sup> ICCPR, article 13; ICRMW, article 1.1(a) of Protocol 7, and article 22.4.

<sup>647</sup> *Lupsa v. Romania*, ECtHR, *op. cit.*, paras. 59–60; *Kaya v. Romania*, ECtHR, *op. cit.*, paras. 59–60; *Nolan and K. v. Russia*, *op. cit.*, para. 115; CCPR, *General Comment No. 15*, *op. cit.*, para. 10. See: ICRMW, article 22.3, and *Twenty Guidelines on Forced Return*, *op. cit.*, Guideline 4.1.

<sup>648</sup> ICCPR, article 13, and ECHR, article 1.1(c) of Protocol 7.

<sup>649</sup> *Concluding Observations on Switzerland*, CCPR, UN Doc. CCPR/C/CHE/CO/3, 29 October 2009, para. 18; *Concluding Observations on Ireland*, CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 19. *Concluding Observations on Japan*, CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25. The European Court of Human Rights found a violation of the procedural guarantees of ECHR, article 1 of Protocol 7, where “the decision on the applicant’s exclusion had not been communicated to him for more than three months and [...] he had not been allowed to submit reasons against his expulsion and to have his case reviewed with the participation of his counsel” *Nolan and K. v. Russia*, *op. cit.*, para. 115.

<sup>650</sup> *Twenty Guidelines on Forced Return*, *op. cit.*, Guideline 5.2.

<sup>651</sup> ECHR, article 1 of Protocol 7, and ICRMW, article 22.4. See: *Explanatory Report, ETS No. 117*, *op. cit.*, para. 13.2. See also: *Europe’s boat people: mixed migration flows by sea into southern Europe*, PACE Resolution No. 1637 (2008), para. 9.10.4.

"[a]n alien must be given full facilities for pursuing his remedy against expulsion... [These] principles ... may only be departed from when 'compelling reasons of national security' so require. There must be no discrimination between different categories of aliens in the application of [the procedural rights in expulsion proceedings]." <sup>652</sup> The Council of Europe's Committee of Ministers has specified that "[t]he competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution". <sup>653</sup>

#### 4.2.2.5 Public order and national security limitations

The ICCPR and ECHR permit limitations to the procedural guarantees set out above in expulsion proceedings where required by "compelling reasons of national security" <sup>654</sup> or as is "necessary in the interests of public order or is grounded on reasons of national security". <sup>655</sup> In such cases, a non-national may be expelled before the exercise of these rights, without undermining his or her entitlement to exercise these rights after the expulsion. <sup>656</sup> In practice, however, such non-suspensive rights of review are unlikely to provide effective protection.

The principles of proportionality and necessity must be met for any protective exceptions to be claimed. The security needs must be "compelling", thereby "requiring" the exception. When these exceptions are claimed, the State must provide evidence capable of corroborating its assertion that the interests of national security or public order are at stake (and that these interests are of a compelling nature). <sup>657</sup> The State must demonstrate that the decision is adequately prescribed by law (i.e. that it has an accessible and foreseeable basis in national law), that it is taken pursuant to a legitimate aim, and is necessary in a democratic society and proportionate to the aim pursued. <sup>658</sup>

An expulsion decision should state the grounds on which it is based, those grounds must be provided by law and "assessed in good faith and reasonably, in light of all circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise." <sup>659</sup> Notably, no one can be expelled "on a ground that is contrary to [the State's] obligations under international law". <sup>660</sup>

It is important to note that article 22 ICRMW, concerning procedural rules for expulsions, is not qualified and therefore does not permit any restriction. The only procedural guarantees that can be dispensed with in situations of

<sup>652</sup> CCPR, *General Comment No. 15, op. cit.*, para. 10. See also: *Hammel v. Madagascar*, CCPR, Communication No. 155/1983, Views of 3 April 1987, paras. 19.2–19.3; *Concluding Observations on Sweden*, CCPR, Report of the Human Rights Committee to the General Assembly, 51<sup>st</sup> Session, Vol. I, UN Doc. A/51/40 (1996), paras. 88 and 96; *Concluding Observations on Syrian Arab Republic*, CCPR, Report of the Human Rights Committee to the General Assembly, 56<sup>th</sup> Session, UN Doc. A/56/40 (2001); *Concluding Observations on Ireland*, CCPR, 2008, *op. cit.*, para. 19; *Concluding Observations on Dominican Republic*, CERD, 2008, *op. cit.*, para. 13.

<sup>653</sup> *Twenty Guidelines on Forced Return, op. cit.*, Guideline 5.1.

<sup>654</sup> ICCPR, article 13.

<sup>655</sup> ECHR, article 1 of Protocol 7.

<sup>656</sup> *Explanatory Report, ETS No. 117, op. cit.*, para. 15.

<sup>657</sup> *Nolan and K. v. Russia, op. cit.*, para. 115; *Explanatory Report, ETS No. 117, op. cit.*, para. 15.

<sup>658</sup> See: *C. G. and others v. Bulgaria*, ECtHR, *op. cit.*, para. 78.

<sup>659</sup> *ILC Articles on Expulsion of Aliens*, article 5.3.

<sup>660</sup> *Ibid.*, article 5.4.

“compelling reasons of national security” are the right to challenge the expulsion measure and to be informed of the grounds for the expulsion decision.<sup>661</sup>

Finally, no justification based on national security, public order or any other ground may justify the execution of an expulsion if there are substantial grounds to believe that the person being expelled is at real risk of serious violations of human rights or their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (principle of *non-refoulement*) or if they could be exposed to a real risk of onward removal to such a country (indirect *refoulement*).<sup>662</sup>

### **Box 11: The Shalabayeva Case (Italy)**

Alma Shalabayeva, a Kazakh national and the wife of Mukthar Ablyazov (see Box No. 2), arrived in Italy in 2012 with her daughter and went to live in Rome. On 28 May, officers of the Kazakh Embassy informed the Italian authorities that her husband, who was the target of an international arrest warrant, was in her house in Rome. For this reason, the Italian authorities stated that they raided her house and arrested her with her daughter because they lacked appropriate identification documents. Her husband was in fact not home.

An expulsion order was issued on 29 May 2013 for having unlawfully entered the Italian territory and stayed irregularly. No humanitarian or human rights considerations were taken into account and no voluntary period of the expulsion granted on the grounds that she was considered a flight risk. This risk was presumed because she declared she did not want to return to her country of origin, she did not provide a valid document to travel, she did not ask for such a document and did not provide sufficient financial guarantees. Within hours she was returned to Kazakhstan with her daughter, who was a minor. A justice of the peace validated her detention on 31 May 2013.

According to a subsequent ruling of the Court of Cassation, the Italian authorities knew the identity of Alma Shalabayeva since May 2013 and that she was at risk of persecution if sent to Kazakhstan.<sup>663</sup>

The Court of Cassation ruled that the factual modalities of the expulsion (the night raid), the knowledge of the real identity of Alma Shalabayeva, the validity of her ID (a genuine diplomatic passport of the Central African Republic) and of two valid residence permits, as well as the absolute lack of time and language facilities to allow her to clarify the conditions of her stay in the country had vitiated her expulsion order from the day it was issued and, consequently, her detention order. The Court added that the excessive speed of the expulsion irremediably nullified her right to seek asylum and her right of defence.<sup>664</sup>

The case drew a high level of scrutiny in the media and in Parliament. The then Minister of Foreign Affairs, Emma Bonino, managed to secure the re-transfer of Ms Shalabayeva and her daughter back to Italy, on 27 December 2013. In April 2014, they obtained refugee status in Italy.<sup>665</sup>

<sup>661</sup> ICRMW, article 22.3 and 4; CMW, *General Comment No. 2*, *op. cit.*, para. 53.

<sup>662</sup> See: for the Principle of *non-refoulement*, Introduction, Section II.

<sup>663</sup> Court of Cassation, *Sixth Civil Section 1*, Ruling 17401/2014 of 11 July 2014, p. 5.

<sup>664</sup> *Ibid.*

<sup>665</sup> Il Sole 24 Ore, ‘*Shalabayeva, Italia concede l’asilo politico*’, 18 April 2014 [accessed on 4 July 2017].

The justice of the peace and seven police officers involved in the case are currently under criminal investigation for kidnapping and abuse of administrative and judicial procedures.<sup>666</sup>

### 4.3 The use of expulsion in national security cases in the CIS

#### 4.3.1 The Russian Federation

The legal framework on migration is applied frequently in the Russian Federation given that there is a strong and established presence of migrant workers from Central Asia in the country. Currently, the majority of migrant workers coming to the Russian Federation are from Central Asian countries.<sup>667</sup>

Both the European Court of Human Rights and the UN Human Rights Committee have established that the Russian Federation has attempted to use administrative expulsion proceedings with respect to persons who were at real risk of persecution or of being subjected to torture or other cruel, inhuman and degrading treatment in the receiving State. These include individuals who the Russian Federation had previously attempted to extradite at the request of their countries of origin but were prevented from doing so by national authorities because of human rights safeguards.<sup>668</sup>

Nationals of Central Asian States, apart from those from Turkmenistan, do not need visas to enter the Russian Federation. This does not mean that the country is a free movement area, since they need to respect certain stay requirements. If they fail to satisfy one of these requirements they are considered to be irregularly present on the territory of the Russian Federation. A newly arriving foreigner is under an obligation to obtain extensive documentation to render their stay legal within 30 days of arrival in the country.<sup>669</sup> The procedure is said to be complex, while the deadline for completion is brief. Consequently many migrants fall foul of the system.<sup>670</sup>

The required documents include a valid ID (and, if necessary, a visa), a stamp confirming timely departure from Russia, a migration card with registration, a valid work permit<sup>671</sup> and medical insurance certificate. The lack of such documentation can serve as grounds for arrest, detention and initiating administrative offence and removal proceedings.<sup>672</sup>

Human rights organizations report that many of the migrants who enter the territory of the Russian Federation could be "hidden refugees" who have not

<sup>666</sup> Il Sole 24 Ore, 'Caso Shalabayeva, l'ex giudice di pace: "Hanno pagato il mio silenzio"', 25 November 2016 [accessed on 4 July 2017].

<sup>667</sup> Civil Assistance Committee, *Administrative Expulsions from Russia: Court proceedings or Mass expulsions?*, Moscow, 2016, p. 6.

<sup>668</sup> See: e.g. *Ismailov v. Russia*, ECtHR, *op. cit.*; *Akram Karimov v. Russia*, ECtHR, Application No. 62892/12, 28 May 2014; *Azimov v. Russia*, ECtHR, *op. cit.*; *R v. Russia*, ECtHR, Application No. 11916/15, 26 January 2016; *A. L. (X. W.) v. Russia*, ECtHR, Application No. 44095/14, 29 October 2015; *Kesmatulla Khakdar v. Russian Federation*, CCPR, Communication No. 2126/2011, Views of 7–31 October 2014.

<sup>669</sup> See: *Summary of the Report of ADC Memorial "Detention Centers for Foreigners and the Failure to Comply with EHCR Rulings on the Protection of Migrant Rights"*, 2015, available at [http://adcmemorial.org/wp-content/uploads/KIM\\_RU1.pdf](http://adcmemorial.org/wp-content/uploads/KIM_RU1.pdf); Civil Assistance Committee, *Administrative Expulsions from Russia*, *op. cit.*

<sup>670</sup> *Ibid.*

<sup>671</sup> *Ibid.*

<sup>672</sup> See, *Ibid.* Failure to carry these documents at all times may result in administrative offence proceedings and expulsion with subsequent ban on re-entry. See interviews with the lawyers for Radio Free Europe, available at <http://www.svoboda.org/content/transcript/26970293.html>

and will not formally seek asylum, due to the high risk of having their asylum claim rejected.<sup>673</sup> Furthermore, they fear contact with the authorities will put them at risk of being expelled.

A group of Russian NGOs<sup>674</sup> reported that the Russian authorities have increasingly relied on administrative expulsion proceedings in response to extradition requests from Central Asian States. Courts have reportedly refused to consider submissions and arguments concerning the person's risk of being subjected to torture in the country of destination, assuming that these arguments are not relevant in cases dealing with a foreigner's violation of immigration rules in Russia.<sup>675</sup> The authorities appear to resort to administrative expulsion proceedings on the basis of minor administrative violations to circumvent the procedures for extradition.<sup>676</sup>

### 4.3.2 Central Asian States

In Kazakhstan, the NGO Forum 18 has in the last five years recorded cases of expulsion of protestant pastors<sup>677</sup> and Jehovah's Witnesses.<sup>678</sup> However, for the purposes of this report it has not been possible to quantify the practice in Kazakhstan of using deportation or administrative removal as a substitute for extradition proceedings. The statistics on removals in Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are not readily available, but some unofficial data can be obtained from online media coverage of the issue. For instance, according to an online media source,<sup>679</sup> following a 2016 immigration raid in Kyrgyzstan, 52 persons were ordered to be removed by the court. In Uzbekistan, a relatively high-profile deportation case in 2016 involved a German freelance journalist who visited the country on a tourist visa to collect material for her work.<sup>680</sup> The immigration authorities did not

<sup>673</sup> Anti-Discrimination Centre Memorial, Human Rights Movement BirDuino Kyrgyzstan "Alternative Report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", March 2015, articles 7, 8, 9, 10, 16, 22, 23, 24, 25, 30, available at [http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/KGZ/INT\\_CMW\\_NGO\\_KGZ\\_19875\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/KGZ/INT_CMW_NGO_KGZ_19875_E.pdf).

<sup>674</sup> See: *Summary of the Report of ADC Memorial, op. cit.*, 2015, available at [http://adcmemorial.org/wp-content/uploads/KIM\\_RU1.pdf](http://adcmemorial.org/wp-content/uploads/KIM_RU1.pdf); Civil Assistance Committee, *Administrative Expulsions from Russia, op. cit.*; and 'Shadow Report on the Observance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Russian Federation for the period from 2006 to 2012', para. 133, available at <http://old.memo.ru/d/135143.html>.

<sup>675</sup> See: 'Shadow Report on the Observance of the Convention against Torture', *op. cit.*

<sup>676</sup> See: NGO ADC "Memorial" alternative report to the Human Rights Committee, *op. cit.* See also: fn. 653.

<sup>677</sup> Felix Corley, Forum 18, "Kazakhstan: Pastor deported, Orthodox priest to follow?", available at [http://www.forum18.org/archive.php?article\\_id=1880](http://www.forum18.org/archive.php?article_id=1880); Felix Corley, Forum 18, "Kazakhstan: Offences a pretext for deportation?", available at [http://www.forum18.org/archive.php?article\\_id=1883](http://www.forum18.org/archive.php?article_id=1883); Felix Corley, Forum 18, "Kazakhstan: Jailed over Easter; new deportation order", available at [http://www.forum18.org/archive.php?article\\_id=1950](http://www.forum18.org/archive.php?article_id=1950).

<sup>678</sup> "Religious Freedom Concerns In Kazakhstan", Statement by the European Association Of Jehovah's Christian Witnesses for the Osce Human Dimension Implementation Meeting, Warsaw, 22 September to 3 October 2014, available at <http://www.osce.org/odihr/124728?download=true>; Felix Corley, Forum 18, "Kazakhstan: Jailed over Easter; new deportation order", available at [http://www.forum18.org/archive.php?article\\_id=1950](http://www.forum18.org/archive.php?article_id=1950); "Religious Freedom Concerns In Kazakhstan", Statement By The European Association Of Jehovah's Christian Witnesses for the Osce Human Dimension Implementation Meeting, Warsaw, 22 September to 3 October 2014, available at <http://www.osce.org/odihr/124728?download=true>.

<sup>679</sup> Evening Bishkek, 'Из Кыргызстана депортировали 50 иностранцев', 30 June 2016, [last accessed on 18 May 2017].

<sup>680</sup> Deutsche Welle, 'German journalist reported deportations from Uzbekistan', 14 November 2016 [last accessed on 17 July 2017].

invoke security grounds but instead expelled the journalist on the grounds of working illegally.

### 4.3.3 Conclusion

The use of immigration law in the national security context is directly linked to the presence of a large migrant population in the country. This factor has implications for whether the country has a full-fledged immigration law system and jurisprudence on the issue. Since the Russian Federation, and to a lesser extent Kazakhstan, are the only States in the region that have a sufficiently large migrant population for these issue to become a legal policy priority, the analysis of this Chapter focuses in particular on their legal systems and practice.

#### **Box 12: Disguised extraditions or security expulsions? Italian cases**

The European Court of Human Rights has in the last decade issued several rulings against Italy in cases of expulsions of persons to Tunisia ordered on the basis of national security. Most of these cases relate to people convicted in Tunisia *in absentia* for terrorism offences. Extradition proceedings have not however been pursued.

In one case, Nassim Saadi,<sup>681</sup> a Tunisian national, had been sentenced in Tunisia *in absentia* to 20 years imprisonment after having been convicted on charges of “membership of a terrorist organization operating abroad in time of peace” and “incitement to terrorism”.

He was expelled by the Italian Ministry of Interior to Tunisia under the anti-terrorism powers of Law Decree 144/2005. The European Court of Human Rights found that his expulsion put him at risk of being subjected to torture or inhuman or degrading treatment or punishment in Tunisia and was therefore in breach of article 3 ECHR.

The Court ruled that the diplomatic guarantees presented by the Tunisian authorities were insufficient as “[a]t first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad . . . It was only in a second *note verbale*, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to ‘the relevant international treaties and conventions’.”<sup>682</sup>

In another case, Essid Sami Ben Khemais<sup>683</sup> had also been convicted in 2002 by a Tunisian military tribunal *in absentia* for “membership of a terrorist organization operating abroad in time of peace” and sentenced to 10 years imprisonment. He was expelled from Italy to Tunisia on 2 June 2008 under the same anti-terrorism powers by the Ministry of Interior. An order for interim measures issued by the European Court of Human Rights was disregarded.

The European Court of Human Rights found that the applicant’s rights under article 3 ECHR had been breached despite the provision by Tunisian

<sup>681</sup> *Saadi v. Italy*, ECtHR, *op. cit.*

<sup>682</sup> *Ibid.*, para 147.

<sup>683</sup> *Ben Khemais v. Italy*, ECtHR, *op. cit.*



authorities of diplomatic assurances. It also found that, by expelling him, Italy breached article 34 ECHR for having disregarded the Court's order for interim measures.

A similar case involved Mohamed Ben Mohamed Mannai<sup>684</sup> who, after having served a sentence in Italy for membership of a terrorist organization, was expelled pursuant to a court order as part of his sentence. Although the court's president warned the Italian Government not to carry out the expulsion, because the European Court of Human Rights had ordered interim measures, the Executive, after first attempting to expel him to Austria where he was originally arrested, expelled him to Tunisia on 1 May 2010, a few days after the end of his sentence. The European Court found violations of his rights under articles 3 and 34 of the ECHR.

Similar findings were made by the European Court in the case of Ali Ben Sassi Toumi, who was convicted in Italy of international terrorism and, having served his sentence, was expelled on 2 August 2009. He had been convicted in absentia in Tunisia for fraud.

The Committee of Ministers of the Council of Europe<sup>685</sup> considered the following actions as significant in addressing the violations found in the cases, although they also noted that the Italian authorities have stopped this use of the expulsion system and the change of the situation in Tunisia:

- Incorporation of the European Court's jurisprudence regarding specific principles in the national jurisprudence and the effectiveness of the remedies provided;
- Emphasis by the Court of Cassation on the binding nature of the European Court's interim measures;
- The fact that the Court of Cassation stressed that "all the judicial authorities should identify and take appropriate preventive measures other than expulsion where the person to be expelled is considered to be socially dangerous"; and
- The Ministry of Justice sending a circular to all courts of appeal and justices of the peace stressing the obligation to respect the Court's interim measures in all cases, including expulsions on national security grounds ordered by the Minister.<sup>686</sup>

Another case that received significant public attention was that of Hosni Hachemi Ben Hassen, a Tunisian national that had been living in Italy and Belgium for 20 years. He was arrested and surrendered to Italy to answer charges of facilitating, promoting, financing, membership or creation of a terrorist organization and promotion of racial, ethnic, religious or national hatred. He was suspected of having created an informal group as a 'school' to motivate people to work toward "jihad". Having been convicted and his conviction affirmed by the Court of Appeal, on 14 July 2016, the Court of Cassation quashed his terrorism conviction because no evidence

<sup>684</sup> *Mannai v. Italy*, ECtHR, *op. cit.*

<sup>685</sup> The execution of these cases is now closed.

<sup>686</sup> See: *Communication from Italy concerning the Ben Khemais group of cases against Italy* (Application No. 246/07), Doc. No. DH-DD (2015) 1070, 14 October 2015; *Communication from Italy concerning the Saadi group of cases against Italy* (Application No. 37201/06), Doc No. DH-DD (2013) 699, 19 June 2013.

was presented demonstrating that the 'indoctrinated' group had the capacity or propensity to carry out terrorist acts or activities and, as such, the offence of terrorism did not apply. The Court however asked the Court of Appeal to rule on the offence of incitement to hatred. By this time, Hosni Hachemi Ben Hassen had been in prison for three years. He was not released, as the Minister of Interior expelled him to Tunisia on grounds of national security on 13 August 2016.<sup>687</sup>

Two other reported cases refer to transfers for having insulted the Catholic religion in a church and for having thrown a crucifix on the floor causing injuries to one person.<sup>688</sup>

## 4.4 Grounds for expulsion

In the Russian Federation<sup>689</sup> and Central Asia States,<sup>690</sup> various types of expulsions are carried out depending on whether the expulsion can be executed under immigration law or constitutes a sanction for an administrative offence, such offences frequently being a breach of immigration law. Expulsions on the grounds of national security can be carried out under either legal regime. Furthermore, expulsions based on mere immigration or administrative violations may hide national security purposes. All of these grounds will therefore be addressed here.

### 4.4.1 National security grounds

In the Russian Federation, legislation permits expulsion on national security grounds if either, being a refugee or a beneficiary of temporary asylum, this protection was terminated for national security reasons, or the authorities designate him or her as "undesirable" because the person poses a threat to the defensive capacity or security of the State, public order or health.<sup>691</sup> In Kazakhstan, grounds for removal include actions against national security or public order; protection of health and morals, protection of rights and legitimate interests of nationals of Kazakhstan and of other persons; or violation of the laws of Kazakhstan.<sup>692</sup> These grounds are broadly defined and, in practice, as illustrated below, result in a lack of legal certainty in the application of this

<sup>687</sup> Il Fatto Quotidiano, 'Terrorismo, Alfano: "Espulso imam di Andria". Era stato assolto da Cassazione', 13 August 2016; La Repubblica, 'Terrorismo islamico, la Cassazione: "Indottrinare al martirio non è reato"', 14 November 2016; POLITICO, 'From mafia to terror, the Italian way', 3 November 2016. See: Judgment No. 48001 of 2016 of the Fifth Criminal Section of the Court of Cassation.

<sup>688</sup> Il Fatto Quotidiano, 'Terrorismo, ministro Alfano in Senato (deserto): "Da gennaio 2015 espulse 102 persone, 8 erano imam"', 28 July 2016.

<sup>689</sup> See: Code of Administrative Offences; Law "On the legal status of aliens and stateless persons"; Law "On refugees"; and Law "On the procedures of entry into and exit from the Russian Federation".

<sup>690</sup> See: Law No. 2337, dated 19 June 1995, "On the legal status of aliens"; Law No. 477-IV, dated 20 July 2011, "On migration of population", Government Regulation No. 148, dated 21 January 2012 "On approving the Rules of entry and stay of immigrants in the Republic of Kazakhstan, as well as their exit from Kazakhstan and Rules on migration control and records on aliens and stateless persons, who illegally cross the State border of the Republic of Kazakhstan, illegally stay on the territory of Kazakhstan, as well as person, whose entry into Kazakhstan is banned"; Regulatory Decision of the Supreme Court No. 4, dated 13 December 2013, "On case law concerning deportation of aliens and stateless person from the territory of Kazakhstan"; Civil Procedure Code, that governs the procedural aspects of deportation; Code of Administrative Offences (CoAO), articles 42 to 51; and Criminal Procedure Code, articles 133.1.3 and 529.4.

<sup>691</sup> Law "On the Procedure for Entering and Leaving the Russian Federation", No. 114-FZ of 15 August 1996, as amended on 10 January 2003, article 25.10.

<sup>692</sup> Law "On legal status of alien", article 28. In these 'deportations', the procedure is governed by the Civil Procedure Code.

measure. In Kyrgyzstan, Tajikistan, Turkmenistan a foreigner may be expelled if he or she is deemed a security risk or his or her continued presence in the country poses a threat to public health or public morals or interferes with the freedoms or lawful interests of its nationals or other persons.<sup>693</sup> In Uzbekistan, a person may be expelled for having been convicted of a crime committed in the territory of Uzbekistan.<sup>694</sup>

While the laws in Central Asian States refer to grounds such as national security as a basis for removal, they are silent as to what constitutes a security risk.

#### **4.4.2 Expulsion on other grounds**

##### *4.4.2.1 The Russian Federation and Central Asian States*

Foreign nationals may be expelled from the Russian Federation if they are in Russia irregularly.<sup>695</sup> In many cases, if their status is irregular, they may also commit an administrative offence which makes them liable to expulsion.<sup>696</sup> The same is true in Kazakhstan,<sup>697</sup> Kyrgyzstan,<sup>698</sup> Tajikistan,<sup>699</sup> Turkmenistan<sup>700</sup> and Uzbekistan.<sup>701</sup>

In Turkmenistan, the Law on Migration provides that, where a visa or residence permit has expired and has not been extended or revoked, the foreign national shall be served by the immigration authorities (Migration Service) with an order of removal.<sup>702</sup> Stateless persons who are habitually resident in Turkmenistan are exempt from administrative removal, except in cases involving "Turkmenistan's national security or public order interests".<sup>703</sup>

With regard to the violation of Tajikistan's laws as a ground for removal in that country, the provision is silent on whether or not such a violation must meet a certain threshold to justify the alien's removal. In particular, there is no specific requirement that the violation must amount to a criminal offence. This introduces ambiguity and creates a potential conflict with the provisions on the prevention of a foreign national's departure from Tajikistan, which permits the relevant authorities to prevent a foreign national from leaving if he or she is suspected of having committed a criminal offence.<sup>704</sup>

<sup>693</sup> Law of the Kyrgyz Republic "On External Migration", article 19. Law of the Republic of Tajikistan "On the Legal Status of Foreign Nationals", article 31; Law of Turkmenistan "On Migration", article 19.3.

<sup>694</sup> Decree of the Cabinet of Ministers of the Republic of Uzbekistan "On the Procedure of Entry, Exit, Stay and Transit of Foreign Nationals and Stateless Persons in the Republic of Uzbekistan", para. 40. For the schedule of gravity of criminal offenses, see: Criminal Code, article 15.

<sup>695</sup> Federal Law "On the legal status of aliens", article 2.1.

<sup>696</sup> CoAO of the Russian Federation, article 18.8.

<sup>697</sup> CoAO of Kazakhstan, articles 495.2, 517, 516.2, 109, 449.3, 490.3 and 519.4 (violation of rules on the use of foreign labour and labour migrants and illegal labour by migrants in Kazakhstan).

<sup>698</sup> Law of the Kyrgyz Republic "On External Migration", article 19.a

<sup>699</sup> CoAO of Tajikistan, article 46.

<sup>700</sup> Law of Turkmenistan "On Migration", article 19(3); Code of Turkmenistan on Administrative Liability, articles 48 and 383.1.

<sup>701</sup> Code of the Republic of Uzbekistan on Administrative Liability, articles 291, 512, 518, 519, 56, 57, 58, 611, 94, 1651, 1842, 1843, 189, 1891, 201, 2021, 2241, 225, 239, 240, 241. The Decree "On Entry, Exit, Stay and Transit" reiterates some of the grounds for removal provided for by the Code of Administrative Liability, as these relate to immigrant/non-immigrant status violations, and adds to the list of priority aliens those with a criminal record.

<sup>702</sup> Law of Turkmenistan "On Migration", article 19(1).

<sup>703</sup> Code of Turkmenistan on Administrative Liability, official commentary to article 48.

<sup>704</sup> Law of the Republic of Tajikistan "On the Legal Status of Foreign Nationals", article 25.

#### 4.4.2.2 Selected EU States

In the European Union the return of foreign nationals is regulated by EU law as implemented in the Member States.<sup>705</sup> In particular, this field is regulated by the EU Return Directive No. 2008/115/EC. However, the permissible grounds for expulsion depend on the national law of Member States insofar as it does not breach EU law. EU law therefore enters into play during the decision-making process and the execution of the expulsion (see below, at Section 4.6.2).

In France, a foreign national can be subject to an order to leave the country when he or she has lived in France for less than three months and his or her behaviour is found to represent a threat to public order<sup>706</sup> or the person does not satisfy the Schengen Borders Code requirements,<sup>707</sup> which, among other things, includes not being “considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States”.<sup>708</sup> Expulsions can be ordered against any foreign national whose presence in France represents a serious threat to public order.<sup>709</sup> In the UK, Section 3.5.a of the Immigration Act 1971 states that the Home Secretary has the power to deport a foreign national if he or she “deems his deportation to be conducive to the public good”.

In Spain, a foreign national who commits certain serious administrative offences may be expelled from Spain instead of being fined, in accordance with the principle of proportionality of the punishment.<sup>710</sup> Such offences include, participation in activities contrary to national security or that could undermine Spain’s relations with other countries and being implicated in activities contrary to public order.<sup>711</sup> Furthermore, foreign nationals may be expelled if they have been sentenced, within or outside Spain, for intentional conduct that would constitute a criminal offence in Spain punishable by more than one year imprisonment, unless the conviction has been expunged from the official records.<sup>712</sup>

In Germany, a foreign national must be expelled if his or her presence in Germany is found to represent a danger to public security and order, the democratic order and its freedoms or to a fundamental interest of the Federal Republic of Germany.<sup>713</sup> Furthermore, the supreme authorities of a Land (regional administrative entity in Germany) and the federal authorities may order the deportation of a foreign national based on the assessed need to prevent a significant threat to the security of Germany or a terrorist threat, without the existence of a prior order of expulsion.<sup>714</sup>

<sup>705</sup> Directive No. 2008/115/EC, of 16 December 2008 (hereinafter, the “EU Return Directive”).

<sup>706</sup> Code de l’entrée et du séjour des étrangers et du droit d’asile of France (CESEDA), article 511-1, I, 7.

<sup>707</sup> *Ibid.*, article 511-2.

<sup>708</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), article 5.1.e.

<sup>709</sup> CESEDA (France), article 521-1.

<sup>710</sup> Law 4/2000, Organic Law on the Rights and Freedoms of Foreigners in Spain and Their Social Integration, of Spain (Ley Organica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social), article 57.1.

<sup>711</sup> *Ibid.*, article 54.1.a. These are defined in the Organic Law 1/1992 of 21 February 1992 on Citizens Security (Spain).

<sup>712</sup> *Ibid.*, article 57.2.

<sup>713</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (*Aufenthaltsgesetz—AufenthG*) of Germany, article 53.1–2.

<sup>714</sup> *Ibid.*, article 58a.

In Italy, the Minister of Interior, or a Prefect delegated by him or her, may order the expulsion of persons or groups that have been operating, whether directly or in the form of preparatory acts, to disrupt the State's order or to commit terrorist offences, or anyone whose presence on Italian territory there are reasonable grounds to believe may facilitate terrorist organizations or activities, whether national or international.<sup>715</sup> The Minister of Interior may also order the expulsion of a foreign national, whether or not he or she resides in Italy, for reasons of public order or national security. The Minister must inform the President of the Council of Ministers and the Minister of Foreign Affairs.<sup>716</sup> An expulsion can also be ordered by the Prefect<sup>717</sup> on a case-by-case basis, for preventive or security reasons, for vaguely circumscribed situations of "social dangerousness", including "endangering ... public security or peace".<sup>718</sup>

### **Box 13: EU law and expulsions for national security and public order**

A particular feature of EU law on expulsions is the status of EU citizens and their right to freedom of movement within the EU and Schengen space.<sup>719</sup> EU citizens' freedom of movement can be restricted solely on "grounds of public policy, public security or public health".<sup>720</sup> With regard to its definition and scope, EU law states that these grounds must "not be invoked to serve economic ends".<sup>721</sup> In *Tsakouridis*, the Court of Justice held that "public security ... covers both a Member State's internal and its external security".<sup>722</sup> Furthermore, "a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security".<sup>723</sup>

<sup>715</sup> Law Decree 144/2005, article 3.1 read together with Law 152/1975 (Italy), article 18. This applies also to membership of disbarred political associations.

<sup>716</sup> Law 286/1998 (Italy), article 13.1.

<sup>717</sup> The Prefect is the representative of the Government at the provincial level, who coordinates the activity of the public administration.

<sup>718</sup> Legislative Decree No. 159/2011 (Anti Mafia and Preventive Measures Code), article 1, that substituted preventative laws Nos. 1423/1956 and 575/1965, to which article 13.2.c of the Immigration Law refers (Italy). *Labita v. Italy*, ECtHR, GC, Application No. 26772/95, Judgment of 6 April 2000, para. 192.

<sup>719</sup> Treaty on the Functioning of the European Union (TFEU), article 20.1: "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." See also: TFEU, articles 18, 21.1, 22; and Treaty of the European Union (TEU), article 9. The current rules on the exercise of this freedom of movement and establishment are enshrined in the Council Directive 2004/38/EC, the so-called "Citizens Directive". Within it, it is clarified that the right is qualified in that it can be limited "on grounds of public policy, public security or public health", see article 27.1.

<sup>720</sup> TFEU, articles 45.3, 56, 202–203. The laws of the EU Member States reproduce the grounds of the EU Citizens Directive, article 19.3 of UK Immigration (European Economic Area) Regulations 2006. The same goes for permits, article 20. See: CESEDA, articles 214-1, 511-3-1, 521-5; Royal Decree 240/2007 of Spain, article 89.4; Legislative Decree 30/2007 of Italy, article 20.1; and Gesetz über die allgemeine Freizügigkeit von Unionsbürgern of Germany, Sections 6 and 7. France also includes as a ground, being a threat to internal security or the international relations of France for a fundamental interest of society, from a point of view of public security and order. Italy includes national security as a ground. The grounds of national security are presumed when a person is a member of or linked to an association or group aimed at disrupting the constitutional order, or his or her presence may facilitate terrorist activities or organizations (see: Legislative Decree 30/2007, article 20.2).

<sup>721</sup> EU Citizens Directive, article 27.1.

<sup>722</sup> *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, para. 43. See, *inter alia*: *H. T. v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 78.

<sup>723</sup> *Ibid.*, para. 44. See, *inter alia*: *Campus Oil Limited and others v. Minister for Industry and Energy and others*, CJEU, *op. cit.*, paras. 34 and 35; *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany*, CJEU, *op. cit.*, para. 27; *H. T. v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 78.

With regard to the concept of “public policy”, the Court held that it “presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society”.<sup>724</sup> “[T]he public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.”<sup>725</sup>

The concept of public order “presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.<sup>726</sup> The European Court of Justice further ruled that “the notions of ‘national security’ and ‘public order’ cover cases where a third country national belongs to an association which supports international terrorism or supports such an association”.<sup>727</sup>

Finally, “[t]he concept of ‘imperative grounds of public security’ presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words ‘imperative grounds’”.<sup>728</sup> The Court of Justice stressed that these grounds “must be interpreted strictly”.<sup>729</sup>

## 4.5 Obstacles to expulsion in the selected countries

The main obstacles to expulsions in all of the CIS and European countries examined arise from international law, first and foremost, the principle of *non-refoulement* (see Chapter II). However, in certain countries, these and other limitations on expulsions are provided for and/or further clarified in domestic law or jurisprudence.

### 4.5.1 The Russian Federation and Central Asian States

The Russian Code of Administrative Offences and Russian immigration law stipulate that obligations of international law prevail over their provisions.<sup>730</sup> This

<sup>724</sup> *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 66. See also: *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, CJEU, *op. cit.* para. 50.

<sup>725</sup> *Ibid.*, para. 67. See also: *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, CJEU, *op. cit.*, paras. 41–42.

<sup>726</sup> *H. T. v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 79. See, to that effect: *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, CJEU, Judgment, C-249/11, 4 October 2012, para. 40 and the case-law cited. The concepts are transferred as well in EU asylum law, see: *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, CJEU, Judgment, Case C-601/15 PPU, 15 February 2016.

<sup>727</sup> *Ibid.*, para. 80.

<sup>728</sup> *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, paras. 20 and 41. See also for a 2009 restatement of the CJEU jurisprudence endorsed by the European Commission, European Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, EU Doc. COM(2009) 313 final, 2 July 2009, p. 10 (bold in original text).

<sup>729</sup> *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, CJEU, *op. cit.*, para. 48.

<sup>730</sup> CoAO of the Russian Federation, article 1.1.2.



is a general reflection of the same principle enshrined in the Constitution.<sup>731</sup> The Constitutional Court of the Russian Federation has ruled that having family members and children in the country are substantial considerations in deciding whether to impose administrative expulsion.<sup>732</sup>

In Kazakhstan, the Supreme Court<sup>733</sup> has affirmed that courts must take into consideration the ICCPR, the 2008 CIS Convention on the legal status of labour migrants and members of their families, and other international treaties, ratified by Kazakhstan. The laws regulating deportation, however, do not contain express *non-refoulement* or other human rights provisions.<sup>734</sup>

In Kyrgyzstan and Tajikistan, immigration law does not provide for specific grounds for relief from removal. Only the Laws on Refugees partially fill this gap by providing that asylum seekers are entitled to uninterrupted presence in the territory of the country throughout the period of their asylum application review, (including the appeal, if applicable).<sup>735</sup> They also provide for protection of the principle of *non-refoulement*, even in cases of a failed asylum application, by prohibiting their removal to States where they would face a risk of persecution, torture or ill-treatment.<sup>736</sup> However, individuals who are deemed a security risk or have been convicted of an especially serious crime are not entitled to claim this protection.<sup>737</sup> In Turkmenistan, refugees cannot be forcibly returned to the country of origin unless they are found to be a security risk.<sup>738</sup> However, the law does not specify who decides whether a particular person poses a security risk or the procedure of risk assessment and determination.

#### 4.5.2 Selected EU States

The principle of *non-refoulement*, as provided for under international refugee law, is enshrined in the laws of France,<sup>739</sup> Germany<sup>740</sup> and Italy.<sup>741</sup> It is also included in Spanish<sup>742</sup> and UK law,<sup>743</sup> either by generic reference to the principle itself (Spain) or by referral to the Geneva Refugee Convention (UK).

German law explicitly excludes the application of this principle if the person represents a threat to the security of the Federal Republic of Germany or is a danger to the general public for having been criminally liable for an offence punishable by at least three years imprisonment or, in cases where the offence

<sup>731</sup> Constitution of the Russian Federation, article 15.4.

<sup>732</sup> *Decisions No. 55-O "On the complaint of Todua Kahabera, national of Georgia"*, concerning violation of his rights by application of article 7(7) of the Federal Law "On legal status of foreign nationals in the Russian Federation" and Decision of the Supreme Court No. 11-ад 06-1, dated 17 February 2006.

<sup>733</sup> See: Regulatory Decision of the Supreme Court No. 4, dated 13 December 2013, "On case law concerning deportation of aliens and stateless person from the territory of Kazakhstan", para. 1.

<sup>734</sup> See: *Concluding Observations on Kazakhstan*, CAT, 2014.

<sup>735</sup> Law of the Kyrgyz Republic "On Refugees", article 7; Law of the Republic of Tajikistan "On Refugees", article 12.1.

<sup>736</sup> Law of the Kyrgyz Republic "On Refugees", article 11; Law of the Republic of Tajikistan "On Refugees", article 14.1.

<sup>737</sup> Law of the Kyrgyz Republic "On Refugees", article 12; Law of the Republic of Tajikistan "On Refugees", article 14.2.

<sup>738</sup> Law of Turkmenistan "On Refugees", article 3(3).

<sup>739</sup> CESEDA, article 513-2, 3.

<sup>740</sup> AufenthaltG, Article 60.1.

<sup>741</sup> Immigration Law, article 19.1. According to article 28.1.d of the Decree of the President of the Republic No. 394/1999, a migrant who meets one of the conditions foreseen in article 19.1 mentioned above, has the right to receive a permit of stay for humanitarian reasons, except when a removal to a safe third country can be carried out.

<sup>742</sup> Law 4/2000 of Spain, articles 57.6 and 58.

<sup>743</sup> UK Borders Act 2007, article 33.2.



is linked to violations of physical or sexual integrity, property, life or against German authorities, of one year imprisonment.<sup>744</sup>

With regard to the principle of *non-refoulement* as provided for under international human rights law, this is expressly enshrined by referral to the principle itself in international law both in Spanish immigration law and<sup>745</sup> Italian law.<sup>746</sup>

German law sets out in detail that a foreign national cannot be removed if he or she is at risk of being subject to the death penalty, torture or inhuman or degrading treatment or punishment, or if he or she is subject to an extradition procedure, if the transfer is in breach of the *European Convention on Human Rights*.<sup>747</sup> In France, the CESEDA provides that no one can be expelled where he or she would be at risk of treatment contrary to article 3 ECHR.<sup>748</sup> In the UK, removals under the UK Borders Act 2007 cannot be carried out if it would breach a person's rights under the European Convention on Human Rights or the *Geneva Refugee Convention*.<sup>749</sup> This includes the *non-refoulement* principle.

In each of these EU countries, immigration laws include additional grounds for preventing a person's expulsion from the State's jurisdiction. Generally, in the UK, deportation orders can be challenged for not conforming to immigration rules or for breaching the *Human Rights Act* and the *European Convention on Human Rights*, other laws or the *Geneva Refugee Convention*. An order can also be challenged for discriminating on the basis of race, being contrary to the EU Treaties, for the unreasonable exercise of discretion in the decision making process<sup>750</sup> or contravening the Council of Europe's *Convention against Trafficking in Human Beings*.<sup>751</sup> UK law explicitly prohibits deportations of persons subject to an extradition procedure.<sup>752</sup> In France, a child under 18 years of age may not be expelled for any reason.<sup>753</sup> A similar prohibition applies in the UK if the person was under eighteen at the time of the commission of the acts.<sup>754</sup> Italian law prohibits the transfer of minors, except for their right to follow a parent or foster parent who has been expelled.<sup>755</sup> Spanish law prohibits the expulsion of a pregnant woman, when the measure may represent a risk to the pregnancy or the health of the mother.<sup>756</sup> In Italy the prohibition encompasses pregnant mothers or mothers caring for children younger than six months, as well as the husband living with her.<sup>757</sup> Finally, Italian law prohibits expulsion of long-term residents; and close family members (e.g. grandchildren, grandparents or co-habiting spouses) of Italian citizens.<sup>758</sup>

<sup>744</sup> AufenthG, article 60.8.

<sup>745</sup> Law 4/2000 of Spain, articles 57.6 and 58.

<sup>746</sup> Court of Cassation, United Sections, Judgment No. 27310 of 17 November 2008. A recent judgment applying the principle of *non-refoulement* and stressing its absolute nature can be found at Court of Cassation, Sixth Civil Section, Ordinance No. 21667, Rv. 627979 (Court of Cassation, First Civil Section, Judgment No. 3898 of 17 February 2011 (unofficial translation); Judgment No. 10636, of 3 May 2010.)

<sup>747</sup> AufenthG, article 60.2–7.

<sup>748</sup> CESEDA, Article 513-2, 3.

<sup>749</sup> UK Borders Act 2007, article 33.2.

<sup>750</sup> Nationality, Immigration and Asylum Act of 2002, article 84.1.

<sup>751</sup> UK Borders Act 2007, article 33.6A.

<sup>752</sup> *Ibid.*, article 33.5.

<sup>753</sup> CESEDA, articles 511-4 and 521-4.

<sup>754</sup> UK Borders Act 2007, article 33.3.

<sup>755</sup> Immigration Law, article 19.2.

<sup>756</sup> Law 4/2000, article 57.5–6.

<sup>757</sup> Immigration Law, article 19.2.

<sup>758</sup> *Ibid.*

### 4.5.3 Conclusions

It must be stressed that, based on the role of international law in the majority of these countries' domestic legal systems (see Chapter II), even if not explicitly referred to in primary legislation, the bars to expulsion provided for in the Geneva Refugee Convention, the ECHR, the CAT, the ICCPR, and other instruments of directly applicable international law, are applied by domestic courts. In the UK legal system, where its dualist character means that international law in the absence of incorporation will not be given direct effect by courts, the incorporation into national law of the ECHR still means that obligations of the State under article 3 of the ECHR are directly applied by national courts, including in expulsion cases.<sup>759</sup> In all of these countries, the prohibition of *refoulement* under international human rights law is absolute and cannot be waived on the grounds of national security, public order or any other security argument.

Unlike in extradition cases, it is clear that for both the CIS and EU countries analysed in this report, prohibitions on expulsion that serve to protect human rights derive mainly from international law and its implementation by national courts, rather than directly from national law. This carries two main risks in terms of human rights protection. First, courts will only be in a position to implement such protections at the later stages of expulsion proceedings. In the absence of judicial intervention at the early stages, there is a risk that international law protections will not be applied by the public officials that execute the expulsion measure. Second, it is not certain that national courts will enforce all obligatory prohibitions of expulsion under international law, either due to a lack of up-to-date information or because they may rely on flawed interpretations of the prohibition.

For these reasons, the ICJ recommends that all existing prohibitions of and protections against expulsions under international law, especially those relating to *non-refoulement*, be prescribed in domestic laws on immigration in addition to clauses permitting direct application of international law.

## 4.6 Expulsion procedures

### 4.6.1 The Russian Federation and Central Asian States

In the Russian Federation, expulsions under immigration law are decided by the Ministry of Interior.<sup>760</sup> The concerned individual must be informed of the expulsion decision in person and sign a written undertaking to leave the country. If a person fails to comply with an expulsion decision and does not contest it in court or through administrative appeal, he/she may be placed in temporary detention and subjected to forcible deportation. When triggered by an administrative sanction, expulsion is imposed by a judge or, when apprehended at border crossings, by a competent public official.<sup>761</sup> No free legal aid is provided to defendants at any stage of the process.<sup>762</sup>

As reported by Russian human rights NGOs, cases concerning violations of migration rules by non-nationals and stateless persons, are decided in a matter

<sup>759</sup> Human Rights Act 1998.

<sup>760</sup> Previously the Federal Migration Service (FMS) under the Ministry of Interior.

<sup>761</sup> CoAC of the Russian Federation, article 3.10.2.

<sup>762</sup> For further details, please see: O. Krivosova, D. Kulagin, D. Shabelnikov, "Free legal aid in the Russian Federation: legislation and practice", available at <http://www.hrights.ru/text/b21/Chapter2%202.htm>.

of minutes.<sup>763</sup> For example, in February 2015, a single judge issued 62 decisions on administrative expulsion in one day.<sup>764</sup> There are reports that courts routinely use a practice of “collective hearings”, when instead of individual cases, courts hear cases concerning the expulsion of between 2 and 12 persons at the same time, in clear violation of procedural standards.<sup>765</sup>

These swift proceedings result in a lack of procedural safeguards. Within this short timeframe it is hardly possible to consider all the essential aspects of a case that may be relevant for the determination of a person’s individual circumstances, including human rights barriers to expulsion. It has been reported that these tight timelines are the underlying reason for violations of rights of defence, failure to provide interpretation services in a timely manner, problems with collecting and analysing evidence, and problems with identifying concerned individuals and clarifying their family status.<sup>766</sup>

In Kazakhstan, decisions on expulsion can be delivered only by a court.<sup>767</sup> The presence of the person in question during the proceedings is mandatory.<sup>768</sup> Court rulings on deportation enter into force immediately.<sup>769</sup> Failure to leave the country within the specified time period may lead to the initiation of proceedings for forcible removal<sup>770</sup> and the commission of a criminal offence punishable with a fine or imprisonment of up to 75 days.<sup>771</sup> In cases of forcible expulsion, if the concerned individual fails to comply with the court order, removal is accompanied by a five-year ban.<sup>772</sup>

In Kyrgyzstan, removal proceedings are take place before a court.<sup>773</sup> A judicial decision to expel a person can be appealed within 10 days, pursuant to the general procedure for appealing administrative decisions.<sup>774</sup> The appeal is subject to review within 20 days.<sup>775</sup> The lodging of an appeal suspends implementation of the expulsion order.<sup>776</sup>

<sup>763</sup> Svetlana Gannushkina, *Expulsion and Extradition from the Russian Federation* (for Alternative report to the UN Committee Against Torture, 22 March 2006, available at [http://refugee.memo.ru/For\\_All/rupor.nsf/83ce5bc05f80840cc3256a5800515acc/1ef88f0b73cca55bc325713a0064f8c7!OpenDocument](http://refugee.memo.ru/For_All/rupor.nsf/83ce5bc05f80840cc3256a5800515acc/1ef88f0b73cca55bc325713a0064f8c7!OpenDocument)).

<sup>764</sup> See: Civic Committee Assistance statement at <http://refugee.ru/news/sudya-vershashhij-sudby-za-minutu/>.

<sup>765</sup> See: interview of Radio Free Europe with lawyers of NGO “Committee of Civic Assistance”, Konstantin Trotskiy, and lawyer of “Migration and Law” programme of NGO “Memorial”, Illarion Vasilyev, available at <http://www.svoboda.org/content/transcript/26970293.html>.

<sup>766</sup> Ya. B. Zholobov, “Administrative expulsion from the Russian Federation of aliens and stateless persons: challenges and solutions”, *Sudya*, Issue No. 6, 2015, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=CJI;n=89363>.

<sup>767</sup> See: Regulatory Decision of the Supreme Court No. 4, dated 13 December 2013 “On case law concerning deportation of aliens and stateless person from the territory of Kazakhstan”, para. 3. A legal provision that invested executive bodies with this power had been ruled to be void by the Supreme Court.

<sup>768</sup> See: *Ibid.*, para. 8. Absence of a concerned individual is a basis for postponing the hearings, article 187(2) of the Civil Procedure Code.

<sup>769</sup> Civil Procedure Code of Kazakhstan, article 240.

<sup>770</sup> CoAO of Kazakhstan, article 916.2.

<sup>771</sup> Criminal Code of Kazakhstan, article 393. Prior to the 2014 justice system reform, failure to depart voluntarily entailed administrative, nor criminal liability. See: K. Duysembiyev, Chairman of the Specialized interregional administrative court of Astana, “Problems of forcible expulsions”, available at <https://www.zakon.kz/4727995-problemy-prinuditelnogo-vydvorenija-k.html>.

<sup>772</sup> In accordance with para 14(10) of the Regulation on Border Service of the Committee on National Security of Kazakhstan No. 282, dated 10 December 1999, border guards must restrict entry of aliens and stateless persons who have been banned from entering Kazakhstan.

<sup>773</sup> Law of the Kyrgyz Republic on External Migration, article 19. See also: Code of the Kyrgyz Republic on Administrative Liability, article 39.

<sup>774</sup> Code of the Kyrgyz Republic on Administrative Liability, article 597.

<sup>775</sup> *Ibid.*, article 599.

<sup>776</sup> *Ibid.*, article 598.

In Tajikistan, the body competent to decide on removal is the State National Security Committee, which is required to obtain approval of the removal order by the Prosecutor General.<sup>777</sup> There is no requirement in law for an automatic judicial approval of a removal order. However, a person subject to an expulsion order has the right to appeal the order in a court of law within a week of the issuance of the order.

Turkmenistan does not require a judicial decision for administrative removal. Rather, it is the Migration Service that both decides on and implements the removal.<sup>778</sup> The Code of Administrative Liability does not require removal proceedings to be conducted in court and the Law on Migration expressly provides that decisions on administrative removal be made by the Migration Service.

Uzbekistan does not distinguish between ordinary and court-ordered removals. All removals are based on judicial authorization of some kind. A removal order may be issued by a court following a criminal conviction or having been found guilty of an administrative offence, if removal is applicable. While courts are responsible for ordering administrative removal as a sanction, the implementation of removal orders is the responsibility of the Ministry of Interior or, in the event that administrative removal is imposed as a punishment for border control violations, of the border guard service.<sup>779</sup>

#### **Box 14: Expulsion cases in the Russian Federation**

##### *a) Abdukhafiz Kholmurodov*

A recent case of expulsion decided by the European Court of Human Rights is that of Abdukhafiz Kholmurodov, an Uzbek national who had been periodically travelling to the Russian Federation since 2002 and was permanently resident there since 2011.

On 14 May 2012, he was charged by Uzbek authorities, among other offences, with having created and directed a local branch of the Islamic Movement of Turkestan, considered a terrorist organization in Uzbekistan.

He was arrested by the Russian authorities on 1 March 2013 with a view to extradition. However, he was later charged in Russia with attempted theft, passport theft and use of a false document for which he was convicted and sentenced to one and a half years imprisonment. His detention pending extradition was therefore superseded. However, having served his sentence, he was placed in extradition detention from 29 August 2014 to 2 March 2015.

On 22 July 2014, the Ministry of Justice issued an order declaring him an "undesirable" person, a decision that led to an order for his expulsion on 18 August of the same year. He challenged the expulsion order arguing that his extradition procedure was still pending and that he would need to exhaust that procedure first. In the extradition proceedings he was challenging his return on the ground that he was at risk of being subject to torture or other ill-treatment if sent back to his country of origin.

The district court of Sverdlovski rejected his appeal, finding that neither reports of international organizations concerning torture and ill treatment

<sup>777</sup> Law of the Republic of Tajikistan "On the Legal Status of Foreign Nationals", article 31.

<sup>778</sup> Law of Turkmenistan "On Migration", article 19(5).

<sup>779</sup> Code of the Republic of Uzbekistan on Administrative Liability, article 3461.

in Uzbekistan nor judgments of the European Court of Human Rights finding that extradition to Uzbekistan in cases of a political or religious nature would violate the *European Convention on Human Rights* were sufficient to annul the expulsion order.

Appeals in the case were rejected. When his extradition detention ended, he was therefore held in a detention centre for foreign nationals with a view to expulsion.

The European Court of Human Rights, once seized of the case, issued interim measures ordering him not to be transferred to Uzbekistan while the case was pending. The Russian authorities respected this order of the Court.

In 2016, the European Court ruled that Abdukhafiz Kholmurodov would be at risk of torture or other forms of ill-treatment if sent to Uzbekistan as he was charged for offences of a political or religious character.<sup>780</sup>

The European Court also found that the Russian courts had not provided an effective remedy against such human rights violations because they did not assess the claim of ill-treatment, accepting the expulsion on the sole ground of public order.<sup>781</sup> It further ruled that the law on detention with a view to extradition was not sufficiently clear to satisfy the principle of legality and that therefore Abdukhafiz Kholmurodov's detention was arbitrary under the ECHR.

Similar cases have been addressed throughout the last decade, for example, in *Egamberdiyev v. Russia*, *Yakubov v. Russia*, *Karimov v. Russia*, *Muminov v. Russia*.

#### *b) Rustam Zokhidov*

Rustam Zokhidov, an Uzbek national, was accused in Samarkand of being a member of Hizb ut-Tahrir, a group considered as an extremist organization in Uzbekistan. He was charged with overthrowing the constitutional order, preparation and dissemination of extremist material constituting a threat to national security and public order, and participation in an extremist organization. His extradition was requested from Russia under the *Minsk Convention* and he was arrested on 14 July 2010, less than two months later, in St. Petersburg.

He challenged his extradition before the Russian courts. After initial decisions upholding the extradition, the Supreme Court of Russia ordered the lower court to verify whether the double criminality principle had been respected as well as the statute of limitations under Russian law. The lower court dismissed the extradition request on these grounds and he was freed on 14 April 2011. When the Supreme Court confirmed this decision it made reference to the rulings of the European Court of Human Rights in similar cases which found the existence of a risk of torture or other ill-treatment for persons transferred to Uzbekistan.

The European Court of Human Rights had in the meantime issued an interim measure ordering the Russian authorities not to transfer the applicant to Uzbekistan while the case was pending before it.

<sup>780</sup> *Kholmurodov v. Russia*, ECtHR, Application No. 58923/14, 1 March 2016, paras. 65–70.

<sup>781</sup> *Zokhidov v. Russia*, ECtHR, Application No. 67286/10, 5 February 2013, paras. 77–78.

His asylum application was, however, rejected, as was the first appeal against this decision. While a further appeal against this decision was pending, on 21 December 2011, the Russian authorities arrested him at his home. On the same day, they flew him to Samarkand in Uzbekistan in execution of an expulsion order on the grounds of irregular presence in the country, since the asylum application had been rejected.<sup>782</sup>

In 2013, the European Court ruled that the Russian courts, despite the reference to international human rights law by the Supreme Court, had not assessed the case with the thoroughness required when a risk of torture or other ill-treatment is claimed.<sup>783</sup> It found that the deportation of the applicant to Uzbekistan breached Russia's obligation not to expose him to the risk of torture or ill-treatment under article 3, ECHR. It also found that his detention had been arbitrary and that he could not access any remedy to challenge its lawfulness in breach of article 5, ECHR and that the failure to respect the European Court's interim measures led to a violation of article 34, ECHR.

#### 4.6.2 Selected EU States

In the European Union, although the EU Return Directive favours voluntary over forced return in matters of expulsion,<sup>784</sup> if the expulsion is ordered for reasons of public policy or national security, it is executed immediately without any time for voluntary departure.<sup>785</sup> In such cases, an entry ban is issued and can go beyond the ordinary limit of five years.<sup>786</sup>

With regard to procedural guarantees, the Return Directive provides that expulsion decisions must be issued in writing and be reasoned in fact and in law, and include information on the legal remedies available.<sup>787</sup> The State must "provide, upon request, a written or oral translation ... in a language the third-country national understands or may reasonably be presumed to understand".<sup>788</sup>

In relation to the Return Directive, the Court of Justice of the EU has made reference to the jurisprudence on EU citizens and ruled that the existence of a threat to public policy must be assessed

*"on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy. When it relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national's personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality. It follows that the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence*

<sup>782</sup> *Ibid.*

<sup>783</sup> *Ibid.*, para. 131.

<sup>784</sup> EU Return Directive, article 7.3.

<sup>785</sup> *Ibid.*, article 6.1–2

<sup>786</sup> *Ibid.*, article 11.2

<sup>787</sup> *Ibid.*, article 12.1, which continues: "The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences."

<sup>788</sup> *Ibid.*, article 12.2.

*under national law cannot, in itself, justify a finding that that national poses a risk to public policy.*"<sup>789</sup>

In France, in case of a threat to public order, authorities may execute the order to leave the country immediately.<sup>790</sup> This measure can be accompanied by a re-entry ban of up to five years, or longer if the expulsion relates to a serious threat to public order.<sup>791</sup> With regard to an expulsion for national security reasons, the person to be expelled must be notified and heard by a commission composed of three judges. These guarantees may be dispensed with in cases of absolute emergency.<sup>792</sup> In all other cases, the person to be expelled must be notified 15 days before the hearing, can be represented by a lawyer or any other person of his or her choice and is entitled to an interpreter. He or she must have access to legal aid. The hearing is public and the decision must be issued within a month.<sup>793</sup> Every five years the reasons for expulsion must be reassessed on the basis of the evolution of the threat to public order, of changes in his or her personal and family situation and of guarantees of social and professional reinstatement in society. The person concerned can present submissions.<sup>794</sup>

In the UK, when the authorities have to assess the compliance of an expulsion order with the expellee's right to family life under article 8 of the ECHR, the Immigration Rules guide their decision. According to the Rules, if the person has been convicted and sentenced to a period of imprisonment of at least four years there is no presumption against removal.<sup>795</sup> If the person has been sentenced to imprisonment of between one and four years, consideration must be given as to whether the person has a child who is a UK citizen, or has lived in the UK for the last seven years and it would be unduly harsh for him or her to live in the country of destination and/or to remain in the UK without the parent being expelled.<sup>796</sup> Consideration must also be given if the person has a stable relationship with a UK citizen or a person who is a habitual resident and the relationship was formed when he or she was lawfully in the UK and it is not precarious, and it would be unduly harsh for the partner to live in the country of destination and/or to remain in the UK without the partner.<sup>797</sup> Finally, another presumption against expulsion arises when the person has been lawfully resident in the UK for most of his or her life, is socially and culturally integrated there, and there would be significant obstacles of integration in the country of destination.<sup>798</sup>

In Spain, an expulsion decision must be notified to the subject of the decision.<sup>799</sup> In national security or public order cases, an accelerated procedure

<sup>789</sup> *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, CJEU, *op. cit.*, para. 50. Based on this case-by-case approach, "a Member State cannot refrain automatically, by legislative means or in practice, from granting a voluntary period for departure where the person concerned poses a risk to public policy. ...there must be a case-by-case assessment of whether the refusal to grant such a period is compatible with that person's fundamental rights" (para 70).

<sup>790</sup> CESEDA, article 511-1, II, 1.

<sup>791</sup> *Ibid.*, article 511-1, III.

<sup>792</sup> *Ibid.*, article 522-1.

<sup>793</sup> *Ibid.*, article 522-2.

<sup>794</sup> *Ibid.*

<sup>795</sup> UK Immigration Rules, Rule 398.

<sup>796</sup> *Ibid.*, Rule 399a.

<sup>797</sup> *Ibid.*, Rule 399b.

<sup>798</sup> *Ibid.*, Rule 399A.

<sup>799</sup> Law 4/2000 of Spain, article 57.9.



applies. Under this procedure, there is no voluntary period to leave the country but access to a lawyer, an interpreter and to legal aid is guaranteed, if the person so requires.<sup>800</sup> The expulsion is accompanied by an entry ban of up to five years, which can be increased to ten years in cases of a serious threat to public order, public security, national security or public health.<sup>801</sup>

In Germany, before deciding on expulsion on national security or public order grounds, the authorities must assess the individual circumstances of the case and whether the public interest in deportation outweighs the interests of the person in staying in Germany. During this assessment, the authorities must take into consideration the person's personal, economic and main ties to the country or other countries, the impact on his or her family members and his or her conduct.<sup>802</sup> A foreign national that is found to represent a danger to public security and/or public order will generally not be granted a voluntary period to leave the territory.<sup>803</sup> He or she is however entitled to a lawyer, of being informed of the implications of the deportation order and of the avenues for redress. An appeal must be filed within seven days of notification of the deportation order. During this period, the deportation may not be carried out.<sup>804</sup> An entry or stay ban may exceed five years only in cases of a serious threat to public security or order or if the expulsion was triggered by a criminal conviction.<sup>805</sup>

In Italy, with regard to an expulsion order on grounds of 'social dangerousness', the expulsion decree issued by the Prefect must set out factual and legal reasoning for the decision.<sup>806</sup> In assessing whether the stated grounds exist, the judge must consider:

- the objective character of the elements that justify suspicions and presumptions;
- the contemporaneous existence of a "danger"; and
- the necessity of an overall assessment of the character of the subject.

Furthermore, the assessment must be conducted by means of close scrutiny of the completeness, cogency and consistency of the authorities' assessment.<sup>807</sup>

### **Box 15: EU law on expulsion of EU nationals**

With regard to EU law on the expulsion of EU nationals, any decision based on national security grounds, must "comply with the principle of proportionality and ... be based exclusively on the personal conduct of the individual concerned".<sup>808</sup> Previous criminal convictions, although they

<sup>800</sup> *Ibid.*, article 63.

<sup>801</sup> *Ibid.*, article 58.

<sup>802</sup> AufenthG, article 53.1–2.

<sup>803</sup> *Ibid.*, articles 58.1 and 59.1.

<sup>804</sup> *Ibid.*, article 58a.

<sup>805</sup> *Ibid.*, article 11.3.

<sup>806</sup> Law No. 286/98 of Italy, article 13.3. See also: Court of Cassation, First Civil Section, Judgment No. 462/2010 of 13 January 2010.

<sup>807</sup> See: Court of Cassation, Sixth Civil Section, Ordinance No. 17585/2010 of 27 July 2010; Sixth Civil Section, Ordinance No. 18482/2011 of 8 September 2011; Sixth Civil Section, Ordinance No. 21796/2013 of 24 September 2013.

<sup>808</sup> EU Citizens Directive, article 27.2. See: *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, para. 34; *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 99. In case of imperative grounds, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, para. 49. See also: paras. 50–54. See also: COM (2009) 313 final, *op. cit.*, p. 13.

can be taken into account, must not per se be used as the basis for the transfer.<sup>809</sup>

When assessing the existence of a risk to public policy or public security, the “personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention [may] not be accepted.”<sup>810</sup> This means that the person must have a propensity to act in such a way in the future<sup>811</sup> and represent a threat in the present moment.<sup>812</sup> The State must re-assess the actuality of the threat if the measure is enforced more than two years after its issuance.<sup>813</sup>

The Court of Justice ruled that EU law “precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens..., in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy...”<sup>814</sup>

## 4.7 Remedies against expulsion decisions

As outlined in Chapter II, where an individual is threatened with an expulsion that gives rise to a real risk of a serious human rights violation in the receiving State, he or she must have an effective right to a remedy that is prompt, accessible, and conducted by an impartial and independent authority capable of reviewing and overturning the decision to expel.<sup>815</sup>

Remedies should generally be provided before a judicial body<sup>816</sup> with the power to bring about cessation of the violation and appropriate reparation (restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition), including, where relevant, to overturn the expulsion order, and must be independent and impartial.<sup>817</sup> The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.<sup>818</sup> In cases of *non-refoulement* to face a risk of torture or ill-treatment,

<sup>809</sup> European Commission, COM (2009) 313 final, *op. cit.*, p. 11.

<sup>810</sup> EU Citizens Directive, article 27.2. See also: European Commission, COM (2009) 313 final, *op. cit.*, p. 11.

<sup>811</sup> *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, para. 30.

<sup>812</sup> *Ibid.*, para. 31. See: European Commission, COM (2009) 313 final, *op. cit.*, p. 11.

<sup>813</sup> EU Citizens Directive, article 33. Authorities must “assess whether there has been any material change in the circumstances since the expulsion order was issued”, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, CJEU, *op. cit.*, para. 32.

<sup>814</sup> *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, CJEU, *op. cit.*, para. 68.

<sup>815</sup> See: ICJ, *Migration and International Human Rights Law, Practitioners Guide No. 6*, *op. cit.*, pp. 166–171; ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, *op. cit.*

<sup>816</sup> ICCPR, article 2.3. See also: Human Rights Committee (CCPR), *General Comment No. 31*, *op. cit.*; CAT, article 14. See also: Committee against Torture (CAT), *General Comment No. 3*, *op. cit.*; UN *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *op. cit.*, article 12.

<sup>817</sup> See: ICJ, *Practitioners Guide No. 2*, *op. cit.*, pp. 49–54.

<sup>818</sup> *Muminov v. Russia*, ECtHR, *op. cit.*, para. 100; *Isakov v. Russia*, *op. cit.*, para. 136; *Yuldashev v. Russia*, ECtHR, *op. cit.*, paras. 110–111; *Garayev v. Azerbaijan*, ECtHR, *op. cit.*, paras. 82 and 84.

the decision to expel must be subject to close and rigorous scrutiny.<sup>819</sup> It must be suspensive of the expulsion measure from the moment the appeal is filed.<sup>820</sup>

#### 4.7.1 The Russian Federation

In the Russian Federation, a judicial decision regarding an administrative offence, including a decision ordering expulsion, can be appealed to a higher instance court within 10 days of its issuance or receipt.<sup>821</sup> An appeal suspends the expulsion's execution<sup>822</sup> and must be decided upon within 24 hours.<sup>823</sup> With respect to these proceedings, the Supreme Court does not consider the presence of the concerned individual as mandatory, provided that he or she has been duly informed of the date and place of the hearings and has not submitted a request to adjourn the hearings or that such a request has been denied.<sup>824</sup> If this appeal is unsuccessful, the decision enters into force. Nevertheless, an appeal may still be lodged with a higher court based on errors of law. This appeal is not suspensive of the expulsion order if it is sought by the expellee.<sup>825</sup>

The Code of Administrative Offences provides for the right to the address the court, provide explanations, make motions and complaints in a language of one's choosing and use interpretation services.<sup>826</sup> However, it has been reported that, in practice, multiple cases concerning administrative offences are typically submitted by the police and the Ministry of Interior (previously FMS) at the same time without translation, and the alleged offenders are not provided with an interpreter.<sup>827</sup> To bypass legal requirements, the authorities have resorted to requesting that foreign nationals write a statement that they do not need interpretation services,<sup>828</sup> without necessarily informing them of the content and legal implications of such a statement. In court, if it becomes apparent that the person lacks the necessary Russian language skills, police or migration services often resort to non-professional interpreters whose competence and independence is highly questionable.<sup>829</sup> It has been reported that courts frequently accept these signed statements without scrutiny.<sup>830</sup>

A foreign national who has been deported or administratively removed from Russia may not re-enter the territory for a five-year period following the deportation or administrative removal.<sup>831</sup>

<sup>819</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.8. *Jabari v. Turkey*, ECtHR, *op. cit.*, para. 39.

<sup>820</sup> See, ICJ, *Migration and International Human Rights Law*, *op. cit.*, p. 169 and fn. 602 for related comprehensive jurisprudence, in particular from CAT and CCPR.

<sup>821</sup> CoAO of the Russian Federation, article 30.3.1.

<sup>822</sup> *Ibid.*, article 31.1.

<sup>823</sup> *Ibid.*, article 30.5.3.

<sup>824</sup> "Review of legislation and judicial practice of the Supreme Court of the Russian Federation for the 2<sup>nd</sup> quarter of 2008", approved by the Decision of the Presidium of the Supreme Court of the Russian Federation, dated 19 September 2008.

<sup>825</sup> CoAO of the Russian Federation, articles 30.12 and 31.6. See also: Ruling No. 5 of 24 March 2005 by the Plenary Supreme Court of Russia, para. 37, and *S. K. v. Russia*, ECtHR, Application No. 52722/15, 14 February 2017, paras. 23–29.

<sup>826</sup> *Ibid.*, article 24.2.2.

<sup>827</sup> Ya. B. Zholobov, "Administrative expulsion from the Russian Federation of aliens and stateless persons: challenges and solutions", *Sudya*, Issue No. 6, 2015, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=CJI;n=89363>.

<sup>828</sup> *Ibid.*

<sup>829</sup> *Ibid.*

<sup>830</sup> For information on violations in court proceedings in cases concerning administrative expulsions, see interview of Radio Liberty/Radio Free Europe with lawyers of the NGO "Committee of Civic Assistance", Konstantin Trotskiy, and of the "Migration and Law" programme of the NGO "Memorial", Illarion Vasilyev, available at <http://www.svoboda.org/content/transcript/26970293.html>.

<sup>831</sup> Law "On the Procedure for Entering and Leaving the Russian Federation", No. 114-FZ of 15 August 1996, as amended on 10 January 2003, article 27.2.

### 4.7.2 Central Asian States

In Kazakhstan, decisions on deportations can be challenged only through cassation and supervisory review.<sup>832</sup> The filing of the cassation challenge automatically suspends the execution of the deportation order.<sup>833</sup> If the cassation appeal or the supervisory review fails, the respective court should indicate a new deadline for the person to leave the territory of the country. In Uzbekistan a court ruling on an administrative offence is appealable within 10 days.<sup>834</sup> In Kyrgyzstan and Tajikistan, supervisory review is available in principle but has not yet been applied to an immigration case, as these procedures are usually dedicated to challenging criminal judgments.<sup>835</sup>

Unlike some other States in the Central Asia and wider CIS region, Turkmenistan does not require a court decision for administrative removal. Specifically, rulings in administrative proceedings, when adopted by “authorized bodies”, can be appealed “to the court in whose jurisdiction the authorized body is or to a superior authorized body”.<sup>836</sup> It remains unclear whether the choice of forum for appeal is left at the discretion of the appellant or whether the State plays a role in deciding the forum.

### 4.7.3 Selected EU States

In EU law, migrants must be provided with an effective remedy to appeal against the expulsion decision “before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence”.<sup>837</sup> The body must have the power to suspend enforcement of the decision.<sup>838</sup> Migrants are entitled to “obtain legal advice, representation and, where necessary, linguistic assistance”<sup>839</sup> and the State must ensure “the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid”.<sup>840</sup> If the expulsion is based on national security grounds, the person may be detained for up to eighteen months, as is the case for ordinary expulsions.<sup>841</sup>

In France, an order of expulsion based on security grounds can be appealed within 48 hours to the President of the Administrative Court. The decision to detain the person in execution of the expulsion can be challenged before the judge.<sup>842</sup> The judge must decide on the case within 72 hours. The foreigner has access to a lawyer, an interpreter and his or her consulate.<sup>843</sup>

<sup>832</sup> Supervisory review (“nadzor”) is a judicial review procedure common to CIS countries to challenge decisions, which have already entered into force, before the Supreme Court. Cassation appeals are appeals against a judicial decision on points of law. See: Regulatory Decision of the Supreme Court No. 4, dated 13 December 2013, “On case law concerning deportation of aliens and stateless person from the territory of Kazakhstan”, para. 18.

<sup>833</sup> Civil Procedure Code, article 384, and Regulatory Decision of the Supreme Court No. 4, dated 13 December 2013, “On case law concerning deportation of aliens and stateless person from the territory of Kazakhstan”, para. 18.

<sup>834</sup> Code of the Republic of Uzbekistan on Administrative Liability, article 316.

<sup>835</sup> See, for example: Criminal procedure code of Tajikistan, article 411.

<sup>836</sup> Code of Turkmenistan on Administrative Liability, article 552(2).

<sup>837</sup> EU Return Directive, article 13.

<sup>838</sup> *Ibid.*, article 13.2.

<sup>839</sup> *Ibid.*, article 13.3.

<sup>840</sup> *Ibid.*, article 13.4.

<sup>841</sup> *Ibid.*, article 14.

<sup>842</sup> CESEDA, article 512-1, III.

<sup>843</sup> *Ibid.*, article 512-1-1, 512-2.

In the UK, the *Nationality, Immigration and Asylum Act* of 2002 provides that deportation orders founded on the basis of “being conducive to the public good” may be challenged before a first-instance tribunal.<sup>844</sup> The tribunal may annul the deportation order if the law has been breached or the exercise of discretion was unreasonable.<sup>845</sup> The ruling can be appealed on points of law to the Upper Tribunal, followed by the Court of Appeal and, finally, the Supreme Court. The expulsion or deportation can also be challenged for breaching human rights and/or refugee law (see below).<sup>846</sup>

In Italy, expulsion decrees issued by the Minister of Interior may be challenged only before administrative courts. An appeal cannot suspend the expulsion order or its execution.<sup>847</sup> However, expulsions for ‘social dangerousness’ must be challenged before a justice of the peace. Any appeal to a justice of the peace must be submitted within 30 days.<sup>848</sup> The justice’s decision may be submitted to the Court of Cassation on questions of law.<sup>849</sup>

### **Box 16: An effective remedy in national security expulsion cases – the CJEU**

With regard to the right to an effective remedy, the Court of Justice of the European Union (CJEU) has ruled that “the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons . . . so as to make it possible for him to defend his rights in the best possible conditions . . . and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question.”<sup>850</sup>

Recognizing that sometimes it may be necessary not to disclose certain information based on overriding considerations of national security, the Court held that, “if, in exceptional cases, a national authority opposes precise and full disclosure to the person . . . by invoking reasons of State security, . . . [Member States are required, first,] to provide for effective judicial review both of the existence and validity of the reasons invoked by the national authority with regard to State security and of the legality of the decision”<sup>851</sup> and to provide the person with an appropriate procedure. This procedure must strike “an appropriate balance between the require-

<sup>844</sup> Nationality, Immigration and Asylum Act of 2002, article 82. See the decision of the Supreme Court in *Hesham Ali (Iraq) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2016] UKSC 60, 16 November 2016, para. 5.

<sup>845</sup> Nationality, Immigration and Asylum Act of 2002, article 86.

<sup>846</sup> UK Borders Act 2007, article 32.7.

<sup>847</sup> Law Decree 144/2005 (Italy), article 3.4. While technically this provision expired in 2007, it reflects the prevailing approach of the Italian legal system on national security based decisions of the government that fall within the remit of administrative courts.

<sup>848</sup> Legislative Decree No. 150/2011 (Italy), article 18.4.

<sup>849</sup> Law 286/1998, article 13.8, referring to article 18 of Legislative Decree 150/2011 (Italy).

<sup>850</sup> *ZZ v. Secretary of State for the Home Department*, CJEU, Judgment, Case C-300/11, 4 June 2013. See also: *Josep Peñarroja Fa*, CJEU, Judgment, Joined Cases C-372/09 and C-373/09, 17 March 2011, para. 63; *Hristo Gaydarov v. Director na Glavna direktsia "Ohranitelna politisia" pri Ministerstvo na vatrechnite raboti*, CJEU, Case C-430/10, Judgment, 17 November 2011, para. 41; *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, CJEU, Judgment, Case 222/86, 15 October 1987, para. 15; and *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, CJEU, Judgment, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, para. 337.

<sup>851</sup> *Ibid.*, paras. 57–58.

ments flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary".<sup>852</sup> It must respect, to the greatest extent possible, compliance with the adversarial principle by informing the person of "the essence of the grounds on which a decision refusing entry ... is based".<sup>853</sup>

## 4.8 Detention pending expulsion

### 4.8.1 The Russian Federation

A person subject to administrative proceedings for a breach of the rules on residence within Russia may be provisionally held in administrative detention for a period not exceeding 48 hours.<sup>854</sup> Within 48 hours of detention, the case must be heard by a court.<sup>855</sup> Administrative removal may be enforced through an order to leave the territory within five days under the authorities' supervision, unless the concerned person has committed more than one administrative offence.<sup>856</sup> If the court decides on a forced removal, administrative detention can be applied prior to removal.<sup>857</sup>

A person awaiting administrative removal is placed either in a detention centre for non-nationals or in the designated premises of the border agencies.<sup>858</sup> At the request of the detainee, the person's relatives, colleagues and defence counsel must be notified of his or her location as soon as possible.<sup>859</sup> A decision on detention pending removal or deportation can be challenged before the courts.<sup>860</sup>

In February 1998, the Russian Constitutional Court held, with reference to article 22 of the Russian Constitution, that courts must assess the lawfulness and reasons for detention and whether the detention is necessary for the purposes of enforcing the removal. The Court explicitly stated that detention for an indefinite period of time is not acceptable and would amount to a form of punishment incompatible with the provisions of the Constitution.<sup>861</sup>

If a decision imposing an administrative penalty is not enforced within two years of the date it became final, it becomes invalid.<sup>862</sup> Until recently, Russian law provided no maximum length for this type of administrative detention and did not provide for periodic judicial review of detention.<sup>863</sup> Consequently,

<sup>852</sup> *Ibid.*, para. 64.

<sup>853</sup> *Ibid.*, paras. 65–68.

<sup>854</sup> CoAO of the Russian Federation, article 27.5.2.

<sup>855</sup> *Ibid.*, article 29.6.4.

<sup>856</sup> *Ibid.*, articles 18.8.4 and 18.10.3. See also: article 32.10.6.

<sup>857</sup> *Ibid.*, article 27.19.

<sup>858</sup> *Ibid.* On 15 September 2015 a new Code of Administrative Procedure (Law No. 21-FZ of 8 March 2015) entered into force. Chapter 28 governs the proceedings for placement of an alien in a special-purpose facility pending his or her deportation or readmission and for the extension of the term of such detention. Article 269(2) requires the courts deciding on the detention of an alien to set a "reasonable time-limit" for such detention and to justify its duration; moreover, the operative part of the decision should set "a concrete term of detention" in a special facility.

<sup>859</sup> *Ibid.*, article 27.3.3.

<sup>860</sup> Code of Administrative Procedure of the Russian Federation, No. 21-FZ, dated 8 March 2015, with amendments as of 2 June 2016.

<sup>861</sup> Constitutional Court Judgment No. 6-P of 17 February 1998.

<sup>862</sup> CoAO of the Russian Federation, article 31.9(1).

<sup>863</sup> NGO ADC "Memorial" alternative report to the Human Rights Committee, available at [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/RUS/INT\\_CCPR\\_ICO\\_RUS\\_17193\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/RUS/INT_CCPR_ICO_RUS_17193_E.pdf).

persons subject to administrative detention could be held in these detention centres for years.<sup>864</sup> Recently, the Constitutional Court of Russia ruled that the authorities must specify the length of detention and provide for the possibility to challenge its lawfulness.<sup>865</sup>

#### 4.8.2 Central Asian States

In Kazakhstan, the Law on Migration provides for the detention of “irregular migrants” in police detention facilities for the period “necessary for deportation”.<sup>866</sup> However, it does not provide any express limitations on the duration of such detention, theoretically rendering indefinite detention possible. It is further unclear whether a remedy of habeas corpus is available to those in police detention awaiting expulsion other than through a challenge to the underlying expulsion order or administrative offence decision.

Kyrgyzstan’s law does not provide for detention pending removal. While the Code of Administrative Liability provides for administrative detention, it is only foreseen as a penalty (for administrative offences other than irregular stay) rather than as a means to secure the implementation of a court ruling in an administrative case. Short-term administrative custody, as distinct from administrative detention, may be applied for up to three hours where there is a need to clarify additional circumstances of the alleged offence or to establish the alleged offender’s identity. Administrative custody may be extended for up to 48 hours for offences for which administrative detention may be imposed or for offences involving border crossing irregularities.<sup>867</sup> However, irregular stay in the territory of the Kyrgyz Republic does not fall into either of these categories. It is unclear whether ordinary habeas corpus proceedings apply to this kind of deprivation of liberty.

Tajikistan’s law does not provide for detention pending expulsion, but it may be applied as a penalty for administrative offences.<sup>868</sup> In Uzbekistan and Turkmenistan, there is no legislation concerning detention pending removal. In Turkmenistan, the Code of Administrative Offences allows for the detention of a person suspected of illegally crossing the border for up to three days to verify the person’s identity, with the possibility to extend custody for up to 10 days if the prosecutor so authorizes.<sup>869</sup> In Uzbekistan, repeat border crossing violations are punishable by up to 15 days of administrative detention.<sup>870</sup> However, this sanction does not formally constitute administrative detention pending removal. *Habeas corpus* procedures are not explicitly applicable to immigration detention in any of these countries.

<sup>864</sup> See case of *Kim v. Russia*, ECtHR, *op. cit.* For more details, please see interview of Radio Liberty/Radio Free Europe with lawyers of the NGO “Committee of Civic Assistance”, Konstantin Trotskiy, and of the “Migration and Law” programme of the NGO “Memorial”, Illarion Vasilyev, available at <http://www.svoboda.org/content/transcript/26970293.html>. See: Summary of the *Report of ADC Memorial, op. cit.*; *Report of the Public Monitoring Commission on the human rights situation in the specialized institution for temporary detention of foreigners of the Department of the Federal Migration Service of Russia for Perm region*, published by the Perm Regional Human Rights Centre, 12 February 2016, available at <http://new.prpc.ru/dokumenty/zaklyuchenie-o-soblyudenii-pravcheloveka.html>.

<sup>865</sup> Decree of the Constitutional Court of the Russian Federation of 23 May 2017 No. 14-P of St. Petersburg “On the case regarding a verification of the constitutionality of the provisions of articles 31.7 and 31.9 of the Code of the Russian Federation on Administrative Offences in connection with the complaint of a stateless person N. G. Mskhiladze”.

<sup>866</sup> Law “On Migration” of Kazakhstan, article 60.1.

<sup>867</sup> Code of the Kyrgyz Republic on Administrative Liability, article 565.

<sup>868</sup> Code of the Republic of Tajikistan on Administrative Offences, article 46.

<sup>869</sup> CoAO of Turkmenistan, article 515(2).

<sup>870</sup> Code of Administrative Liability of Uzbekistan, article 196-1.



### 4.8.3 Selected EU States

In France, in case of absolute emergency and imperative necessity (*urgence absolue et nécessité impérieuse*) for the sake of national or public security, house arrest can be imposed for up to one month before the authorisation of the expulsion order.<sup>871</sup> Other control orders envisaged are the wearing of electronic surveillance devices.<sup>872</sup> A fundamental principle in French immigration law is that any deprivation of liberty must last only for the time strictly necessary to carry out the transfer and the authorities must exercise due diligence in this regard.<sup>873</sup> In cases of national security, public security and public order, a person subject to an expulsion order may be detained for up to 48 hours.<sup>874</sup> The detention must be authorized by a judge within 24 hours, after having heard the detainee and his or her lawyer.<sup>875</sup> In case of absolute urgency, serious threat to public order or impossibility of execution within the timeframe, the judge may extend the detention for a further 15 days. However, if the person has been convicted of terrorism related offences, detention can last up to one month, renewable each month on the order of a judge up to a maximum of six months.<sup>876</sup> The judge's decision can be appealed to the President of the Court of Appeal, which rules within 48 hours. The appeal is not automatically suspensive of the expulsion order, but it may be suspended at the discretion of the President, upon the request of the public prosecutor, acting as the public authority.<sup>877</sup> Any procedural violation can lead to the nullification of the measure only if it breaches the rights of the person.<sup>878</sup>

In Spain, a foreign national subject to an expulsion order can be detained upon the authorization of an examining judge who must hold a hearing with the person and the public prosecutor present. The judge must apply the principle of proportionality and perform an assessment of the following factors: risk of flight; lack of a residence or of identity documents; any actions of the foreign national aimed at impeding the expulsion; the existence of prior convictions; and the risk of detention to the person's health. The detention can last a maximum of 60 days and cannot be ordered for persons under 18 years of age.<sup>879</sup> It is also possible to subject the person to control orders such as withdrawing his or her passport, imposing an obligation to report periodically to the authorities, imposing an obligation of residence in a particular place or any other preventive measure the judge may find appropriate.<sup>880</sup>

German law provides that detention pending deportation is not permissible if the transfer may be achieved by less invasive means.<sup>881</sup> The law permits the use of alternative measures to detention unless the foreign national has been sentenced to two years imprisonment or convicted of violent crimes. Such measures include the obligation to register once a week with the authorities, the obligation to live in a specified district or in an assigned residence, and/or

<sup>871</sup> CESEDA, article 523-3. See also: mitigation in cases of ill-health and less serious cases, articles 523-4 and 523-5.

<sup>872</sup> *Ibid.*, article 571-3.

<sup>873</sup> *Ibid.*, article 554-1.

<sup>874</sup> *Ibid.*, article 551-1.

<sup>875</sup> *Ibid.*, article 552-1.

<sup>876</sup> *Ibid.*, article 552-7.

<sup>877</sup> *Ibid.*, article 552-10.

<sup>878</sup> *Ibid.*, article 552-13.

<sup>879</sup> Law 4/2000 (Spain), article 62.

<sup>880</sup> Royal Decree 557/2011 of 20 April 2011 (Spain), article 235.6.

<sup>881</sup> AufenthG (Germany), article 62.1.

prohibitions on interaction with specified persons, undertaking certain occupations or accessing specified devices.<sup>882</sup>

If alternatives to detention have not been deemed applicable, detention may be ordered by a judge while a decision for deportation is under consideration. In such instances, the period of detention may not last more than six weeks.<sup>883</sup>

A foreign national is detained in order to execute the deportation order if he or she has entered the country unlawfully, or has been expelled on public security and/or public order grounds. Detention can last for a period of six months, although this can be extended by a further twelve months if the foreigner is presumed to create obstacles to his or her deportation.<sup>884</sup>

In Italy, forced accompaniment to the border must be ordered by the "Questore",<sup>885</sup> who may do so if there is a risk of the person absconding or if the expulsion has been ordered following an arrest or a conviction for a criminal offence.<sup>886</sup> Immigration law grants the Questore the power to detain a migrant, for the time "strictly necessary", in order to prepare the expulsion.<sup>887</sup> Detention may be ordered when expulsion through forced accompaniment to the border<sup>888</sup> cannot be executed immediately, due to a temporary situation that obstructs preparation of the repatriation or execution of the removal.<sup>889</sup> The detention may last up to 90 days.<sup>890</sup>

A justice of the peace is charged with validating the detention within 48 hours of the migrant being notified of the decision to detain. The hearing is held in camera, with the mandatory presence of a defence lawyer, and, if needed, an interpreter.<sup>891</sup> If the justice of the peace fails to validate the order within 48 hours, the person subject to expulsion may not be detained any longer. Any extension of the period of detention must in each instance be confirmed by a justice of the peace. A migrant may appeal to the Court of Cassation to challenge the detention decisions of the justice of the peace. Critically, however, any such appeal does not suspend detention, unless and until an appeal is successful.<sup>892</sup>

## 4.9 Conclusions

A central concern arising from this review of the legal framework of the countries considered is the extreme vagueness of immigration laws in terms of the definitions of national security, public order and/or public policy or "unreliability" on which expulsions are based. This problem exists in all the States examined.

Despite the judgments of the European Court of Human Rights, which allow a degree of latitude to individual countries to define these terms depending on the risks they face, what appears from the above analysis is that countries extend such concepts to include economic risks, hate speech or other situations open to subjective assessments and political abuse. The ambiguity of these

<sup>882</sup> *Ibid.*, article 56.

<sup>883</sup> *Ibid.*, article 62.2.

<sup>884</sup> *Ibid.*, article 62.4.

<sup>885</sup> "Questore" is the chief of police of an Italian province.

<sup>886</sup> Legislative Decree 286/1998 (Italy), article 13.4.

<sup>887</sup> *Ibid.*, article 14.1.

<sup>888</sup> *Ibid.*, article 13.4.

<sup>889</sup> *Ibid.*, article 14.1.

<sup>890</sup> *Ibid.*, article 14.5.

<sup>891</sup> *Ibid.*, article 14.4.

<sup>892</sup> *Ibid.*, article 14.6.

definitions is also highlighted by the stark discrepancy in the statistics in this field, set out in the first part of this Chapter. This discrepancy is principally due to the different understandings among States of what is encompassed by grounds such as “national security” or “public order”. What better demonstration of the lack of respect for the principle of legality than being unable to foresee what conduct, statements, economic activity or religious manifestation will result in expulsion.

It is essential that all States provide stricter definitions of these grounds for expulsion and allow the concerned person to challenge their application and validity before national courts in open proceedings with all fair trial guarantees.

Furthermore, any grounds for expulsion that would serve as a sanction for the enjoyment of internationally protected human rights, such as, for example, freedom of expression or association, are incompatible with international human rights law. Under international law, human rights are enjoyed by every person without distinction based on nationality, apart from the right to vote and to enter a foreign country. Any grounds for expulsion, however masked as national security based, that would directly curb the enjoyment of these rights, would breach the principle of non-discrimination.

Expulsions in the CIS region need to be seen in the context of the existence of a large population of irregular migrants resident in the Russian Federation and, to a lesser extent, Kazakhstan. Until the 1990s, such migrants were citizens of a single country (the USSR). The immigration system among these States has only recently been introduced and is still being introduced in certain Central Asian countries. The number of persons that are at risk of being subject to expulsion for administrative offences or other immigration expulsions at any moment is therefore very large.

Persons resident in these States in an irregular fashion, because of the wide variety of administrative offences they are likely to commit as a result of their status, are therefore vulnerable to expulsion proceedings at any moment.

This situation has given rise, especially in the Russian Federation, as documented by the European Court of Human Rights, to the possibility of authorities expelling such persons when extradition procedures fail, i.e. disguised extraditions. The situation is particularly applicable to the Russian Federation because its criminal courts, more than those of Central Asian countries, have begun to implement, though by no means uniformly across the country and in all cases, the rulings of the European Court of Human Rights. Alternatives have therefore been sought by the authorities. Examination of the practices surrounding such expulsions have further demonstrated that courts use accelerated procedures without assessing the human rights risks of expellees.

The ICJ stresses that, regardless of the type of transfer chosen by the authorities, the obligations of the country under international law, notably in these cases respect of the principle of *non-refoulement*, continue to apply. Performing an expulsion instead of an extradition proceeding does not in any way affect whether a human rights obligation is breached.

The typical reasons for resorting to expulsion procedures, particularly in the CIS States examined, is that courts are slower to assess the human rights risks inherent in the transfer in such proceedings. In contrast, in extradition cases in these States, international human rights courts and non-judicial authorities

have issued a greater number of judgments and criminal law guarantees are applicable. It is therefore important that administrative courts perform a strict assessment of the risk of human rights violations caused by the expulsion of the concerned person. While this recommendation is focused on the Russian Federation and Central Asia States, European countries have also been shown to periodically resort (see Box No. 12) to these practices and therefore should ensure the same assessment always takes place.

With regard to the legal framework, in Central Asian States, there are substantial problems with the framework governing detention. Administrative detention is imposed without due reference to necessity and proportionality. It should be stressed that, under international law, in general, detention should only be imposed pursuant to a criminal conviction, and administrative detention, in particular in relation to immigration proceedings, may be resorted to only exceptionally and for very brief periods. In Central Asia, there is a lack of specification as to of maximum periods of detention, while the Russian Federation has only recently addressed the problem. Obstacles to expulsions are predominantly found only in refugee laws, with the consequence that absolute prohibitions of *non-refoulement* are not enshrined in law. Tajikistan and Turkmenistan have no judicial involvement in the administrative detention process, although Tajikistan does at least provide for appeals against detention to a court.

While it is clear that in Russia and Kazakhstan appeals to courts are suspensive of the execution of the expulsion, the same is not true for other Central Asia States. Likewise, in these countries there is no specific legislative framework for immigration detention and the system relies on other administrative law measures.

The ICJ considers that most of the shortcomings in the laws of Central Asian States may be due to the low impact of migration in their countries. Nonetheless, it is their obligation under international law to set up a national legal framework which ensures the respect, protection and fulfilment of the human rights of all, including of migrants.

## V. International protection

All CIS countries examined in this report, apart from Uzbekistan, are parties to the 1951 *Geneva Refugee Convention* (and its 1967 Protocol). In the region, only Turkmenistan is party to the 1954 *Convention on the Status of Stateless Persons* or to the 1961 *Convention on the Reduction of Statelessness*. In Uzbekistan, a system of international protection is not codified in national legislation.

All of these States, except Uzbekistan, have incorporated into national law the definition of a refugee set out in article 1 of the Geneva Refugee Convention.<sup>893</sup> Kyrgyzstan adds to the grounds of persecution, that of persecution “due to an armed or inter-ethnic conflict.”<sup>894</sup>

In 1999, Uzbekistan’s President signed the *OSCE Charter for European Security*, which contains a commitment by signatory states to respect the right to seek asylum and to ensure the international protection of refugees, as set out in the 1951 Convention and its 1967 Protocol.<sup>895</sup> This commitment is political in nature and not a legally binding commitment. In addition, Uzbekistan has no specialized domestic legislative act on the issue of refugees. There is one mention of asylum in the Constitution of the Republic of Uzbekistan, namely in article 93, which outlines the scope of presidential powers.<sup>896</sup>

### 5.1 Exclusion

All the examined countries except Uzbekistan enshrine in their laws the grounds for excluding refugee status set out at article 1F of the *Geneva Refugee Convention*.<sup>897</sup> In the Russian Federation, Kazakhstan, Turkmenistan and Kyrgyzstan, refugee status is also excluded when those seeking refugee protection can avail themselves of the protection of another State where they are nationals or habitual residents,<sup>898</sup> and, in respect of Kyrgyzstan, if they have obtained refugee status elsewhere.

Tajikistan, the Russian Federation and Kazakhstan exclude refugee status for those protected by UN agencies, other than the UNHCR.<sup>899</sup> The Russian Federation and Tajikistan also exclude from protection those “who have left the country of [their] citizenship (his former habitual residence) for economic reasons or due to famine, epidemics or emergency situations of natural and technological nature”.<sup>900</sup>

The Law “On Refugees” of Kazakhstan provides additional exclusion grounds in respect of persons for whom there “are reasonable grounds to believe ... took

<sup>893</sup> Federal Law No. 4528-1 of 19 February 1993 (the Refugees Act) of the Russian Federation, article 1.1; Law of the Kyrgyz Republic “On Refugees”, article 1; Law of the Republic of Kazakhstan “On Refugees” of 3 July 2014 No. 227-V (Law on Refugees), article 1.1; Law of the Republic of Tajikistan “On Refugees”, article 2; Law of Turkmenistan “On Refugees”, article 1.

<sup>894</sup> Law of the Kyrgyz Republic “On Refugees”, article 1.

<sup>895</sup> *OSCE Charter for European Security*, Istanbul, November 1999, para. 2.

<sup>896</sup> Constitution of Uzbekistan, article 93 (“The President of the Republic of Uzbekistan shall: [...] 22) rule on matters of citizenship of the Republic of Uzbekistan and granting political asylum”).

<sup>897</sup> Refugees Act (Russian Federation), article 2.1.1–3; Law “On Refugees” of Kazakhstan, article 12.6–8; Law of the Kyrgyz Republic “On Refugees”, article 5; Law of the Republic of Tajikistan “On Refugees”, article 3; Law of Turkmenistan “On Refugees”, article 7.

<sup>898</sup> *Ibid.*, article 2.1.4.5, and 2.2; Law of the Kyrgyz Republic “On Refugees”, article 5; Law of Turkmenistan “On Refugees”, article 7; Law “On Refugees” of Kazakhstan, article 12.

<sup>899</sup> *Ibid.*; Law of the Republic of Tajikistan “On Refugees”, article 3; Law “On Refugees” of Kazakhstan, article 12.

<sup>900</sup> *Ibid.*; Law of the Republic of Tajikistan “On Refugees”, article 3.

part in the activities of terrorist, extremist or banned religious organizations functioning in the country of origin or country from which he/she has arrived".<sup>901</sup>

Persons "convicted for participation in the activities of a terrorist, extremist or banned religious organizations" may also be deprived of refugee status.<sup>902</sup>

Under the laws of the Russian Federation and in Tajikistan, an asylum application may be declared inadmissible if:

- a previous request has been rejected by the authorities and no new grounds are presented;
- they can find protection in a third State;
- the applicant has come to the country to flee punishment for the commission of criminal offences, in Russia this includes the crime of illegal exit from the country;
- the person was forced to cross the border to ask for international protection;
- the applicant refuses to provide information about the circumstances of his or her arrival in the country; or
- the applicant already has a permit to live there or could have one.<sup>903</sup>

Furthermore, in the Russian Federation, an application may be dismissed if the applicant is being prosecuted for a criminal offence committed in Russia, or if the person has been denied refugee status in another State Party to the *Geneva Refugee Convention*, provided that the international protection legislation of that country is compatible with that of the Russian Federation.<sup>904</sup>

The applicant may also be deprived of refugee status if he or she has been convicted of criminal offence committed in the Russian Federation; if he or she has reported false information or used fake documents in his or her asylum application; or has been convicted for an administrative offence related to drug trafficking.<sup>905</sup> Reporting false information or using fake documents bears the same consequences in Kazakhstan.<sup>906</sup>

Under the law of Turkmenistan, refugee status can be revoked if the individual in question: acquired this status by submitting misleading information or counterfeit documentation; poses a threat to national security or the public order of Turkmenistan; or participates in acts contrary to the purposes and principles of the United Nations.<sup>907</sup>

## 5.2 Non-refoulement

Under Russian law, an asylum seeker cannot be sent back to his or her country of nationality or habitual residence while he or she is classified as a refugee.<sup>908</sup>

<sup>901</sup> Law "On Refugees" of Kazakhstan, article 12. 5, the other grounds are at points 2, 3, 4 and 9.

<sup>902</sup> *Ibid.*, article 13.5.

<sup>903</sup> Refugees Act (Russian Federation), article 5; Law of the Republic of Tajikistan "On Refugees", article 8.

<sup>904</sup> *Ibid.*, article 5.

<sup>905</sup> *Ibid.*, article 9.2.

<sup>906</sup> Law "On Refugees" of Kazakhstan, article 12.

<sup>907</sup> Law of Turkmenistan "On Refugees", article 9.

<sup>908</sup> Refugees Act (Russian Federation), article 10.1.

If the person is unable to obtain refugee status but cannot be expelled for humanitarian reasons,<sup>909</sup> he or she may be granted temporary asylum.<sup>910</sup> Recognition of this status entails a prohibition of transfer to the country of nationality or habitual residence “against his will”.<sup>911</sup> It is granted for renewable terms of one year.<sup>912</sup> The status can be withdrawn if the person is convicted of a criminal offence committed in the Russian Federation, has reported false information or used fake documents in his or her asylum application or has been convicted of an administrative offence related to drug trafficking.<sup>913</sup>

Under the new Law “On Refugees” of Kazakhstan, *non-refoulement*, as defined under international refugee law, is enshrined as an overarching principle governing the whole refugee law system.<sup>914</sup> It is absolute in scope, without the possibility of derogation even for national security reasons.<sup>915</sup> Refugee status is temporary and lasts for renewable terms of one year.<sup>916</sup>

Under the laws of Kyrgyzstan, the principle of *non-refoulement* applies to rejected asylum seekers by prohibiting their removal to States where they would face a risk of persecution, torture or ill-treatment.<sup>917</sup> However, this guarantee of protection does not apply to those individuals who are deemed a security risk or who have been convicted of an especially serious crime.<sup>918</sup>

In Tajikistan, the principle of *non-refoulement* protects rejected asylum seekers by prohibiting their removal to States “where their life and freedom would be threatened on account of their race, religion, citizenship, membership of a particular social group or political opinion”.<sup>919</sup> However, individuals who are deemed a security risk or who have been convicted of a serious crime are excluded from this protection.<sup>920</sup>

### 5.3 Procedure

In the Russian Federation,<sup>921</sup> Kazakhstan,<sup>922</sup> Kyrgyzstan<sup>923</sup> and Tajikistan<sup>924</sup> a rejected asylum seeker must leave the country within a set period, provided that *non-refoulement* or other exceptions to transfer identified above do not apply. This decision may be appealed, with suspensive effect on his or her transfer, in both extradition and expulsion proceedings.

Uzbekistan has no detailed legal procedural framework on asylum, but refugee status represents a statutory bar to extradition.<sup>925</sup> In Turkmenistan, decisions revoking refugee status can be appealed but the law is silent on whether the appeal suspends the execution of the transfer decision.

<sup>909</sup> This ground may include the need to respect the principle of *non-refoulement*.

<sup>910</sup> Refugees Act (Russian Federation), article 12.2. See also: Russian Government’s Decree No. 274 of 9 April 2001, article 7 (with reference to health as an example of humanitarian grounds).

<sup>911</sup> *Ibid.*, article 12.4.

<sup>912</sup> Russian Government’s Decree No. 274 of 9 April 2001, article 12.

<sup>913</sup> Refugees Act (Russian Federation), article 12.6. See: Russian Government’s Decree No. 274 of 9 April 2001, article 17.

<sup>914</sup> Law “On Refugees” of Kazakhstan, article 4.6.

<sup>915</sup> *Ibid.*, article 18.2.

<sup>916</sup> *Ibid.*, article 11.5.

<sup>917</sup> Law of the Kyrgyz Republic “On Refugees”, article 12.

<sup>918</sup> *Ibid.*, article 12.

<sup>919</sup> Law of the Republic of Tajikistan “On Refugees”, article 14.1.

<sup>920</sup> *Ibid.*, article 14.2.

<sup>921</sup> Code on Administrative Court Proceedings of the Russian Federation, article 298.1.

<sup>922</sup> Law “On Refugees” of Kazakhstan, articles 15 and 18.

<sup>923</sup> Law of the Kyrgyz Republic on Refugees, articles 7 and 9.

<sup>924</sup> Law of the Republic of Tajikistan on Refugees, articles 9 and 12.1.

<sup>925</sup> Code of Criminal Procedure of the Republic of Uzbekistan, article 603.



## 5.4 International protection, exclusion and national security in the EU

The EU Qualification Directive 2011/95/EU, the EU-wide legislation on the granting of international protection, adopts the definition of refugee in the *Geneva Refugee Convention*. Besides the traditional grounds for excluding refugee status,<sup>926</sup> the Directive contemplates that a Member State may revoke, end or refuse to renew a person's refugee status already granted, if "there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present".<sup>927</sup>

Under EU law, subsidiary protection must be granted to persons at risk of torture, inhuman or degrading treatment or punishment, the death penalty or indiscriminate violence. However, the asylum seeker may be excluded from this form of protection on any of the traditional bases for excluding refugee status and/or if "he or she constitutes a danger to the community or to the security of the Member State in which he or she is present".<sup>928</sup>

A beneficiary of international protection, i.e. a person recognized as refugee or granted subsidiary protection, may be transferred where "there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present".<sup>929</sup> However, article 21.1 affirms respect for the principle of *non-refoulement* under international law.

While national security or public order are not strictly defined (see Introduction), they cover "cases in which a third-country national belongs to an association which supports international terrorism or supports such an association".<sup>930</sup>

France, Germany and Italy codify these same grounds of exclusion and revocation of international protection.<sup>931</sup> They further specify that a person under protection may be excluded when the presence of the refugee in the country would represent a serious threat to national security.<sup>932</sup> In Spain, the situations threatened also include the community, and the internal and external security of Spain.<sup>933</sup> In France, exclusion is also possible if the person has been convicted of a criminal offence for an act of terrorism or sentenced to ten years imprisonment and his or her presence represents a serious threat to society.<sup>934</sup> In Italy, exclusion is extended to persons that, having been convicted of one of the serious criminal offences listed in a specific article of the criminal code, represent a danger to public security and public order.<sup>935</sup>

<sup>926</sup> See article 1F, Geneva Convention 1951.

<sup>927</sup> Article 14.4.a, Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (EU Qualification Directive).

<sup>928</sup> Article 17.1.d, *ibid.*

<sup>929</sup> Article 21.2.a, *ibid.*, or his or her residence permit may be revoked.

<sup>930</sup> Recital 37, *ibid.*

<sup>931</sup> Article 712-2 CESEDA (France); article 3.2, Asylum Law (Germany); articles 12 and 13, Legislative Decree 251/2007 (Italy); articles 8, 9, 11 and 12, Law 12/2009 of Spain.

<sup>932</sup> Article 711-6 CESEDA: articles 4.2.4 and 4.2.1-3 Asylum Law (Germany); articles 12 and 13, 17 and 18, Legislative Decree 251/2007 (Italy); articles 8, 9, 11 and 12, Law 12/2009 of Spain.

<sup>933</sup> Articles 8, 9, 11 and 12, Law 12/2009 of Spain.

<sup>934</sup> Article 711-6 CESEDA (France)

<sup>935</sup> Articles 12 and 13, Legislative Decree 251/2007 (Italy).

## 5.5 Conclusions

With the notable exception of Uzbekistan, all the States considered above have refugee laws that purportedly implement the 1951 *Geneva Refugee Convention*. It is however of concern that the CIS States examined permit the exclusion of refugee status for persons arriving in the country: for economic reasons; fleeing famine, epidemics, or other emergencies; fleeing punishment for criminal offences, including irregular entry; using false documents; or being suspected of terrorist or extremist activities.

Exclusion clauses in international refugee law are exhaustive. No exceptions other than those recognized in article 1F are permitted and all of the recognized exceptions, if applied outside of the framework of this article, can easily lead to breaches of international refugee law.

Finally, a concern remains that States may rely on measures of temporary protection or on the need to renew refugee status yearly without recognizing full-fledged refugee status. International refugee law requires stability of status, once it has been recognized, which can be withdrawn only if and when cessation clauses under article 1C of the *Geneva Refugee Convention* apply, i.e. when the factors that led the person to seek refugee status are no longer applicable.

## VI. Rendition Operations

### 6.1 What are renditions?

#### 6.1.1 Defining renditions

Cross-border transfers of persons taking place outside of ordinary legal frameworks, such as extradition and deportation, are commonly known as “renditions”. “Rendition” is not a legal category under international law, but a descriptive term to identify practices used to bypass ordinary transfer proceedings. It is therefore not possible to provide a full and uniform definition.

The ICJ’s Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, in its paradigmatic study *Assessing Damage, Urging Action*, characterized rendition operations as consisting of the “abduction of a person from one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation.”<sup>936</sup>

While not every practice that might be described as a rendition falls foul of international law, the pattern of practices, particularly those administered by the US after 11 September 2001, are grossly unlawful and marked by numerous human rights violations, such as arbitrary detention, torture and other ill-treatment, denial of recognition as a person before the law, and enforced disappearance.<sup>937</sup>

The European Court “takes ‘rendition to detention’ to mean extra-judicial transfer of persons from one jurisdiction or state to another, for the purposes of detention and interrogation outside the normal legal system”<sup>938</sup> while “extraordinary renditions” — a practice identified with the United States — are characterized by the presence of a real risk of serious violations of human rights.<sup>939</sup> Similarly, several United Nations Special Procedures have called rendition a “practice of ‘proxy detention’, involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure . . . , often in disregard of the principle of *non-refoulement*”.<sup>940</sup>

<sup>936</sup> ICJ, *Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009, p. 80.

<sup>937</sup> See, among others: Dick Marty, *Alleged secret detentions and unlawful inter-State transfers involving Council of Europe member states*, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, CoE Doc. AS/Jur (2006) 16, 7 June 2006; Dick Marty, *Secret detentions and illegal transfers involving Council of Europe members states: second report*, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, CoE Doc. AS/Jur (2007) 36, 7 June 2007; Temporary Committee of the European Parliament, *Report on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners*, Rapporteur Claudio Fava, EU Doc. PE 382.246v01-00, 23 November 2006; Amnesty International, *USA: Below the radar—Secret flights to torture and ‘disappearance’*, AI Index: AMR 51/051/2006, 5 April 2006; Center for Human Rights and Global Justice, *On the Record: US Disclosures on Rendition, Secret Detention and Coercive Interrogation* (New York: NYU School of Law, 2008); Open Society Justice Initiative, *Gloablizing Torture: CIA Secret Detention and Extraordinary Rendition*, OSF, 2013.

<sup>938</sup> *Babar Ahmad and others v. United Kingdom*, ECtHR, Applications Nos. 24027/07, 11949/08 and 36742/08, Admissibility Decision, 6 July 2010, para. 113; *El-Masri v. the Former Yugoslav Republic of Macedonia*, ECtHR, GC, Application No. 39630/09, Judgment of 13 December 2012, 221.

<sup>939</sup> *Babar Ahmad and others v. United Kingdom*, ECtHR, Admissibility, *op. cit.*, para. 113. *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 221.

<sup>940</sup> *UN Joint Study on Global Practices in Relation to Secret Detention* (the “UN Secret Detention Study”), UN Doc. A/HRC/13/42, 19 February 2010.

The Council of Europe's Venice Commission has described two different forms of rendition: renditions for "obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State".<sup>941</sup> "Extraordinary" rendition for a situation where "there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time".<sup>942</sup>

For these bodies, renditions and extraordinary renditions are characterized by the abduction or false imprisonment—i.e. an unlawful arrest whether carried out by private persons or public officers—and forcible transfer of a person so as to deprive him or her of legal protection. Renditions become extraordinary when there is a risk of a breach of the principle of *non-refoulement*. In many cases, the rendition itself leads to secret detention or other types of unlawful or arbitrary deprivations of liberty. Frequently, a rendition operation involves a practice of enforced disappearance, and denial of recognition as a person before the law, in violation of the ICCPR, article 16.

For the purpose of this report, the definition of the ICJ Eminent Jurists Panel, that encompasses both types of rendition, will be followed. When reference is made to the CIA rendition system, and similar rendition systems that intentionally aim at the absolute abstraction of a person from the protection of the law, these will be referred to as "extraordinary" renditions. There is no inherent connotation of a heightened level of brutality in these transfers—although, as will be seen, the abuses that have occurred during such transfers have in practice been abysmal.

### **6.1.2 What are renditions for?**

Historically, renditions have been resorted to by different States with varying aims, the common denominator of which is the obtaining of results that are perceived to be unachievable or difficult to achieve through ordinary means and procedures. Early forms of rendition seem to have been used to facilitate the prosecution of criminal suspects, in place of established extradition procedures. In more recent decades, however, they have been resorted to for intelligence gathering through interrogation or to inflict informal punishment. Such practices occurred in Nazi Germany, the Soviet Union and Latin America during the military regimes of the 1970s and 80s, and in a few States in other regions. In some cases they amounted to enforced disappearance, as they aimed "to have a deterrent effect, to ensure that detainees would vanish without a trace, and that no information would be given with regard to their whereabouts or fate".<sup>943</sup>

In the late twentieth century, the practice of renditions was occasionally used by the United States to transfer suspects for criminal prosecution. However, the CIA rendition programmes (see below) changed this approach and redirected

<sup>941</sup> European Commission for Democracy through Law (Venice Commission), *Opinion No. 363/2005 on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners*, adopted on 17–18 March 2006, CoE Doc. CDL-AD (2006) 009, para. 30.

<sup>942</sup> *Ibid.*, para. 31.

<sup>943</sup> *UN Secret Detention Study*, *op. cit.*

the purpose of renditions toward intelligence gathering, with criminal prosecution<sup>944</sup> being either a secondary objective or not sought at all. The hallmark of these practices was the divesting of the rendered person of the protection of the law.

## 6.2 International law and renditions

### 6.2.1 Renditions and international human rights law

As noted, “rendition” does not have any fixed meaning under international law and certain forms of rendition are not necessarily contrary to international law.<sup>945</sup> Nonetheless, rendition operations, in their contemporary practice, typically involve violations of international law, including international human rights law, international refugee law and international humanitarian law.

Renditions, especially under the US administered program, may entail human rights violations, including torture or other cruel, inhuman or degrading treatment or punishment; arbitrary detention;<sup>946</sup> violations of the right to recognition as a person before the law; violations of the right to a fair trial, including the presumption of innocence;<sup>947</sup> and even violations of the right to life. The European Court of Human Rights held that an “extraordinary” rendition entails detention “outside the normal legal system” that, “by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention”.<sup>948</sup>

Rendition operations and enforced disappearances typically not only entail multiple violations of human rights, but the violations themselves are mutually reinforcing. For example, international law recognizes that, in cases of enforced disappearance, the combination of the flagrantly unlawful deprivation of liberty in the form of secret, unacknowledged, incommunicado detention<sup>949</sup> and the removal of the “disappeared” person from the protection of law, result inevitably

<sup>944</sup> The European Court concluded from an examination of the available documents that the US programme’s rationale “was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention, to mention only the right to be brought before a judge and be tried within a reasonable time or the *habeas corpus* guarantees. To this end, the whole scheme had to operate outside the jurisdiction of the US courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities,” *Husayn (Abu Zubaydah) v. Poland*, ECtHR, Application No. 7511/13, Judgment of 24 July 2014, para. 524.

<sup>945</sup> Venice Commission, *Opinion No. 363/2005*, *op. cit.*, para. 30.

<sup>946</sup> *Nasr and Ghali v. Italy*, ECtHR, Application No. 44883/09, Judgment of 23 February 2016, para. 301; *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 103, 106, 113, 119, 123 and 239; *Al Nashiri v. Poland*, ECtHR, Application No. 28761/11, Judgment of 24 July 2014, paras. 530–532; *et Abu Zubaydah*, ECtHR, *op. cit.*, paras. 524–526

<sup>947</sup> *UN Secret Detention Study*, *op. cit.*, p. 4: “If secret detention constitutes an enforced disappearance and is widely or systematically practiced, it may even amount to a crime against humanity” and “States of emergency, armed conflicts and the fight against terrorism — often framed in vaguely defined legal provisions — constitute an ‘enabling environment’ for secret detention.”

<sup>948</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 452.

<sup>949</sup> GA Resolution A/RES/66/150, 17 December 2007, para. 15; GA Resolution 63/166, 12 December 2008, para. 20; GA Resolution A/RES/66/150, 19 December 2011, para. 22; *Velasquez Rodriguez Case*, Judgment of 29 July 1988, InterAm.Ct.H.R. (Ser. C) No. 4 (1988), para. 187; *Report of the UN Special Rapporteur on Torture*, UN Doc. E/CN.4/2001/66, 25 January 2001, para. 665; Venice Commission, *Opinion No. 363/2005*, *op. cit.*, paras. 124–125; Working Group on Arbitrary Detention (WGAD), *Report to 62<sup>nd</sup> session of the Commission on Human Rights*, UN Doc. E/CN.4/2006/7, 12 December 2005.

in a violation of the detainee's right to be free from torture and inhuman or degrading treatment or punishment.<sup>950</sup>

States breach their human rights obligations in rendition operations by transferring someone to a place where they would be at risk of the death penalty, torture or cruel, inhuman or degrading treatment or punishment, flagrant denial of justice, of liberty or other serious violations of human rights (see Chapter II).<sup>951</sup> In some instances, such as in the CIA secret detention programme, the State may transfer a victim over territorial lines but remain directly involved in the violations, by operating on the territory of the State of transfer. The European Court of Human Rights has indicated that a State would violate the European Convention on Human Rights "if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition".<sup>952</sup>

### 6.2.2 Renditions as enforced disappearances

Rendition operations often include the crime of enforced disappearances, particularly when they lead to secret, undisclosed detention either by the State undertaking the transfer or any receiving or intermediate State. The generally international agreed definition of enforced disappearance, from the *International Convention for the Protection of All Persons from Enforced Disappearance* is:

*"the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*<sup>953</sup>

As several international human rights authorities have emphasized,<sup>954</sup> an enforced disappearance typically involves composite and cumulative violations of any number of the following human rights guarantees: the right to life,<sup>955</sup> freedom from torture or other cruel, inhuman or degrading treatment or punishment;<sup>956</sup> the right to liberty and security of the person;<sup>957</sup> the right to

<sup>950</sup> CCPR, *El-Megreisi v. Libya Arab Jamahiriya*, Communication No. 440/1990, UN Doc. CCPR/C/50/D/440/1990 (1994), paras. 2.2 and 5.4; *Rafael Mojica v. Dominican Republic*, Communication No. 449/1991, UN Doc. CCPR/C/51/D/449/1991 (1994), para. 5.7; Human Rights Chamber for Bosnia and Herzegovina, *Palić v. Republika Srpska*, case No. CH/99/3196, 11 January 2001, paras. 71–74; *Conclusions and Recommendations of the Committee against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 22; *Nasr and Ghali v. Italy*, ECtHR, *op. cit.*, paras. 286–287. *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 211; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 511–516; and *Abu Zubaydah*, ECtHR, *op. cit.*, paras. 504–511; 286.

<sup>951</sup> *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 453, 455–456; *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 212–214; *Nasr and Ghali v. Italy*, ECtHR, *op. cit.*, para. 244.

<sup>952</sup> *Babar Ahmad and others v. UK*, ECtHR, *op. cit.*, Admissibility, para. 114. *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 451; *Nasr and Ghali v. Italy*, ECtHR, *op. cit.*, para. 243; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 454.

<sup>953</sup> ICED, article 2. The United Nations Declaration on the Protection of Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992, provides a slightly different definition. See also: *Inter-American Convention on Forced Disappearance of Persons*.

<sup>954</sup> See e.g.: CCPR, *Yamina Guezout and others v. Algeria*, Communication No. 1753/2008, Views adopted 9 July 2012, paras. 8.5–8.9; *Kamel Djebrouni v. Algeria*, Communication No. 1781/2008, Views adopted 31 October 2011, para. 9; *Khaled Il Khwildy and others v. Libya*, Communication No. 1804/2008, Views adopted 1 November 2012, paras. 7.4–5; *Tahar Mohamed Aboufaied v. Libya*, Communication No. 1782/2008, Views adopted 21 March 2012, para. 7.3; *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 240–241.

<sup>955</sup> ICCPR, article 6; ECHR, article 2.

<sup>956</sup> ICCPR, article 7; ECHR, article 3.

<sup>957</sup> ICCPR, article 9; ECHR, article 6.

recognition everywhere as a person before the law;<sup>958</sup> the right to humane treatment in detention;<sup>959</sup> the right to truth; and the right to an effective remedy.<sup>960</sup> Moreover, the victim includes not just the “disappeared person” since enforced disappearance also entails violation of the prohibition of inhuman or degrading treatment in respect of the family members and close friends of the “disappeared person”.<sup>961</sup>

Enforced disappearances are crimes under international law<sup>962</sup> and are continuing violations, in that the human rights violations they entail take place from the moment of the enforced disappearance to the moment in which the truth is established concerning the fate or whereabouts of the person and the “disappearance itself”.<sup>963</sup>

### 6.2.3 State responsibility, complicity and renditions

Under the rules of State responsibility, States who act in breach of their human rights obligations remain internationally responsible for such unlawful conduct and the harm that results, which they are obliged to remedy.<sup>964</sup> The States carrying out, in full or in part, and having control of the rendition operation are internationally responsible for breaching their obligations and the direct violation of the human rights of victims.<sup>965</sup> The same is true regardless of whether the operation takes place within or outside the State’s territory, by virtue of the extraterritorial application of these obligations, and includes situations where the State exercises authority or effective control over a person or a territory.<sup>966</sup>

However, as institutions of the European Union, Council of Europe and European Court of Human Rights have documented,<sup>967</sup> these operations, in respect of the US led programmes, have “largely depended on cooperation, assistance and active involvement of [other] countries”.<sup>968</sup> Under international laws governing State responsibility, a State which “aids or assists” another State in wrongful conduct, such as States involved in rendition, is itself also responsible if it “does so with knowledge of the circumstances of the internationally wrongful act; and ... the act would be internationally wrongful if committed by that State.”<sup>969</sup> The co-operation of government agents, even without the

<sup>958</sup> ICCPR, article 16.

<sup>959</sup> *Ibid.*, article 10.

<sup>960</sup> ICCPR, article 2.3; ECHR, article 13. See: 2.4. for more detail.

<sup>961</sup> See *Iljina and Sarulienė v. Lithuania*, ECtHR, Application No. 32293/05, 15 March 2011, para. 47; *Dikme v. Turkey*, ECtHR, Application No. 20869/92, paras. 82 and 95; *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 202; *Nasr and Ghali*, ECtHR, *op. cit.*, para. 317.

<sup>962</sup> ICED, articles 6 and 5; *Declaration on the Protection of All Persons from Enforced Disappearance*, Preamble.

<sup>963</sup> See: *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 239–240; *Varnava and others v. Turkey*, ECtHR, GC, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, para. 148. See: *Ilascu and others*, ECtHR, *op. cit.*, para. 321. Further, such composite acts in violation of international obligations may be made up of a series of acts some of which in themselves also constitute violations of the State’s international obligations, see Commentary to article 15 *ILC Articles on State Responsibility*, *op. cit.*, article 9.

<sup>964</sup> *ILC Articles on State Responsibility*, *op. cit.*, article 1.

<sup>965</sup> *Ibid.*, *op. cit.*, article 2.

<sup>966</sup> See: *Al-Skeini and others v. United Kingdom*, ECtHR, GC, Application No. 55721/07, 7 July 2011; *Al-Saadoon and Mufti v. United Kingdom*, ECtHR, *op. cit.*; Human Rights Committee (CCPR), *General Comment No. 31*, *op. cit.*

<sup>967</sup> See: footnote 937.

<sup>968</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 524; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 530.

<sup>969</sup> *ILC Articles on State Responsibility*, *op. cit.*, article 16. See further: *Commentary to Draft Article 16*, paras. 1–6. They reflect customary international law, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) ICJ, Judgment of 26 February 2007, para. 420.



overall authorization of the government, engages the responsibility of the State.<sup>970</sup> Responsibility for assistance may arise either from positive steps taken to assist another State in a wrongful act, or from failure to take action required by international legal obligations that would have prevented a wrongful act by another State.<sup>971</sup>

States are subject to additional obligations to refrain from co-operation in internationally wrongful acts where those acts amount to "a serious breach", that is, "a gross or systematic failure" by a State to fulfil "an obligation arising under a peremptory norm of general international law".<sup>972</sup> In these circumstances, States must not only refrain from co-operation in the wrongful acts but, irrespective of whether they have been implicated in the acts or not, they must also "co-operate to bring to an end through lawful means"<sup>973</sup> such a breach and must not recognize as lawful a situation created by the breach.<sup>974</sup>

Often, unless the country of departure and of destination share a border, some degree of complicity of a third State, such as allowing use of its airspace or its territory, for example for refuelling aircraft, may be implied in the operation, if the State was aware or ought to have been aware that that aircraft was being used to commit violations. Attributing such responsibility for human rights violations that have taken place in rendition operations requires detailed analysis, even if "acquiescence and connivance" in the operation is usually sufficient.<sup>975</sup>

The facilitation of gross human rights violations entails responsibility not only for the facilitating acts, but for the entirety of the human rights violations committed by the other State.<sup>976</sup>

In practice, in relation to rendition operations, complicity has been found when:

- A State has asked another State to secretly detain someone;
- A State has sent questions to the detaining State to interrogate the victim or solicit information about his or her interrogation;
- A State has actively participated in the arrest or transfer of a person with at least constructive knowledge that he or she would be subject to a rendition, including secret detention and/or torture and ill-treatment;
- A State hands over a person to another State, which puts him or her in secret detention;

<sup>970</sup> *ILC Articles on State Responsibility*, *op. cit.*, article 7. See also: Venice Commission, *Opinion No. 363/2005*, *op. cit.*, para. 119.

<sup>971</sup> *ILC Articles on State Responsibility*, Commentary, *op. cit.*, Chapter IV, para. 4. See also: *Corfu Channel*, Merits, Judgment, ICJ Reports 1949, p. 4, at p. 22; *Mohammed Alzery v. Sweden*, CCPR, *op. cit.* See also: Venice Commission, *Opinion No. 363/2005*, *op. cit.*, paras. 118, 159 and 126; *Ilascu and others v. Moldova and Russia*, ECtHR, *op. cit.*, para. 318.

<sup>972</sup> *Ibid.*, articles 41.1 and 41.2.

<sup>973</sup> *Ibid.*, article 41.1.

<sup>974</sup> *Ibid.*, article 41.2. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at p. 200, para. 159.

<sup>975</sup> See: *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 206; *Nasr and Ghali v. Italy*, ECtHR, *op. cit.*, paras. 241, 288; *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 449; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 452.

<sup>976</sup> *Ibid.*, para. 239.

- A State fails to take measures to identify modes of transport passing through its jurisdiction having constructive knowledge that they could be used for rendition operations;<sup>977</sup>
- A State allows part of a rendition operation to take place in its jurisdiction with at least constructive knowledge that a rendition operation could take place,<sup>978</sup> even if “it is unlikely that the ... officials witnessed or knew exactly” what occurred during the other State’s operations;<sup>979</sup>
- A State’s authorities “fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known”.<sup>980</sup>

#### 6.2.4 Accountability and remedies for renditions

The right to an effective remedy for violations of human rights<sup>981</sup> requires remedies that are “effective” in practice as well as in law, and which are not unjustifiably hindered by the acts or omissions of State authorities. Under international law, the legal consequences of the breach of an international obligation is an obligation of cessation of the wrongful act and of reparation. The most appropriate forms of reparation must be granted according to the individual circumstances of the case, including compensation, guarantees of non-repetition, rehabilitation, restitution, and satisfaction. Such reparations, while historically taking the form of State to State reparations, under contemporary human rights law is due from States directly to individuals.<sup>982</sup>

International authorities have elucidated the obligation to restore the situation of a wrongfully transferred person to the position they were in before the violation occurred.<sup>983</sup> Where a State has co-operated in a human rights violation that transported the victim out of its jurisdiction, the positive obligation to take reasonable, appropriate, practical and effective measures requires the State to make diplomatic representations to the State in which the victim is held.<sup>984</sup>

Finally, rights like the right to life or the prohibition of torture or inhuman or degrading treatment or punishment also entail an obligation to put in place “appropriate safeguards—both in law and in practice—against intelligence services violating Convention rights, notably in the pursuit of their covert operations”.<sup>985</sup>

<sup>977</sup> Derived from *UN Secret Detention Study*, *op. cit.*

<sup>978</sup> *Al-Nashiri v. Poland*, ECtHR, *op. cit.*, para. 442(a), (b).

<sup>979</sup> *Ibid.*, para. 517.

<sup>980</sup> *Ibid.*, para. 509. See: *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 211.

<sup>981</sup> See, among others: *Iatridis v. Greece*, ECtHR, Application No. 31107/96, Judgment of 25 March 1999, para. 65.

<sup>982</sup> ICCPR, article 2.3; CAT, article 14; ECHR, article 13; Human Rights Committee (CCPR), *General Comment No. 31*, *op. cit.*; UN Committee against Torture (CAT), *General Comment No. 3: Implementation of article 14 by States parties*, 13 December 2012, UN Doc. CAT/C/GC/3, (GC 3); *ILC Articles on the Responsibility of States for Internationally Wrongful Acts*, article 31; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, *op. cit.*, Principles 18, 19, 23. See also: ICJ, *Practitioners Guide No. 2*, *op. cit.*

<sup>983</sup> See, for example: CCPR, *Jimenez Vaca v. Colombia*, UN Doc. CCPR/C/74/D/859/1999 (2002), para. 9; CAT, *Dar v. Norway*, UN Doc. CAT/C/38/D/249/2004 (2007), para. 16.4; *Hirsi Jamaa and others v. Italy*, ECtHR, *op. cit.*, para. 211.

<sup>984</sup> See: *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 587; *Hirsi Jamaa and others v. Italy*, ECtHR, *op. cit.*, paras. 9–13; *Al Saadoon and Mufdhi*, ECtHR, *op. cit.*, paras. 45–89; *Savridin Dzburayev v. Russia*, ECtHR, *op. cit.*, para. 138.

<sup>985</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 492.

#### 6.2.4.1 *The duty to investigate and prosecute*

States have investigative obligations in respect of any credible information disclosing evidence of violations of human rights.<sup>986</sup> Criminal proceedings are an important element of ensuring an effective remedy for such violations.<sup>987</sup> In addition to providing accountability in a given case, they are also critical to ensuring the effective protection of human rights in the future.<sup>988</sup> Criminal proceedings will usually be the main avenue by which the victims' right to truth, which requires identification of the perpetrators, as an element of reparation through satisfaction, can be realized.<sup>989</sup>

In cases of unlawful rendition activities, including those amounting to enforced disappearances in which the State authorities may be implicated, prompt investigations are essential "in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory".<sup>990</sup>

The principle that the investigation should be effective in practice as well as in law requires that the authorities take effective measures to find out what has happened, by taking active and thorough steps, to the extent that these are reasonable and available to them, to secure potential evidence relating to the alleged crimes, including eyewitness testimony and forensic evidence.<sup>991</sup>

When substantive violations of human rights arise from certain crimes under international law, such as torture and ill-treatment, enforced disappearances, war crimes and crimes against humanity, States must: establish jurisdiction over such crimes under international law, including on the basis of the nationality of the perpetrator<sup>992</sup> or victim,<sup>993</sup> or by exercising universal jurisdiction; either extradite or prosecute (*aut dedere aut judicare*),<sup>994</sup> subject to human

<sup>986</sup> CAT, *General Comment No. 3*, *op. cit.*, para. 17. *McCann and others v. United Kingdom*, ECtHR, GC, Application No. 18984/91, 27 September 1995, paras. 160–164; *Assenov and others v. Bulgaria*, ECtHR, Case No. 90/1997/874/1086, 28 October 1998, paras. 101–106; *Aksoy v. Turkey*, ECtHR, Application No. 21987/93, 18 December 1996, para. 95; *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 182–186. See also: *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, Adopted by the Committee of Ministers on 30 March 2011 at the 1110<sup>th</sup> meeting of the Ministers' Deputies, Principle V and VIII; UN Commission on Human Rights, 61<sup>st</sup> session, provisional agenda item 17, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add. 1 (2005) (UN Impunity Principles), Principle 19. *UN Basic Principles on the Right to a Remedy*, Principle 3.

<sup>987</sup> See: *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 140 and 261.

<sup>988</sup> For example, in *Krastanov v. Bulgaria*, ECtHR, Application No. 50222/99, 30 September 2004, para. 60.

<sup>989</sup> *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 191–193; UN Human Rights Council Resolution 9/11 of 24 September 2008, article 1; Resolution 12/12 of 1 October 2009, article 1.

<sup>990</sup> *Ibid.*, paras. 181 and 192; *Assenov v. Bulgaria*, ECtHR, *op. cit.*, para. 102; *Labita v. Italy*, ECtHR, GC, Application No. 26772/95, 6 April 2000, para. 131; *Varnava and others*, ECtHR, *op. cit.* para. 191.

<sup>991</sup> *Ibid.*, paras. 183, 192; *Gul v. Turkey*, ECtHR, *op. cit.*, Application No. 22676/93, 14 December 2000, paras. 89–91; *Assenov v. Bulgaria*, ECtHR, *op. cit.*, para. 103; *Varnava and others v. Turkey*, ECtHR, *op. cit.*, para. 148; *Silih v. Slovenia*, ECtHR, Application No. 71463/01, 9 April 2009, para. 157.

<sup>992</sup> CAT, article 5.1.2; ICED, article 9.1.b.

<sup>993</sup> CAT, article 5.1.c; ICED, article 9.1.c.

<sup>994</sup> CAT, article 5.2; ICED, article 13.4.

rights safeguards; and provide mutual legal assistance in criminal and civil proceedings in other States.<sup>995</sup>

To be effective, an investigation must involve the victim of an alleged human rights violation or his or her next-of-kin.<sup>996</sup> Information must be promptly<sup>997</sup> provided on all significant developments in the investigation<sup>998</sup> and victims or their relatives must be heard by the investigative authorities and must be provided with relevant documents and decisions.<sup>999</sup> These duties extend to providing the victims with reasons explaining why a prosecution has not been pursued.<sup>1000</sup> EU Member States are also separately obliged to ensure that victims have the right to a review of a decision not to prosecute.<sup>1001</sup>

#### 6.2.4.2 *The right to the truth and State secrets*

The right to truth<sup>1002</sup> embodies the right of the victim and his or her family members to know the truth about the victim's fate and whereabouts and the nature and circumstances of the human rights violations that have taken place. More broadly, it requires public acknowledgement of the violations and public disclosure of the results of the investigation. It is also necessary for public trust in State institutions and for public confidence that action will be taken to prevent impunity.<sup>1003</sup>

<sup>995</sup> CAT, article 9; ICED, article 14; *Supplementary Convention on the Abolition of Slavery, the Slave trade and Institutions and Practices Similar to Slavery*, 1956, article 8. See also: *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, adopted by General Assembly Resolution 3074 (XXVIII). See also: CAT, article 5, and ICED, article 9; International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 75. See also: Center for Constitutional Rights and ECCHR, *Amicus Brief in Support of the Association for the Dignity of Male and Female Prisoners of Spain, In their Appeal Pending Before the Spanish Supreme Court, in relation to Criminal Complaints Pending Against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes, and John Yoo, In the Audencia Nacional*, Madrid, Spain, Case No. 134/2009, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/09/2012-09-25-CCR-ECCHR-Amicus-Brief-to-Supreme-Court-FINAL.pdf>; CCPR *General Comment No. 31*, *op. cit.*, para. 18; CCPR, *General Comment No. 20*, *op. cit.*, para. 15; *Basic Principles on the Right to a Remedy*, Principle IV; *UN Impunity Principles*, Principle 23.

<sup>996</sup> *McKerr v. UK*, ECtHR, Application No. 28883/95, 4 May 2001, para. 115; *Ognyanova and Choban v. Bulgaria*, Application No. 46317/99, 23 February 2006, para. 107.

<sup>997</sup> *Denis Vasilyev v. Russia*, ECtHR, Application No. 32704/04, 17 December 2009, para. 157.

<sup>998</sup> *Khadzhaliyev and others v. Russia*, ECtHR, Application No. 3013/04, 6 November 2008, para. 106.

<sup>999</sup> *Dedovskiy and others v. Russia*, ECtHR, Application No. 7178/03, 15 May 2008, para. 92; ICED, article 24(2); UN Working Group on Enforced and Involuntary Disappearances, *General Comment on the right to truth in relation to enforced disappearance*, UN Doc. A/HRC/16/48, paras. 3 and 39. See also: *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Recommended by General Assembly Resolution 55/89 of 4 December 2000, Section 4.

<sup>1000</sup> *Hugh Jordan v. the United Kingdom*, ECtHR, Application No. 24746/94, 4 May 2001, para. 42.

<sup>1001</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, article 11.

<sup>1002</sup> Human Rights Council (HRC) Resolution 9/11 of 24 September 2008, article 1; HRC Resolution 12/12 of 1 October 2009, article 1. See also: *UN Impunity Principles*, Principle 4; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, UN Doc. A/HRC/19/61, 18 January 2012, para. 48. UN General Assembly: Resolution 65/196. In 2011 the UN Human Rights Council established a special procedure on the promotion of truth, justice, reparations and guarantees of non-recurrence: Resolution 18/7 of 29 September 2011.

<sup>1003</sup> *Isayev and others v. Russia*, ECtHR, Application No. 43368/04, 21 June 2011, para. 140; *Al-Skeini and others v. UK*, ECtHR, *op. cit.*; *McKerr v. UK*, ECtHR, *op. cit.*, para. 115; Council of Europe, *Guidelines on Eradicating impunity for serious human rights violations*, *op. cit.*, articles I.3, III.2, III.3, XVI; *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 191; CCPR, *General Comment No. 31*, *op. cit.*, para. 18; ICED, article 8; *UN Impunity Principles*, Principle 23.

No national security argument, including reliance on the doctrine of State secrets, or foreign policy grounds, may justify a failure to investigate allegations of torture or inhuman or degrading treatment or punishment, arbitrary detention, or extraordinary rendition operations.<sup>1004</sup>

The Parliamentary Assembly of the Council of Europe openly stressed, in relation to rendition operations, that “information concerning the responsibility of state agents who have committed serious human rights violations . . . does not deserve to be protected as secret”.<sup>1005</sup> Furthermore, the European Parliament in its resolution of 11 September 2012 declared that “in no circumstance does state secrecy take priority over inalienable fundamental rights and that therefore arguments based on state secrecy can never be employed to limit states’ legal obligations to investigate serious human rights violations”.<sup>1006</sup>

### 6.3 US-led renditions

Although the focus of this report is Europe and Central Asia, it is necessary to describe rendition practices by the United States in order to address the rendition practices of European States, since most of the latter involved some form of complicity or other involvement with US-administered practices.

The United States practice of rendition pre-dates the terrorist attacks in the US of 11 September 2001. While some of the measures employed prior to 11 September 2001 no doubt included unlawful conduct and even criminal offences, such as abduction, the practice was largely used as means to ensure criminal prosecution of persons whose presence for trial in the US was considered to be difficult or impossible through ordinary channels and processes.<sup>1007</sup>

In the United States, the leading jurisprudence governing renditions to face trial is the Supreme Court judgment in *US v. Alvarez-Machain*. In this landmark ruling of 1992, the Supreme Court decided on the consequences of the unlawful rendition of a Mexican physician, alleged to have aided and abetted the torture and eventual killing of a DEA agent in Mexico, for the purposes of his criminal prosecution in the US. The Supreme Justices held by majority that the existing extradition treaty between the US and Mexico made no explicit reference to, or prohibition of, abductions. Therefore the “fact of respondents’ forcible abduction [did] not . . . prohibit his trial in a court of the United States for violations of the criminal laws of the United States”.<sup>1008</sup>

<sup>1004</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 488. *Ibid.*, para. 38. WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, *op. cit.*, para. 4.

<sup>1005</sup> PACE, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Resolution 1838 (2011), adopted by the Assembly on 6 October 2011, para. 4.

<sup>1006</sup> European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee Report (2012/2033(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0309%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>1007</sup> President Bill Clinton directed US authorities to return “suspects by force . . . without the cooperation of the host government,” if this was lacking, with the purpose of ensuring criminal prosecution in the US, Presidential Decision Directive No. 39, para. 2. The George W. Bush’s National Security Directive No. 77 remains to date classified.

<sup>1008</sup> *US v. Alvarez-Machain*, 504 US 655 (1992) at 670. The three dissenting Justices, led by Justice Stevens, wrote that, following the majority’s logic, if “the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty”, *US v. Alvarez-Machain*, 504 US 655 (1992) at 674.

Following the attacks of 11 September 2001, the US administration adopted a more robust form of renditions, replete with unlawful elements. On 17 September 2001, President George W. Bush signed a Memorandum of Notification granting the CIA the authority to “covertly capture and detain individuals ‘posing a continuing, serious threat of violence or death to US persons and interests or planning terrorist activities’.”<sup>1009</sup> Together with a military order<sup>1010</sup> issued on 13 November 2001, this document effectively authorized the CIA-administered rendition, secret detention and interrogation programmes (hereinafter, the *CIA rendition programmes*). The variety of practices undertaken pursuant to such programmes include detaining persons in secret detention centres under US control as well as or transferring persons to other States for interrogation.

The programmes applied to any non-US national who: there were reasons to believe was a member of Al-Qaeda; “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;” or has harboured any of these individuals.<sup>1011</sup>

The Secretary of Defense was given carte blanche to effectively place any person outside the protection of US law,<sup>1012</sup> both legally and physically, via the authorization of secret detention sites outside US territorial jurisdiction. Any person subject to the programme was foreclosed from accessing any remedy.<sup>1013</sup> The programme’s stated purpose was the “effective conduct of military operations and prevention of terrorist attacks”.<sup>1014</sup>

The CIA rendition programmes were closely linked to the Bush Administration’s promotion of a “war on terror”, which adopted an intelligence-led system based on a military strategy, at the expense of a law enforcement approach to tackling terrorism. It led the US to selectively (and arbitrarily) apply the laws of war, while disregarding international human rights law, as well as the US Constitution and other domestic laws. As the ICJ Eminent Jurists Panel explained, “the net effect of this war paradigm was to create a ‘legal black hole’ in which individuals were supposedly placed beyond the protection of all law.

<sup>1009</sup> US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, declassified on 3 December 2014 (US Senate’s Executive Summary), Findings and conclusions, p. 9.

<sup>1010</sup> “*Detention, treatment, and trial of certain non-citizens in the war against terrorism*”, 66 FR 57833. It is based on the US Armed Forces and on the Authorization for the Use of Military Force (AUMF) that authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

<sup>1011</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Military Order of 13 November 2001, Section 2a. The procedures introduced by this Order must be understood together with President Bush’s determination that “members of Al-Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war”. Executive Order 13440 of 20 July 2007, Section 1. The determination has been in place since 7 February 2002.

<sup>1012</sup> *Ibid.*, Section 3.b to e. This includes “adequate food, drinking water, shelter, clothing, and medical treatment; ... free exercise of religion consistent with the requirements of such detention.”

<sup>1013</sup> *Ibid.*, Sections 2b, 3a, 7b. On Military Commissions, see: Section 4.

<sup>1014</sup> *Ibid.*, Section 1.e.

No such black hole exists either in international human rights or humanitarian law".<sup>1015</sup>

The programmes remained secret until NGO and media reports revealed elements of its operations.<sup>1016</sup> On 5 December 2005, Secretary of State, Condoleezza Rice, recognized the existence of a programme of secret transfer and detention of "enemy combatants".<sup>1017</sup> President Bush was forced to disclose the existence of the programmes on 6 September 2006 following several revelations in the press, "the unwillingness of other countries to host existing or new detention sites, and legal and oversight concerns".<sup>1018</sup>

In 2007, towards the end of the CIA rendition programmes, President Bush ordered that the programmes be made subject to "the obligations of the United States under Common Article 3"<sup>1019</sup> of the *Geneva Conventions* 1949, which applies minimum standards for protection of rights in non-international armed conflicts. Reportedly, the CIA used its interrogation, rendition and secret detention programme for the last time on 8 November 2007 and held no detainees in secret detention centres after April 2008.<sup>1020</sup> According to the US Senate report of 2014, 119 persons have been victims of this programme,<sup>1021</sup> "at least 39 detainees were subjected to one or more of the CIA's enhanced interrogation techniques [and] at least 17 CIA detainees ... without CIA Headquarters approval".<sup>1022</sup>

The practice of extraordinary renditions has been widely condemned.<sup>1023</sup> The ICJ Eminent Jurists Panel concluded that extraordinary renditions violated numerous human rights, as outlined below, and that they often constituted enforced disappearances, a crime under international law. Furthermore, where they are "part of a widespread and systematic government policy, they may also amount to crimes against humanity".<sup>1024</sup>

The CIA rendition programmes entailed multiple, composite and cumulative grave human rights violations, such as torture or other ill-treatment; enforced

<sup>1015</sup> ICJ, *Assessing Damage, Urging Action*, *op. cit.*, p. 51.

<sup>1016</sup> See: footnote No. 937.

<sup>1017</sup> *Nasr and Ghali*, ECtHR, *op. cit.*, para. 174.

<sup>1018</sup> *US Senate's Executive Summary*, *op. cit.*, Findings and conclusions, p. 16.

<sup>1019</sup> Executive Order 13440 of 20 July 2007, Section 3b.

<sup>1020</sup> *US Senate's Executive Summary*, *op. cit.*, Findings and conclusions, p. 16. This excludes the detention centre of Guantanamo Bay that is not secret.

<sup>1021</sup> *Ibid.*, Findings and conclusions, p. 10. The number, however, by the same report's admission, is not accurate, because the CIA failed to provide an accurate accounting of the individuals held and detained that had no linkage with the grounds of detention of the CIA programme. See: Findings and conclusions, p. 12–13. The report of OSJI, *Globalizing Torture*, *op. cit.*, refers to 136 known victims of the CIA programmes.

<sup>1022</sup> *Ibid.*, p. 101. The 17 detainees who were subjected to techniques without the approval of CIA Headquarters were: Rafiq Bashir al-Hami, Tawfiq Nasir Awad al-Bihandi, Hikmat Nafi Shaukat, Lufti al-Arabi al-Gharisi, Muhammad Ahmad Ghulam Rabbani aka Abu Badr, Gul Rahman, Abd al-Rahim al-Nashiri, Ramzi bin al-Shibh, Asadallah, Mustafa al Hawsawi, Abu Khalid, Laid bin Duhman aka AbuHudhaifa, Abd al-Karim, Abu Hazim, Sayyid Ibrahim, Abu Yasir al-Jaza'iri, and Suleiman Abdullah (pp. 101–103).

<sup>1023</sup> See, among others: CAT, *Concluding Observations on the USA*, UN Doc. CAT/C/USA/CO/3-5, 2014; CCPR, *Concluding Observations on the USA*, UN Doc. CCPR/C/USA/CO/4, 2014; CCPR, *Concluding Observations on the USA*, UN Doc. CCPR/C/USA/CO/3/Rev.118, 2006; CAT, *Concluding Observations on the USA*, UN Doc. CAT/C/USA/CO/2, 2006; see: footnote No. 937; PACE, *Lawfulness of detentions by the United States in Guantanamo Bay*, Resolution 1433 (2005) adopted on 26 April 2005; PACE, *Enforced disappearances*, Resolution 1463 (2005) adopted on 3 October 2005.

<sup>1024</sup> ICJ, *Assessing Damage, Urging Action*, *op. cit.*, p. 81.



disappearances;<sup>1025</sup> incommunicado detention; systematic arbitrary deprivation of liberty;<sup>1026</sup> nullification of the rights to recognition before the law;<sup>1027</sup> and violation of the right to a fair hearing and of access to an effective remedy against human rights violations, including through pre-trial detention without judicial review or the deliberate and systematic refusal of access to a lawyer.<sup>1028</sup> The programmes entailed the perpetration of multiple crimes under international and national law.<sup>1029</sup>

As the European Court of Human Rights has summarized from the documents that have been released thus far, the programmes “included “transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention”. The transfers to unknown locations and unpredictable conditions of detention were specifically designed to deepen their sense of disorientation and isolation. The detainees were usually unaware of their exact location.”<sup>1030</sup> The European Court has identified several of the renditions it has dealt with—and all of those it has examined up until now in the context of the CIA rendition programmes—as enforced disappearances.<sup>1031</sup>

An essential feature of the renditions programme was the active co-operation and support of many other States, including in Europe, Africa and Asia. A 2013 report by the Open Society Justice Initiative, *Globalizing Torture: CIA secret detention and extraordinary rendition*, documented rendition operations concerning 136 individuals and demonstrated that as many as 54 foreign governments reportedly participated in these operations in various ways, ranging from hosting secret detention centres on their territory, to facilitating the passage of aircraft and/or providing intelligence information.<sup>1032</sup>

<sup>1025</sup> See, *inter alia*: ICED, article 2; *Kurt v. Turkey*, ECtHR, *op. cit.*, para. 129; *Chitayev and Chitayev v. Russia*, ECtHR, Application No. 59334/00, 18 January 2007, para. 173.

<sup>1026</sup> The prohibition of arbitrary deprivation of liberty is a rule of customary international law. See, *inter alia*: CCPR, *General Comment No. 29*, UN Doc. CCPR/C/21/Rev. 1/Add. 11, 31 August 2001, para. 11; CCPR, *General Comment No. 24*, UN Doc. CCPR/C/21/Rev. 1/Add. 6, 4 November 1994, para. 8; Working Group on Arbitrary Detention (WGAD), *Opinion No. 15/2011 (People's Republic of China, concerning Mr Liu Xiaobo)*, 3 February 2011, para. 20; WGAD, *Opinion No. 16/2011 (People's Republic of China, concerning Ms Liu Xia)*, 8 February 2011, para. 12; ICRC (Jean-Marie Henckaerts and Louise Doswald-Beck, eds), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 99 (Vol. I, pp. 344–353; Vol. II, Ch. 32, Sec. L, pp. 2328–2362).

<sup>1027</sup> See: *Grioua v. Algeria*, CCPR, UN Doc. CCPR/C/90/D/1327/2004 (2007), paras. 7.5 (article 9) and 7.8–7.9 (article 16); *El Abani v. Libyan Arab Jamahiriya*, CCPR, UN Doc. CCPR/C/99/D/1640/2007 (2010), paras. 7.6 (article 9) and 7.9 (article 16).

<sup>1028</sup> See: *Al-Moayad v. Germany*, ECtHR, Application No. 35865/03, 20 February 2007, Admissibility, para. 101.

<sup>1029</sup> See: *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Nuremberg, 30 September and 1 October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 88. It is considered a crime under the *Inter-American Convention on the Forced Disappearance of Persons*, Preamble; *International Law Commission 1996 Draft Code of Crimes against the Peace and Security of Mankind*, article 18 (i); *Rome Statute of the International Criminal Court*, articles 7.1(i) and 7(2)(i); International Criminal Court, *Elements of Crimes*, article 7.1(i); ICED.

<sup>1030</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 298; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 398.

<sup>1031</sup> *El-Masri v. FYRM*, ECtHR, *op. cit.*, para. 240.

<sup>1032</sup> OSJI, *Globalizing Torture*, *op. cit.*, p. 6. These countries included “Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Ireland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Yemen, and Zimbabwe.

## 6.4 Accountability and impunity: comparative experiences

Despite the fact that the CIA rendition programmes began more than 15 years ago and involved the complicity of several countries across at least four continents, accountability is still largely absent. Apart from a partial success in Italy, no judicial investigation has led to a final judgment at the national level providing full redress to the victims, and no person directly involved in these operations has served any sentence.<sup>1033</sup>

### 6.4.1 The United States

The United States has comprehensively failed to provide an effective remedy and reparation for violations of human rights that have occurred under the CIA rendition programmes. While it appears to have discontinued the worst of the practices, it has uniformly failed to ensure any form of recognition of responsibility, by criminal prosecuting any officials responsible for crimes under international law and reparations for the victims.<sup>1034</sup> The continuing existence of the Guantánamo Bay detention centre, where a number of rendition victims are presently held, and of its inmates is evidence of the fact that, for many of the victims of the CIA rendition programmes, the human rights violations are not at an end.

#### 6.4.1.1 Non-repetition

On 22 January 2009, soon after assuming power as President of the United States, Barack Obama revoked all orders that authorized the CIA-led rendition, interrogation and secret detention programme.<sup>1035</sup> Presidential Executive Order 13491, Ensuring Lawful Interrogations, established standards for the humane treatment of detainees and ordered that the "CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future".<sup>1036</sup> Notification of and access to any place of detention had to be granted to the ICRC.<sup>1037</sup>

However, the effectiveness of this guarantee of non-repetition remains doubtful. On the one hand, resort to "traditional" rendition practices has not been excluded, as the abduction of Abu Anas al-Libi in Libya and the failed apprehension of a senior leader of Al-Shabaab in Somalia during the Obama administration, demonstrate.<sup>1038</sup> On the other hand, nothing is known of the follow-up that the Obama administration carried out regarding the recommendations of the Special Task Force on Interrogations and Transfer Policies Issues of 24 August 2009, which, among other things, pushed for a resumption of transfers or renditions on the "strict" condition of obtaining reliable diplomatic assurances that

<sup>1033</sup> See: *UN Secret Detention Study*, op. cit.: "In almost no recent cases have there been any judicial investigations into allegations of secret detention, and practically no one has been brought to justice. Although many victims feel that the secret detention has stolen years of their lives and left an indelible mark, often in terms of loss of their livelihood and frequently their health, they have almost never received any form of reparation, including rehabilitation or compensation." As far as the ICJ is aware, only one or two accessories, including one Carabinieri that physically assisted with the abduction of the victim, have been convicted by a criminal court in Italy in the Abu Omar case. They did not serve any time in prison.

<sup>1034</sup> Human Rights Watch, *Getting Away with Torture*, 12 July 2011.

<sup>1035</sup> Executive Order 13491 of 22 January 2009, Ensuring Lawful Interrogations, Section 1.

<sup>1036</sup> *Ibid.*, Section 4a.

<sup>1037</sup> *Ibid.*, Section 4b.

<sup>1038</sup> Dr Helen McDermott, *Extraterritorial abduction under the framework of international law: does irregular mean unlawful?*, PhD Thesis, Irish Centre for Human Rights, School of Law College of Business, Public Policy and Law, National University of Ireland Galway, p. 31.

the person not be subject to torture in the receiving country.<sup>1039</sup> In reality, the Task Force recommended a system to assess the assurances' reliability<sup>1040</sup> that fell short of even requiring a mandatory monitoring mechanism and of reforming the US policy on *non-refoulement* in line with international law.<sup>1041</sup>

Moreover, the widespread resort to targeted killings, including through the use of drones, in counter-terrorism operations, which are marked by a systematic practice of unlawful killings, has apparently become the preferred method of dealing with many terror suspects.<sup>1042</sup>

#### 6.4.1.2 *The duty to investigate and prosecute*

On 30 June 2011, the Department of Justice announced, after an investigation carried out by Assistant US Attorney John Durham into the cases of 101 persons subject to the rendition programme, that only two cases, those of two persons who died in custody, would be subject to a full criminal investigation, and that "an expanded criminal investigation of the remaining matters is not warranted".<sup>1043</sup> In August 2012, the Department of Justice (DoJ) dropped the investigation into the two cases.<sup>1044</sup> The scope of that investigation was entirely inadequate, as it only targeted officials that acted outside of official instructions, which themselves permitted torture and ill-treatment and other unlawful acts. There has therefore been no official and effective investigation and prosecution. No investigations have been opened by the Justice Department, even following the revelations of the US Senate report (see below).<sup>1045</sup>

#### 6.4.1.3 *The efforts of the victims to seek remedy and reparation*

In the United States, attempts by victims to obtain effective remedies and accountability for the egregious human rights violations and crimes under international law committed during extraordinary renditions have floundered in the face of obstructive legal doctrines and political blockages.

One of the first victims that sought accountability was Khaled El-Masri, a German national of Lebanese origin. Mistaken for another Khaled al-Masri, a suspected Al-Qaeda operative, he was arrested by the authorities of the former

<sup>1039</sup> *Report of the Special Task Force on Interrogation and Transfer Policies*, p. 15; US Department of Justice, 'Special Task Force on Interrogation and Transfer Policies Issues Its Recommendations to the President', 24 August 2009.

<sup>1040</sup> *Ibid.*, p. 16: Factors that the "United States should consider in evaluating the credibility and reliability of assurances include: (1) information concerning the judicial and penal conditions and practices of the country providing assurances; (2) US relations with the receiving country, including diplomatic relations as well as military, intelligence, or law enforcement relations as appropriate; (3) the receiving state's capacity and incentives to fulfill its assurances; (4) political or legal developments in that country that would provide context for the assurances; (5) that country's record in complying with similar assurances previously provided to the United States or another country; (6) any information on the identity, position, or other relevant facts concerning the person providing the assurances that bear on the reliability of those assurances; and (7) the relationship between that person and the entity that will detain the person or otherwise monitor his activity."

<sup>1041</sup> *Ibid.*, p. 17. With regard to the principle of *non-refoulement*, the documents states that the US should maintain their legal and policy position that it is prohibited to transfer anyone from US custody where it is more likely than not that the person will be tortured.

<sup>1042</sup> See, among others: OSJI and Mwatana Organization for Human Rights, *Death by Drone: Civilian Harm Caused by US Targeted Killings in Yemen*, OSF, 2015.

<sup>1043</sup> US Department of Justice, 'Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees', 30 June 2011.

<sup>1044</sup> US Department of Justice, 'Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees', 30 August 2012.

<sup>1045</sup> AI, 'Amnesty International, ACLU and Human Rights Watch urge DOJ to appoint Special Prosecutor for Torture', 22 June 2015.

Yugoslav Republic of Macedonia (FYRM), on 31 December 2003, at the border, while he was travelling on holiday. He was subsequently detained in a hotel room until 23 January 2004, interrogated by unknown persons and threatened with death. On 23 January, he was brought to the airport in Skopje (the capital), handcuffed, blindfolded and subject to torture and other cruel, inhuman or degrading treatment. He was flown to the Bagram airbase and detention centre in Afghanistan where he was subject to repeated interrogation and torture. On 28 May, he was flown back to the FYRM, blindfolded and taken across the border to Albania where he was abandoned. He was later arrested by the Albanian authorities and repatriated to Germany.

### **Box 17: El-Masri – an example of torture under rendition**

The European Court of Human Rights (*El-Masri v. FYRM*, para. 21) documented that Khaled El-Masri was subject to the following treatment, supposedly at the hands of CIA agents:

*...he was initially placed in a chair, where he sat for one and a half hours. He was told that he would be taken into a room for a medical examination before being transferred to Germany. Then, two people violently pulled his arms back. On that occasion he was beaten severely from all sides. His clothes were sliced from his body with scissors or a knife. His underwear was forcibly removed. He was thrown to the floor, his hands were pulled back and a boot was placed on his back. He then felt a firm object being forced into his anus ... a suppository was forcibly administered on that occasion. He was then pulled from the floor and dragged to a corner of the room, where his feet were tied together. His blindfold was removed. A flash went off and temporarily blinded him. When he recovered his sight, he saw seven or eight men dressed in black and wearing black ski masks. One of the men placed him in an adult nappy. He was then dressed in a dark blue short-sleeved tracksuit. A bag was placed over his head and a belt was put on him with chains attached to his wrists and ankles. The men put earmuffs and eye pads on him and blindfolded and hooded him. They bent him over, forcing his head down, and quickly marched him to a waiting aircraft, with the shackles cutting into his ankles. The aircraft was surrounded by armed Macedonian security guards. He had difficulty breathing because of the bag that covered his head. Once inside the aircraft, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. During the flight he received two injections. An anaesthetic was also administered over his nose. He was mostly unconscious during the flight. A Macedonian exit stamp dated 23 January 2004 was affixed to [his] passport.*

In *El-Masri v. Tenet*, Khaled El-Masri sought damages against the US Government. The US Court of Appeals for the Fourth Circuit barred his lawsuit for damages based on the doctrine of State secrets. In its judgment, which the US Supreme Court declined to review,<sup>1046</sup> the Appeals Court upheld the

<sup>1046</sup> The Supreme Court did not grant *certiorari*: <https://www.supremecourt.gov/orders/courtorders/100907pzor.pdf>.

rule that evidence is covered by this “doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged”.<sup>1047</sup> Furthermore, it held that, if such privileged information is so “central to the litigation that any attempt to proceed will threaten that information’s disclosure”,<sup>1048</sup> the case must be dismissed. With regard to the assessment of whether the disclosure of information would jeopardize national security or foreign relations, courts must accord “utmost deference” to the Executive.<sup>1049</sup>

Without disputing El-Masri’s contention that the information concerning his rendition operation was already in the public domain, the Appeals Court determined that a civil lawsuit would require more information to be justiciable, including on the functioning and structure of the internal administration of the CIA and the calling of witnesses whose identities should be protected on grounds of national security.<sup>1050</sup> Furthermore, the Court held that the defendants would not be able to mount an effective defence.

In another case, *Mohamed et al v. Jeppesen Dataplan, Inc.*, former Guantánamo detainees Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi sued a subsidiary company of Boeing allegedly involved in the provision of flights for the US rendition operations. The Court of Appeals<sup>1051</sup> en banc dismissed the case on the grounds of State secrets. As in *El-Masri*, the Court dismissed the case because it deemed the case not feasible to be litigated “without creating an unjustifiable risk of divulging state secrets”.<sup>1052</sup> While the Court did “not hold that the existence of the extraordinary rendition program is itself a state secret” it ruled that “partial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude other details from remaining state secrets if their disclosure would risk grave harm to national security”.<sup>1053</sup>

Five justices dissented from this approach and considered it as illustrative of the fact that “state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law”.<sup>1054</sup>

<sup>1047</sup> *El-Masri v. Tenet*, US Court of Appeals for the Fourth Circuit, Case No. 06-1667, 2 March 2007, p. 15, quoting Reynolds, 345 U.S. at 10.

<sup>1048</sup> *Ibid.*, referring to Sterling, 416 F.3d at 348. See also: Reynolds, 345 U.S. at 11 n. 26; Totten, 92 U.S. at 107.

<sup>1049</sup> *Ibid.*, p. 11.

<sup>1050</sup> *Ibid.*, pp. 16–17: “he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations. ... Even marshaling the evidence necessary to make the requisite showings would implicate privileged state secrets, because El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security.” The Court rejected El-Masri’s proposal to examine the evidence in camera proceedings on the basis that this possibility was foreclosed by the precedent in Reynolds.

<sup>1051</sup> *Mohamed et al v. Jeppesen Dataplan, Inc.*, US Court of Appeals for the Ninth Circuit, en banc, Case No. 08-15693, 8 September 2010, at 13546.

<sup>1052</sup> *Ibid.*, at 13548, Jeppesen. See also: at 13549, 13552–13552.

<sup>1053</sup> *Ibid.*, at 13552, Jeppesen. Mr Britel’s case was also considered by several UN Special Procedures, see: Letter USA 12/2015 of 3 June 2015.

<sup>1054</sup> *Ibid.*, at 13559, Jeppesen. The ICJ submitted an *amicus curiae* in the case.

Khaled El-Masri also filed a case against the United States before the Inter-American Commission on Human Rights, on 9 April 2008. The Commission, which can issue only non-binding opinions in respect of the United States, did not receive a reply from the US until 11 April 2016, i.e. 8 years later. On 15 April 2016, the Commission declared the case admissible on the basis that El-Masri was under the authority and control, hence the jurisdiction, of the United States throughout the whole rendition operation.<sup>1055</sup> The case, which is still ongoing, contests violation of his rights to life, liberty and security, to equality before the law, to residence and movement, to recognition of legal personality and civil rights, to a fair trial, to the right of petition and of protection from arbitrary arrest, as well as to due process of law under the *American Declaration of the Rights and Duties of Man*.

In the case of Mahrer Arar, which the Supreme Court declined to review, the Court of Appeals went even further in refusing jurisdiction. The case was based on immigration law, i.e. the expulsion to Syria of a foreign citizen from the US while he happened to be in the international zone of a US airport (JFK). Mahrer Arar, who was tortured in Syria after the United States had unlawfully transferred him there, sued US Government officers for violations of his constitutional rights, including breach of the principle of *non-refoulement*. The Court declined to rule on the question of whether a remedy should be provided in these cases, deferring instead to the discretion of the Executive and of Congress.<sup>1056</sup> The Court based its decision on the fact that Congress had “expressly limited [courts] review of the removal of aliens who (like Arar) are removable for reasons related to national security”.<sup>1057</sup>

Mustafa al Hawsawi, a Saudi Arabian national currently detained at Guantanamo, has similarly been denied a remedy. He was arrested in Pakistan in 2003 and subjected to rendition and secret detention. Mustafa al Hawsawi was one of the many “high-level” persons subjected to torture following his rendition.<sup>1058</sup> He was held in detention site code-named “COBALT” in 2003 where he was subject to treatment that could “easily approximate waterboarding”.<sup>1059</sup> The US Senate Report’s Executive Summary states that al Hawsawi was held by the CIA, “despite doubts and questions surrounding [his] knowledge of terrorist threats and the location of senior Al-Qa’ida leadership”.<sup>1060</sup> He arrived in Guantánamo on 6 September 2006. He is currently subject to proceedings before a military commission together with four other defendants; they are all charged with being involved in the 9/11 attacks. The UN Working Group on Arbitrary Detention found that his right to liberty and to a fair trial had been violated and that the US has a duty to release him and provide him with compensation.<sup>1061</sup> Several UN Special Rapporteurs raised serious concerns at the

<sup>1055</sup> IACHR, Report No. 21/16, Case Petition 419-08, Admissibility, Khaled El-Masri. United States, 15 April 2016, para. 26.

<sup>1056</sup> *Arar v. Ashcroft*, US Court of Appeals for the Second Circuit, *en banc*, Case No. 06-4216-cv, 2 November 2009, p. 11. Page 46 refers also to the absolute Executive and Congress’ discretion to evaluate diplomatic assurances.

<sup>1057</sup> *Ibid.*, pp. 32–33, referring to 8 U.S.C. para. 1225(c).

<sup>1058</sup> *US Senate’s Executive Summary*, *op. cit.*, pp. 101–103.

<sup>1059</sup> *Ibid.*, p. 106.

<sup>1060</sup> *Ibid.*, p. 432.

<sup>1061</sup> WGAD, *Opinion No. 50/2014*, UN Doc. A/HRC/WGAD/2014, 23 January 2015. See also: *Letter of the Working Group on Arbitrary Detention, the SR on the independence of judges and lawyers, the SR on the promotion and protection of human rights while countering terrorism; and the SR on torture and other cruel, inhuman or degrading treatment or punishment*, Doc. USA 31/2012, 30 November 2012.

denial of medical treatment for Mr al Hawsawi, leading to a deterioration in his health, and the inhumane detention conditions.<sup>1062</sup>

A civil action is now pending against the two psychologists that designed and managed the interrogation programme, James Mitchell and John "Bruce" Jessen, the only civil case concerning rendition that has not been dismissed at the preliminary stage.<sup>1063</sup>

The above cases are but a small sample of the many victims of renditions who have been unable to seek, or dissuaded from seeking, justice for the extremely serious human rights violations they have suffered.

#### 6.4.1.4 *The US Senate Report's Executive Summary*

The Executive Summary of the Report of the Intelligence Committee of the US Senate (the *US Senate Report*) represents the main official record describing in detail the rendition programmes. To date, only the Executive Summary is publicly available, and even it has been heavily redacted.

The US Senate Report documents the ill-treatment of detainees subject to CIA rendition, interrogation and secret detention programmes.<sup>1064</sup> It documents that at least 17 detainees were subject to interrogation techniques that were either not allowed or were listed as "enhanced" techniques, which required CIA authorization that had not been obtained. Even when these violations were identified, "action was rarely taken against the interrogators involved".<sup>1065</sup> It is a major finding of the *US Senate Report* that CIA officers and contractors "who were found to have violated CIA policies or performed poorly were rarely held accountable or removed from positions of responsibility",<sup>1066</sup> even in the most severe cases, such as the death of a detainee or the use of unauthorized interrogation techniques. Likewise, the CIA managers failed to intervene to provide proper leadership and management and were not held to account. The Report highlights two cases:

*In one instance, involving the death of a CIA detainee . . . , CIA Headquarters decided not to take disciplinary action against any officers involved because, at the time, CIA Headquarters had been "motivated to extract any and all operational information" from the detainee. In another instance related to a wrongful detention, no action was taken against a CIA officer because "[t]he Director strongly believes that mistakes should be expected in a business filled with uncertainty," and "the Director believes the scale tips decisively in favor of accepting mistakes that over connect the dots against those that under connect them".*<sup>1067</sup>

Internal and external criticisms of the programme were ignored and were actively discouraged to the extent that CIA officers were instructed not to put their concerns in writing.<sup>1068</sup>

<sup>1062</sup> Letter of the Working Group on Arbitrary Detention, the *SR on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*; the *SR on the independence of judges and lawyers*; the *SR on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, and the *SR on torture and other cruel, inhuman or degrading treatment or punishment*, USA 5/2016, 6 May 2016.

<sup>1063</sup> See, among others: The Intercept, 'Trump Administration fights in court to prevent top CIA official from testifying on torture', 5 May 2017.

<sup>1064</sup> *US Senate's Executive Summary*, op. cit., Findings and conclusions, p. 4.

<sup>1065</sup> *Ibid.*, p. 12.

<sup>1066</sup> *Ibid.*, p. 14.

<sup>1067</sup> *Ibid.*

<sup>1068</sup> *Ibid.*, p. 15.



With regard to oversight, the US Senate's Intelligence Committee concluded that the CIA "avoided, resisted, and otherwise impeded oversight ... by the CIA's Office Inspector General"<sup>1069</sup>. There has been no independent and effective evaluation of the programme's effectiveness and internal assessments were "conducted by CIA personnel who participated in the development and management of the program, as well as by CIA contractors who had a financial interest in its continuation and expansion".<sup>1070</sup> Even more worryingly, the report documents that "no CIA officer, up to and including CIA Directors George Tenet and Porter Goss, briefed the President on the specific CIA enhanced interrogation techniques before April 2006".<sup>1071</sup>

### 6.4.2 Italy

Italy is the only State to have secured the conviction of persons responsible for carrying out a rendition operation. Hassan Mustafa Osama Nasr, also known as Abu Omar,<sup>1072</sup> was kidnapped on 17 February 2003 in Milan by CIA operatives and subject to rendition to Egypt, where he was disappeared, arbitrarily detained and tortured.<sup>1073</sup>

However, the subsequent trial, which began with the investigation and prosecution by Milan Prosecutors Armando Spataro and Ferdinando Pomarici, has not been smooth. Since 2007, successive Italian governments have raised State secrets exceptions, even concerning material already disclosed to the public, arguing that the executive prerogative on State secrets takes precedence over international law obligations to prosecute persons for committing crimes under international law, such as torture and enforced disappearance. No Italian government, since the issuance of arrest warrants has formally requested the extradition of the US agents that participated to the rendition operation. A European Arrest Warrant for them, however, still exists.

During the trial, the Constitutional Court, on 18 March 2009, at the instigation of the Italian Government, upheld the use of the State secrets doctrine as a bar to prosecution. The Court found that the Italian Government—in this case the President of the Council of Ministers—had an almost absolute discretion, limited only by the prohibition to use it on facts that are disruptive of the constitutional order and by the duty to inform Parliament.<sup>1074</sup> Subsequently, on 4 November 2009, the Tribunal of Milan convicted 23 US agents and 2 Italian officers for kidnapping, but did not pass judgment on the remaining Italian defendants.

The Court of Cassation, however, ordered the trial to be reopened and held that the doctrine of "State secrets" did not apply to the Italian secret services as they have no authority to conduct such illegal operations and they therefore effectively acted in a private capacity. Nevertheless, in 2012, a second Constitutional Court ruling annulled the subsequent convictions of the Italian secret agents involved in the rendition.<sup>1075</sup> The Court agreed with the contention

<sup>1069</sup> *Ibid.*, p. 8.

<sup>1070</sup> *Ibid.*, p. 13.

<sup>1071</sup> *Ibid.*, p. 6. It further affirms that the "CIA repeatedly provided incomplete and inaccurate information to the White House personnel regarding the operation and effectiveness" of the programme (p. 7).

<sup>1072</sup> *Nasr and Ghali*, ECtHR, *op. cit.*, para. 222.

<sup>1073</sup> See reconstruction in *Nasr and Ghali*, ECtHR, *op. cit.*

<sup>1074</sup> Constitutional Court, Judgment No. 106/2009, *The Law*, para. 3.

<sup>1075</sup> See: Constitutional Court, Judgment No. 23/2012.

of the Italian Government that the Government may protect from disclosure and use in court information it considers to be "State secrets", even if to do so would prevent revelation of the truth about serious crimes and human rights violations and accountability for those responsible. The Court affirmed that such decisions could not be questioned by ordinary courts. Since this ruling, two different Presidents of the Republic, Giorgio Napolitano and the incumbent Sergio Mattarella, have pardoned three of the convicted US agents: Colonel Joseph L. Romano III, Robert Seldon Lady and recently Sabrina de Sousa.

The lack of full accountability based on the interpretation of the State secrets doctrine prompted the lawyers of Abu Omar and his wife to refer the case to the European Court of Human Rights, which found Italy in violation of the ECHR. It stressed that the Italian authorities were obliged to take preventive measures to ensure that Abu Omar, who was subject to their jurisdiction, was not exposed to torture or inhuman or degrading treatment or punishment and to arbitrary detention.<sup>1076</sup> Because of the failure of Italian agents to protect Abu Omar, the Court held Italy directly responsible for his torture, all the more so considering that he enjoyed refugee status in Italy.<sup>1077</sup>

The Court welcomed the efforts of national prosecutors and judges that had worked hard to "establish the truth",<sup>1078</sup> but found that their investigation was deprived of all effectiveness because of the application of the State secrets doctrine by the Executive.<sup>1079</sup> This in turn prevented identification and punishment of those responsible, establishment of the truth and provision of an effective remedy and reparation, including by hampering criminal and civil proceedings, in breach of article 13 ECHR.<sup>1080</sup>

The Court also noted that the information was already in the public domain when the State secrets argument was applied to it and therefore it was difficult to see "how the use of the secret of state ... could serve the purpose of preserving the confidentiality of the facts".<sup>1081</sup>

During proceedings before the European Court, the Government admitted that it had not sought extradition of the CIA agents convicted in absentia.<sup>1082</sup>

The Court ruled that the State secrets doctrine had been applied in order to impede those responsible from being held accountable, and that this led to impunity.

It is further worth noting that the rendition of Abu Omar not only led to multiple violations of his human rights, but was also counterproductive in terms of the effectiveness of counter-terrorism investigations. Abu Omar was, at the time of the kidnapping, under investigation by the Milan prosecution office for links with international terrorist groups. The public prosecutors were monitoring his movements and acquaintances to obtain more evidence on groups

<sup>1076</sup> *Nasr and Ghali*, EctHR, *op. cit.*, paras. 289, 302, 309.

<sup>1077</sup> *Ibid.*, paras. 290, 291, 302, 309.

<sup>1078</sup> *Ibid.*, paras. 265–266. The Court noted that the Italian secret agents from the SISMI involved in the rendition could have been convicted based on the available evidence, as they had previously been up to the level of the Court of Cassation, but that they avoided conviction only because of the use of the State secrets arguments concerning such evidence, see: para. 268.

<sup>1079</sup> *Ibid.*, para. 334.

<sup>1080</sup> *Ibid.*, paras. 334–337.

<sup>1081</sup> *Ibid.*, para. 268.

<sup>1082</sup> *Ibid.*, paras. 270–272.

involved in forging passports and supporting the recruitment of potential terrorists. These efforts were thwarted the day Abu Omar disappeared from the streets of Milan, irredeemably damaging months of criminal investigations that would likely have led to the dismantling of terrorist groups and the incrimination of several persons linked with terrorist groups and activities.<sup>1083</sup>

Ultimately, the Italian prosecutors investigating the case, decisions of Italian courts, and a Council of Europe inquiry (the Marty report) consistently found that an operation of such magnitude as the rendition of Abu Omar on Italian soil could not have been carried out without the knowledge and/or the participation of the Italian authorities.<sup>1084</sup> The same conclusion was later reached by the European Parliament<sup>1085</sup> and the European Court of Human Rights.<sup>1086</sup> It was not, however, possible to fully identify and punish all those responsible due to reliance on the State secrets doctrine, a problem that continues today, despite the judgment of the European Court of Human Rights.

### 6.4.3 Poland

According to the findings of several international inquiries, from both inter-governmental and non-governmental sources<sup>1087</sup> and of the European Court of Human Rights, Polish authorities provided CIA operatives with access to their airspace and an airport, and allowed a CIA detention centre to be operated on Polish territory, turning a blind eye to any activities that were carried out there.

Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah, was apprehended by CIA agents in Pakistan, on 27 March 2002, and has been in US custody ever since.<sup>1088</sup> He was reportedly held in a secret detention centre in Bangkok (Thailand), where he was subjected to enhanced interrogation techniques, including “waterboarding”, from an unspecified moment until 4 December 2002.<sup>1089</sup> Abd Al Rahim Hussayn Muhammad Al Nashiri was held in the same Bangkok facility from 15 November 2002 to 4 December 2002.<sup>1090</sup> The European Court of Human Rights found beyond any reasonable doubt that Abu Zubaydah and Al Nashiri were transferred to Poland and arrived at Szymany airport on 5 December 2002. Abu Zubaydah remained in Poland in a secret detention centre located in Stare Kiejkuty until 22 September 2003, before being transferred first to another secret detention centre and later to Guantánamo Bay detention centre, where he remains at present.<sup>1091</sup> Al Nashiri is also currently detained in Guantánamo, where he is subject to “trial” by a military commission with the military prosecutor seeking the death penalty. The European court found that both Abu Zubaydah and Al Nashiri were subjected to torture and ill-treatment during their time in Poland.<sup>1092</sup>

<sup>1083</sup> This is recognized by the European Parliament in *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, No. P6\_TA(2007)0032, 14 February 2007, para. 56.

<sup>1084</sup> Dick Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, *op. cit.*, para. 231. *Nasr and Ghali*, ECtHR, *op. cit.*, para. 233.

<sup>1085</sup> *Ibid.*, para. 54 and following.

<sup>1086</sup> *Nasr and Ghali*, ECtHR, *op. cit.*, paras. 233 and 235.

<sup>1087</sup> See: footnote No. 937.

<sup>1088</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para 397.

<sup>1089</sup> *Ibid.*, para. 401.

<sup>1090</sup> *Ibid.*, para. 404.

<sup>1091</sup> *Ibid.*, para. 419; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, para. 417.

<sup>1092</sup> The ICJ has submitted third party interventions in both the Abu Zubaydah and Al Nashiri cases, available at <https://www.icj.org/icj-welcomes-european-court-ruling-on-renditions-and-secret-detentions/>.

The European Court of Human Rights concluded that the “Polish authorities knew that the CIA used its airport in Szymany and the Stare Kiejkuty military base for the purposes of detaining terrorist suspects captured within the ‘war on terror’ operation by the US authorities”.<sup>1093</sup> The Court further held that even if it had not been demonstrated that the Polish authorities knew precise details of what was going on in the secret detention centre, they certainly had reason to know about its general nature because of the wealth of public sources available on the CIA rendition programmes already available in 2002.<sup>1094</sup> In the *Al Nashiri* case, the Court stressed that such a degree of coordination would have been inconceivable without some sort of pre-arrangement, regardless of its formal legal nature.<sup>1095</sup>

For these reasons, the Court concluded that Poland was complicit in and internationally responsible for the rendition operation and the treatment endured. The Court found that Poland contributed to the rendition operations by allowing the CIA to use its airspace and airport, assisting in “disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA’s secret detention”.<sup>1096</sup>

Further, the European Court of Human Rights held that Poland was responsible for the torture that Abu Zubaydah and Al Nashiri endured because “Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring,”<sup>1097</sup> and was therefore responsible “on account of its ‘acquiescence and connivance’”<sup>1098</sup> with the CIA programme. It was also responsible for the transfer of the two detainees out of Poland since, being in the hands of the CIA, they were exposed to the risk of torture or inhuman or degrading treatment or punishment upon transfer.<sup>1099</sup>

In Poland, investigations into the alleged existence of a CIA secret detention facility were not opened until 11 March 2008. As at the date of the decision of the European Court of Human Rights in the cases of Abu Zubaydah and Al Nashiri (24 July 2014), nothing had resulted from the investigation and no one had been charged with a criminal offence.<sup>1100</sup> However, two successive prosecutors leading the investigation were removed from the case.<sup>1101</sup> A previous parliamentary inquiry in November–December 2005 was held behind closed doors and produced no result.

The European Court of Human Rights also stressed that Poland committed a further violation of the prohibition of torture and/or inhuman or degrading treatment or punishment by knowing, or having been in a position to know, what was taking place within Polish jurisdiction and failing to prevent the rendition, secret detention and interrogation of the victims.<sup>1102</sup>

<sup>1093</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 443.

<sup>1094</sup> *Ibid.*, para. 443; *Al Nashiri*, paras. 439–441.

<sup>1095</sup> *Al Nashiri v. Poland*, ECtHR, *op. cit.*, 428.

<sup>1096</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, paras. 444–445. *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 442–443.

<sup>1097</sup> *Ibid.*, para. 512; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 517–519.

<sup>1098</sup> *Ibid.*; *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 517–519.

<sup>1099</sup> *Ibid.*, paras. 513–514, *Al Nashiri v. Poland*, ECtHR, *op. cit.*, paras. 517–519.

<sup>1100</sup> *Ibid.*, para. 482.

<sup>1101</sup> *Ibid.*, para. 487.

<sup>1102</sup> *Ibid.*, para. 483.

According to communications from the Polish Government, investigations into those responsible for assisting in the renditions in Poland are continuing. While documents have been translated and experts heard, most of the case material has remained classified, although the victims' lawyers can reportedly have access to it. The US authorities have refused requests for international co-operation and Romania has not replied (for Romania's involvement in the case, see below).

A new Law on Prosecution Office was adopted on 28 January 2016, which allows the General Prosecutor to release information to the media about classified proceedings if it is of important public interest. However, as the Helsinki Foundation for Human Rights—Poland pointed out, the General Prosecutor is a government minister, has no independence and his or her decision cannot be challenged in court. He or she can also intervene in all proceedings at any stage.<sup>1103</sup> An audit of secret services has yet to be completed and no public acknowledgement has been provided.<sup>1104</sup>

Media reports indicate that part of the investigation into the negligence of the previous Public Prosecutor has been discontinued and that one person has been formally identified as a suspect but there is insufficient evidence to charge him or her. Furthermore, the Prosecutor's Office has refused to recognize Mustafa al Hawsawi as a victim (see above), who was allegedly detained in the same CIA secret detention centre. A case regarding the investigation has been filed before the European Court of Human Rights.<sup>1105</sup>

### **Box 18: Romania and Lithuania – the rendition path of Al-Nashiri and Abu Zubaydah**

Two additional cases brought by Al Nashiri<sup>1106</sup> and Abu Zubaydah<sup>1107</sup> against Romania and Lithuania respectively are also pending before the European Court of Human Rights.

Romania is accused of having hosted a secret detention site—code-named "Bright Light"—in a government building, where Mr Al Nashiri was detained, with other persons, during his rendition, between 2003 and 2005. While there, he was allegedly subject to torture and other cruel, inhuman or degrading treatment. After the news of the detention site's existence was published by the Washington Post, it was closed and Mr Al Nashiri was flown out of the country. The Romanian authorities have always denied the existence of the centre, despite a Council of Europe inquiry documenting it. A parliamentary inquiry in 2008 denied its existence<sup>1108</sup> and a criminal complaint filed with the General Prosecutor on 20 July 2012 has yet to lead to an effective investigation.<sup>1109</sup>

<sup>1103</sup> Committee of Ministers of the Council of Europe, Communication from a NGO (Helsinki Foundation for Human Rights) (25 August 2016) and reply from the authorities (1 September 2016) in the Al Nashiri group of cases against Poland (Application No. 28761/11), Doc. No. DH-DD (2016) 957, 2 September 2016.

<sup>1104</sup> Committee of Ministers of the Council of Europe, Communication from a NGO (Open Society Justice Initiative) (6 September 2016) and reply from the authorities (13 September 2016) in the Al Nashiri group of cases against Poland (Application No. 28761/11), Doc. No. DH-DD (2016) 1007, 14 September 2016.

<sup>1105</sup> Committee of Ministers of the Council of Europe, Doc. No. DH-DD (2016) 957, *op. cit.*

<sup>1106</sup> The ICJ intervened as a third party in this case.

<sup>1107</sup> The ICJ intervened as a third party in this case.

<sup>1108</sup> *Al Nashiri v. Romania*, ECtHR, Application No. 33234/12, Statement of Facts, para. 101.

<sup>1109</sup> *Ibid.*, para. 105. See also: OSF, 'Romania's Role in CIA Torture and Rendition Comes Before European Court', 20 June 2016.

Lithuania is alleged to have hosted a secret detention site in which Abu Zuabydah was held during his rendition in 2005, seemingly after having been held in Morocco.<sup>1110</sup> The Lithuanian Parliament held an inquiry that found the existence of CIA flights in and out of the country, but could not establish whether they transported any detainees. It further found that detention centres may have existed but that it was not clear whether they held CIA detainees.<sup>1111</sup> On 14 January 2011, the Prosecutor General's Office closed an investigation into the issue because no action/inaction "had been committed which constituted evidence of a criminal offence or a criminal misdemeanour".<sup>1112</sup>

#### **6.4.4 The former Yugoslav Republic of Macedonia**

The first case to achieve recognition of responsibility by an independent tribunal,<sup>1113</sup> aside from the rulings of the Italian criminal courts in the Abu Omar case, was that of Khaled El-Masri against the former Yugoslav Republic of Macedonia (FYRM) (see above regarding the facts of the case).

With regard to the FYRM's duty to investigate, an internal Government inquiry was undertaken in 2005 without hearing from Khaled El-Masri. It produced two reports, in 2006 and 2008, denying the events and stating that El-Masri was not abducted but was simply arrested for allegedly having a forged passport. In 2008, Khaled El-Masri filed a criminal complaint against unidentified law enforcement officers. Based on the previous inquiry, the public prosecutor rejected the complaint as unsubstantiated. A civil case, filed by Khaled El-Masri against the State, was rejected in October 2014 for being the same as that under examination by the European Court of Human Rights.<sup>1114</sup>

As detailed above, Khaled El-Masri attempted to seek a remedy before US courts but his action was barred (see Section 6.4.1.3). In 2004, he filed a criminal complaint with the public prosecutor's office in Munich (Germany), which issued on 31 January 2007, 13 arrest warrants against CIA agents, whose names were not disclosed. However, the German Government has not actively pursued these extraditions from the US, after having apparently received an informal first refusal and after administrative courts in Germany rejected a legal challenge to order the executive authorities to do so.<sup>1115</sup> A parliamentary inquiry of the German Bundestag into the renditions phenomena, which concluded on 18 June 2009, confirmed the allegations of El-Masri.<sup>1116</sup>

Khaled El-Masri also sought investigations in Spain for complicity. He alleged that the plane and the team that executed his rendition in FYRM stopped in

<sup>1110</sup> *Abu Zubaydah v. Lithuania*, ECtHR, Application No. 46454/11, Statement of Facts, para. 5. See also: AI, 'CIA rendition victims challenge Romania and Lithuania at Europe's human rights court', 29 June 2016.

<sup>1111</sup> *Ibid.*, para. 66.

<sup>1112</sup> *Ibid.*, para. 78.

<sup>1113</sup> Other independent bodies such as the UN Human Rights Committee and the Committee against Torture (see cases of Alzery and Agiza below) had previously reached a ruling on a rendition operation in Europe.

<sup>1114</sup> *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 64–73, and Committee of Ministers of the Council of Europe, Communication from "The former Yugoslav Republic of Macedonia" concerning the case of El-Masri against "The former Yugoslav Republic of Macedonia" (Application No. 39630/09), Doc. No. DH-DD (2015) 241, 26 February 2015. The ICJ intervened as a third party in this case.

<sup>1115</sup> Administrative Court of Cologne, Case No. 5 K 7161/08, 7 December 2010.

<sup>1116</sup> *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 59–61.

Spain and spent a night there before travelling on to Skopje. The investigative judge of the Audiencia Nacional and the plenary of the Second Chamber of the Audiencia Nacional dismissed the complaint in its entirety, including complaints against Spanish officers for having authorized the landing of the CIA aircraft.<sup>1117</sup>

In the case filed by El-Masri against the FYRM, the European Court of Human Rights concluded that the FYRM authorities were responsible for the US-led rendition of Khaled El-Masri. The Court found that the FYRM authorities had arrested him at the behest of the US forces, kept him in detention without a legal basis and handed him over to CIA agents who later transferred him to Bagram airbase detention centre (Afghanistan). The Court held that the FYRM authorities knew or should have known that by handing El-Masri over to the US authorities they were exposing him to the risk of torture.<sup>1118</sup>

The Court found that FYRM authorities “not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer”.<sup>1119</sup> The Court therefore held the FYRM responsible for the applicant’s subsequent detention, including the time when he was detained solely by the US authorities in Bagram (Afghanistan), since the renditions amounted to an “enforced disappearance” consisting in “an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity”.<sup>1120</sup>

After the European Court of Human Rights ruling, the FYRM Government reported that it had reformed the criminal code to increase penalties for torture and ill-treatment from five to eight years imprisonment<sup>1121</sup> and had introduced a right to appeal against prosecutors’ decisions to close investigations.<sup>1122</sup> The Government further stated that it was planning to set up an independent commission of inquiry — as recommended by Open Society Justice Initiative,<sup>1123</sup> introduce a separate judicial police institution headed by the Public Prosecutor,<sup>1124</sup> and introduce a complaints process for human rights violations before the Constitutional Court.<sup>1125</sup> On 20 February 2017, the Government announced that it had not yet carried out these reforms due to political instability in the country.<sup>1126</sup>

#### 6.4.5 United Kingdom

In the United Kingdom, a group of seven Guantánamo detainees who had been subject to renditions tried to obtain redress through the courts for the

<sup>1117</sup> El País, ‘La Audiencia Nacional da carpetazo a la investigación de los vuelos de la CIA’, 12 January 2015; EL País, ‘El juez archiva la investigación de un vuelo de la CIA que hizo escala en Palma’, 8 September 2014.

<sup>1118</sup> *El-Masri v. FYRM*, ECtHR, *op. cit.*, paras. 218–222.

<sup>1119</sup> *Ibid.*, paras. 239 and 241.

<sup>1120</sup> *Ibid.*, para. 240.

<sup>1121</sup> Committee of Ministers of the Council of Europe, Doc. No. DH-DD (2015) 241, *op. cit.*, p. 4.

<sup>1122</sup> *Ibid.*, p. 8.

<sup>1123</sup> Committee of Ministers of the Council of Europe, Communication from the authorities (14 February 2017) in the case of *El-Masri v. “the former Yugoslav Republic of Macedonia”* (Application No. 39630/09), Doc. No. DH-DD (2017) 184, 20 February 2017. See: Committee of Ministers of the Council of Europe, Communication from a NGO (Open Society Justice Initiative) (13 September 2016) in the case of *El-Masri against “the former Yugoslav Republic of Macedonia”* (Application No. 39630/09), Doc. No. DH-DD (2016) 1082, 4 October 2016.

<sup>1124</sup> Committee of Ministers of the Council of Europe, Doc. No. DH-DD (2015) 241, *op. cit.*, p. 6.

<sup>1125</sup> *Ibid.*, p. 9.

<sup>1126</sup> Committee of Ministers of the Council of Europe, Doc. No. DH-DD (2017) 184, *op. cit.*



alleged complicity of the UK secret services. In *Al Rawi and others v. Security Service and others*, the UK secret services were accused of having “caused or contributed to [the complainants’] detention ... and ... alleged ill-treatment by foreign authorities. The case for each claimant is that he was subjected to unlawful extraordinary rendition, to torture and to inhuman and degrading treatment during the course of his detention.”<sup>1127</sup>

The Government argued that courts should introduce a closed material procedure in civil damages cases. The closed material procedure was introduced in administrative cases of expulsion for national security reasons. The proceedings were to involve the appointment of a security-cleared lawyer, the ‘special advocate’, who would be the only person allowed to act for the defendant in a closed hearing in which the Government would share classified evidence. The defendant and his or her counsel of choice would not be able to participate in such hearings.

While the High Court accepted that Special Advocates could be allowed in principle, in addition to a public-interest immunity (PII) procedure that would have simply prevented classified evidence from being adduced in the proceedings or the trial altogether, the Court of Appeal was of a different view and reversed the High Court’s ruling, citing the fundamental nature of the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his or her case.<sup>1128</sup>

In response to this ruling, the UK Parliament passed the Justice and Security Act 2013, which effectively introduced the closed material procedure in civil damages proceedings.<sup>1129</sup> To date, it appears to have been applied primarily in cases relating to Northern Ireland, with the notable exception of the case of the transfer by UK soldiers of two Pakistani men, Amanatullah Ali and Yunus Rahmatullah, who were detained in Iraq, to US forces who then sent them to Bagram airbase in Afghanistan.<sup>1130</sup>

An inquiry into the complicity of the UK secret services in torture occurring during rendition operations was launched by the UK Government but was closed following criticism of its lack of independence and limited scope, as well as the opening of an investigation by the parliamentary intelligence and security committee.<sup>1131</sup>

On 17 January 2017, the Supreme Court of the UK allowed one case for civil damages against UK officers, brought by Abdelhakim Belhaj and his wife, to continue. Abdelhakim Belhaj, a leader of the opposition to former Colonel Muammar Gaddafi — then leader of Libya — and his wife were arrested in Kuala Lumpur in 2004, allegedly after information was provided by MI6, with the intention that they would be rendered to Libya. They were detained in Malaysia, Thailand (allegedly by Thai and US agents) and in Libya. They accuse the UK of having “arranged, assisted and encouraged” the operation and of being complicit in their torture and degrading treatment both in Libya and while in detention in Bangkok. The Supreme Court ruled that the act of State and State immunity doctrines could not prevent this case from proceeding.

<sup>1127</sup> *Al Rawi and others v. the Security Service and others* [2009] EWHC 2959 (QB), 18 November 2009.

<sup>1128</sup> *Ibid.*, para 30.

<sup>1129</sup> *Justice and Security Act 2013*.

<sup>1130</sup> Reprieve, ‘Secret courts — a dark day for British justice’.

<sup>1131</sup> The Guardian, ‘UK rights groups reject official inquiry into post-September 11 rendition’, 8 November 2014.

### 6.4.6 Sweden

Sweden has been found in breach of its human rights obligations in relation to two rendition cases. Egyptian nationals, Mohammed Alzery and Ahmed Hussein Mustafa Kamil Agiza, were both summarily expelled from Sweden to Egypt on 18 December 2001, brought to the airport of Bromma and handed over, on Swedish territory, to 10 agents, who a subsequent inquiry by the Parliamentary Ombudsman would later identify as US and Egyptian agents. At the airport, they were reportedly subject to severe ill-treatment by the US and Egyptian agents.<sup>1132</sup> On arrival in Egypt, they were detained and allegedly subjected to torture.<sup>1133</sup>

Mohammed Alzery was an asylum seeker who arrived in Sweden on 4 August 1999. His asylum request was rejected on security grounds, based on "intelligence services information that the author was involved, in a leading position and role, in the activities of an organization implicated in terrorist activities".<sup>1134</sup>

Ahmed Agiza had been convicted in absentia in Egypt by a military court of "belonging to the terrorist group 'Al Gihad', and was sentenced, without the possibility of appeal, to 25 years' imprisonment".<sup>1135</sup> He claimed asylum in Sweden on 23 September 2000 but his claim was rejected on the same day that he was summarily expelled. The Swedish intelligence services considered that he was implicated in terrorist activities and a national security threat. His wife, who was subject to the same expulsion decision, went into hiding.<sup>1136</sup>

In April 2002, in relation to both cases, the Ministry of Justice conducted an internal assessment of the expulsion proceedings. A criminal investigation began in 2004. Inquiries against the Ministry, competence of a parliamentary committee, were closed in 2005 with no action taken. As for the remainder of the complaints, the Stockholm district prosecutor decided to discontinue the investigations at the end of 2004.<sup>1137</sup>

Ahmed Agiza brought a claim to the UN Committee against Torture, which held that Sweden was in breach of its obligations under the Convention against Torture.<sup>1138</sup> Mohamed Alzery brought his case before the Human Rights Committee for Sweden's breach of its obligations under the International Covenant on Civil and Political Rights.

Both the Human Rights Committee and the Committee against Torture found that Sweden was responsible for the applicants' transfer to Egypt, where they were at risk of being subject to torture or cruel, inhuman or degrading treatment or punishment, in breach of article 7 of the ICCPR<sup>1139</sup> and article 3 of the CAT.<sup>1140</sup> Both Committees found that the diplomatic assurances provided were insufficient and should not have been relied upon.<sup>1141</sup> They further found that Sweden was responsible for the ill-treatment that Alzery and Agiza suffered at the hands of US and Egyptian agents at Bromma airport on the basis that,

<sup>1132</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 10.2.

<sup>1133</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, para. 3.8.

<sup>1134</sup> *Ibid.*, para. 3.8.

<sup>1135</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 2.4.

<sup>1136</sup> *Ibid.*, 2.5.

<sup>1137</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, paras. 3.20–21; *Agiza v. Sweden*, CAT, *op. cit.*, para. 10.3.

<sup>1138</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.4.

<sup>1139</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, para. 11.4.

<sup>1140</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.4.

<sup>1141</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, para. 11.5; *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.4.

since the treatment took place on Swedish territory, it had necessarily occurred with the “consent or acquiescence of the State party”.<sup>1142</sup>

The Committee against Torture found that Sweden’s ordinary process for reviewing expulsions was sidelined for national security reasons and “that the absence of any avenue of judicial or independent administrative review of the Government’s decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention”.<sup>1143</sup> It further noted that the speed of the transfer in practice prevented Mr Agiza from applying for interim measures to the Committee, thereby undermining his right of petition under article 22 of the CAT.<sup>1144</sup>

In the *Alzery* case, the UN Human Rights Committee underlined Sweden’s obligation under the ICCPR, article 7, to “ensure that its investigative apparatus is organized in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence”.<sup>1145</sup> The HRC criticized the fact that “neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences”.<sup>1146</sup>

On 15 June 2004, the Swedish authorities granted permanent resident status to Agiza’s wife and five children.<sup>1147</sup> They were each awarded compensation of 3 million SEK.<sup>1148</sup> On 27 October 2003, Alzery was finally released without charge. Agiza, however, was not released until 2 August 2011.<sup>1149</sup>

## 6.5 “Rendition” operations in the CIS countries

Rendition operations in CIS countries have been taking place for at least the last fifteen years. Their purpose is to bypass legal transfer channels, such as extradition and expulsion procedures, to ensure that a certain person is brought to trial. Therefore, after being subject to rendition in the CIS States, individuals have found themselves processed through the ordinary legal framework, through which they have been tried and placed in an ordinary prison. While these renditions are similar in nature and consequences for the rights of the persons concerned, in this sense they differ, for example, from the US administered “extraordinary” renditions, which were aimed primarily at gathering intelligence through interrogations that resorted to torture and ill-treatment or other violations (see above, US Rendition System).

However, in other respects the renditions in CIS countries more closely resemble extraordinary renditions. Similarities include the lack of effective guarantees against violations of human rights in the country of destination; the absence of adequate procedural protection in the processes to which the transferred

<sup>1142</sup> *Ibid.*, para. 11.6; *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.4.

<sup>1143</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 13.8.

<sup>1144</sup> *Ibid.*, para. 13.9.

<sup>1145</sup> *Alzery v. Sweden*, CCPR, *op. cit.*, para. 11.7.

<sup>1146</sup> *Ibid.*

<sup>1147</sup> *Agiza v. Sweden*, CAT, *op. cit.*, para. 10.4.

<sup>1148</sup> Civil Rights Defenders, ‘*Compensation for Ahmed Agiza — but only part way*’, 6 October 2008.

<sup>1149</sup> The Rendition Project, ‘*Ahmed Agiza and Mohamed el Zery*’.

person is subject; fundamental problems concerning the underlying criminal offences the persons are accused of, including the lack of predictability and the legality of the offences. The European Court has concluded that the CIS rendition operations, have been “conducted ‘outside the normal legal system’ and, ‘by [their] deliberate circumvention of due process, [are] anathema to the rule of law and the values protected by the Convention’.”<sup>1150</sup>

There have generally been two types of operations, distinguishable by the degree of responsibility of the country hosting the person to be transferred:

- Operations carried out at least in part by the security officials of the host country, sometimes in secret (direct responsibility); and
- Operations carried out by the security officials of the requesting country on the territory of the host country and with its complicity (indirect responsibility).

The difference in the assessment of responsibility is often a matter of availability of evidence. In the case of Mirsobir Mirsobitovich Khamidkariyev, the direct responsibility of the Russian Federation could be established, as it was clear that FSB agents were themselves involved in the operation, while for Savriddin Dzhurayev such involvement was not evident.

Another case of indirect responsibility is the situation of “disappeared” persons who have previously been detained by the Russian authorities but who have been shown by the Russian Government to have left the detention centre on their own before their disappearance. In such cases, the European Court of Human Rights has not found the State directly responsible for the enforced disappearance. In contrast, direct responsibility is presumed if the State is unable to demonstrate that the person is no longer detained.<sup>1151</sup>

### **6.5.1 Direct responsibility: Case Examples**

#### **6.5.1.1 Murodzhon Adikhamzhonovich Abdulkhakov**

The situation of Murodzhon Adikhamzhonovich Abdulkhakov, an Uzbek national, provides a clear example of direct responsibility of the Russian authorities. He was apprehended by plain-clothed individuals, presumed to be State agents, after an identity control by the police on 23 August 2011. He was forced into a van with a plastic bag on his head and brought to a forest where he was beaten and threatened with a gun. His hands were burnt with a lighter. The next day, he was taken by plane to the city of Khujand in Tajikistan and handed over to Tajik police officials. He was detained there pending extradition to Uzbekistan, a period during which he claims to have been ill-treated by the Tajik authorities. Once released, he went into hiding.<sup>1152</sup> The European Court considered this as a secret transfer at the hands of the Russian authorities<sup>1153</sup> in breach of the principle of *non-refoulement* and of his right to liberty, and found “it particularly

<sup>1150</sup> *Savriddin Dzhurayev v. Russia*, ECtHR, *op. cit.* para. 204. See also: para. 257: “the repeated abductions of individuals and their ensuing transfer to the countries of destination by deliberate circumvention of due process — notably in breach of the interim measures indicated by the Court — amount to a flagrant disregard for the rule of law and suggest that certain State authorities have developed a practice in breach of their obligations under the Russian law and the Convention. Such a situation has the most serious implications for the Russian domestic legal order, the effectiveness of the Convention system and the authority of the Court.”

<sup>1151</sup> *Ibid.*, para. 70, referring to Mamazhonov case.

<sup>1152</sup> *Abdulkhakov v. Russia*, ECtHR, Application No. 14743/11, 2 October 2012, paras. 54–62.

<sup>1153</sup> *Ibid.*, paras. 152–153.

striking that the applicant's transfer to Tajikistan was carried out in secret and outside any legal framework capable of providing safeguards against his removal to Uzbekistan without an evaluation of the risks of his ill-treatment there".<sup>1154</sup>

#### 6.5.1.2 *Lutpiddin Bakhritdinovich Mukhitdinov*

The case of Lutpiddin Bakhritdinovich Mukhitdinov, an Uzbek national, exemplified how the direct responsibility of the Russian Federation was engaged by the State's failure to give an account of his whereabouts following detention. Mukhitdinov was wanted in his country of origin for "infringement of the constitutional order of Uzbekistan" and "organization of a criminal enterprise"<sup>1155</sup> for allegedly being a member of the Islamic Movement of Uzbekistan (IMU).<sup>1156</sup> His extradition was upheld by Russian courts in 2014, based on an international warrant issued on 16 December 2009.<sup>1157</sup> However, he was released from detention on 11 March 2014 pursuant to a court order.<sup>1158</sup> The European Court of Human Rights prescribed interim measures on 17 March 2014 ordering Russia not to extradite or involuntarily remove him to Uzbekistan.

On 22 July 2014, he was arrested by seven officers of the Federal Migration Service (FMS). When his wife and son arrived later that day at the FMS office they were told he had been released. Five days later, his lawyer asked that the FSB, Border Control and the Prosecutor General's Office halt his transfer to Uzbekistan as she "had information that the applicant was detained in a police ward in Tyumen and that he might be placed on the next flight to Tashkent".<sup>1159</sup> He has not been seen since his arrest.<sup>1160</sup> Since there was no evidence that he left the detention centre other than declarations by the Russian authorities,<sup>1161</sup> the European Court of Human Rights held that there was a presumption that the detention of Mukhitdinov did not end and the authorities continue to bear responsibility for his whereabouts as if he were still held in detention. The Court therefore concluded that the Russian authorities were directly responsible for his apparent enforced disappearance.<sup>1162</sup>

The Court further ruled that it is "beyond any doubt that the Russian authorities were well aware—or ought to have been aware—... that the applicant faced a ... risk of disappearance and irregular transfer after his release from custody on 11 March 2014".<sup>1163</sup>

#### 6.5.1.3 *Mirsobir Mirsobitovich Khamidkariyev*

Mirsobir Mirsobitovich Khamidkariyev, an Uzbek national, left Uzbekistan fearing political persecution at the end of 2010.<sup>1164</sup> In 2011, he was targeted by an international arrest warrant issued by Uzbek authorities for having participated in the establishment of an unspecified "jihadist organization".<sup>1165</sup> On 20 July

<sup>1154</sup> *Ibid.*, para. 156.

<sup>1155</sup> Criminal Code of Uzbekistan, articles 159.3 and 242.1.

<sup>1156</sup> *Mukhitdinov v. Russia*, ECtHR, Application No. 20999/14, 21 May 2015, para. 14.

<sup>1157</sup> *Ibid.*, para. 20.

<sup>1158</sup> *Ibid.*, para. 22.

<sup>1159</sup> *Ibid.*, para. 25.

<sup>1160</sup> *Ibid.*, para. 70.

<sup>1161</sup> *Ibid.*, para. 72.

<sup>1162</sup> *Ibid.*, paras. 76–77.

<sup>1163</sup> *Ibid.*, para. 61.

<sup>1164</sup> *Khamidkariyev v. Russia*, ECtHR, Application No. 42332/14, 26 January 2017, para. 10.

<sup>1165</sup> *Ibid.*, para. 11.

2013, he was arrested in Moscow with a view to extradition. Nineteen days later he was released on the basis of the double criminality rule.<sup>1166</sup>

He applied for refugee status, which was denied by the Federal Migration Service. He then appealed this denial to the Moscow City Court.<sup>1167</sup>

On 9 June 2014, with his asylum appeal still pending, Khamidkariyev was abducted while taking his son to the hospital in a taxi with his wife. The taxi stopped at a pharmacy, his wife and son stepped out to buy medicine and, when they returned to the taxi, it had departed, driven by unknown people.<sup>1168</sup> Their lawyer contacted the FSB and the border control agency on the same day to warn them about the abduction and the risk that he may be removed from Russia.<sup>1169</sup>

According to the applicant, he was abducted by two FSB agents that “put a sack over [his] head[, took him] to an unidentified house, tied him up and taken the sack off his head. . . . The two men had beaten [him] and kept him inside the house until the following day.”<sup>1170</sup> He was taken to an airport in Moscow on 10 June without passing through border control and handed over to Uzbek officers at the door of a plane headed to Tashkent.<sup>1171</sup>

Mirsobir Khamidkariyev has alleged that he was detained “for two months and . . . subjected to torture and other ill-treatment by Uzbek law-enforcement officers with a view to securing a self-incriminating statement. [He] had been tied head downwards to a bar attached to the wall and had been beaten repeatedly. The officers had broken two of [his] ribs and knocked out seven of his teeth.”<sup>1172</sup>

His asylum claim was turned down by the Moscow City Court, on 2 December 2014, after his abduction, alleged torture and conviction in Uzbekistan because he had not provided “convincing and irrefutable evidence of the existence of well-founded fears of becoming a victim of persecution in Uzbekistan”.<sup>1173</sup>

As part of the “investigations” into his abduction, the applicant was questioned while in detention in Uzbekistan and, in these circumstances, he was reported to have stated that “he had not been arrested by the Russian authorities and that he had voluntarily left Moscow to go to Uzbekistan to visit his ailing mother”.<sup>1174</sup> He reportedly said that he had not been disappeared at all on 9 June but had come back home that day and decided the following day to leave for Uzbekistan by bus.<sup>1175</sup> On 12 February, in Uzbekistan, his wife confirmed this statement.<sup>1176</sup> As the European Court of Human Rights stressed, one must be “reluctant to accept [these statements] as satisfactory given that the interview in question was not attended by sufficient procedural safeguards against abuse and arbitrariness”.<sup>1177</sup>

<sup>1166</sup> *Ibid.*, para. 14.

<sup>1167</sup> *Ibid.*, para. 17.

<sup>1168</sup> See: *Ibid.*, paras. 20–21.

<sup>1169</sup> *Ibid.*, para. 23.

<sup>1170</sup> *Ibid.*, para. 28.

<sup>1171</sup> *Ibid.*, para. 29.

<sup>1172</sup> *Ibid.*, para. 30.

<sup>1173</sup> *Ibid.*, para. 50.

<sup>1174</sup> *Ibid.*, para. 90.

<sup>1175</sup> *Ibid.*, para. 90.

<sup>1176</sup> *Ibid.*, para. 91.

<sup>1177</sup> *Ibid.*, para. 118.

The Court referred to the agreed facts that Mirsobir Khamidkariyev had no passport on 9 June 2014 and that to travel to Tashkent he must have crossed the Russian border<sup>1178</sup> as well as the border with Kazakhstan. On this basis, the Court found it “implausible that an individual whose name appeared on the wanted lists ... could travel some 3,400 kilometres through Russia and Kazakhstan by bus and cross the Russia–Kazakhstan and Kazakhstan–Uzbekistan State borders unimpededly despite having no passport on him...”<sup>1179</sup> It therefore found that the “Russian authorities bear responsibility, as a result of direct or indirect involvement, for the applicant’s forcible transfer from Moscow to Tashkent”.<sup>1180</sup>

On 18 June 2014, the Uzbek Ministry of Interior informed the father of Mirsobir Khamidkariyev that his son had been arrested and detained on 17 June 2014.<sup>1181</sup> He was convicted on 18 November 2014<sup>1182</sup> and sentenced to eight years imprisonment. He is currently in prison.

### **6.5.2 Complicity by facilitation**

#### *6.5.2.1 Savriddin Dzhanobiddinovich Dzhurayev*

Savriddin Dzhanobiddinovich Dzhurayev, a Tajik national, was charged by a Tajik prosecutor, on 7 November 2006, with having formed a “criminal armed group”, the Islamic Movement of Uzbekistan (IMU), and having being involved in an armed attack against three members of Parliament.<sup>1183</sup> An international arrest warrant was issued on the same day. He was detained by Russian authorities on 21 November 2009 and remained in detention pending extradition until 21 May 2011 (one year and six months).

His application for refugee status, submitted while in detention, was rejected by the Federal Migration Service (FMS) on the basis that the IMU was considered a terrorist organization by the Supreme Courts of both the Russian Federation and of Tajikistan. Furthermore, it was considered that he did not risk being persecuted on religious grounds, since Tajikistan is a predominantly Muslim country and the “authorities’ attempt to strengthen control over religious beliefs [was] pursuing the understandable aim of limiting the influence of radical Islam”.<sup>1184</sup> UNHCR stated that he qualified for international protection under its mandate.<sup>1185</sup> He was granted temporary protection (see Section on international protection) on 6 September 2011.<sup>1186</sup>

The European Court of Human Rights found that the FMS had “failed to consider whether the applicant would risk being tortured or ill-treated in Tajikistan”.<sup>1187</sup> It concluded that “the domestic authorities did not carry out an independent and rigorous scrutiny of the applicant’s claim that there existed substantial grounds for fearing a real risk of treatment contrary to Article 3 in his home

<sup>1178</sup> *Ibid.*, para. 122.

<sup>1179</sup> *Ibid.*, para. 123.

<sup>1180</sup> *Ibid.*, para. 126.

<sup>1181</sup> *Ibid.*, para. 28.

<sup>1182</sup> He was convicted of “illegal establishment of public associations or religious organizations” and “establishment of, management of, participation in religious extremist, separatist, fundamentalist or other proscribed organizations”, articles 216 and 244 of the Criminal Code of Uzbekistan. See: *Ibid.*, para. 43.

<sup>1183</sup> Criminal Code of Tajikistan, articles 186.2 and 187.2.

<sup>1184</sup> *Savriddin Dzhurayev v. Russia*, ECtHR, *op. cit.*, para. 26.

<sup>1185</sup> *Ibid.*, para. 30.

<sup>1186</sup> *Ibid.*, para. 31.

<sup>1187</sup> *Ibid.*, para. 159.



country".<sup>1188</sup> Furthermore, the issuance of temporary protection had not addressed these risks because his abduction erased any of its benefits.<sup>1189</sup>

According to Savriddin Dhzruev, on the night of 31 October 2011, the car he was travelling in with a friend was blocked by a minivan. The friend managed to escape but Dhzruev was "stopped, beaten up with a truncheon and forced into the mini-van by the same men, who did not identify themselves".<sup>1190</sup> He was allegedly detained in the minivan for approximately 24 hours and subjected to torture and ill-treatment: "They beat him up, put a gun to his head and threatened to kill him unless he agreed to return to his home country".<sup>1191</sup> One of the kidnappers was said to be of Tajik origin. He was then brought to Moscow's Domodedovo airport, handed over to a team of Tajik agents and put on a plane.<sup>1192</sup>

The European Court of Human Rights concluded beyond reasonable doubt that he had been "kidnapped by unidentified persons in Moscow on the evening of 31 October 2011, detained by his kidnappers in Moscow for one to two days, then forcibly taken by them to an airport and put onboard a flight to Khujand in Tajikistan, where he was immediately placed in detention by the Tajik authorities".<sup>1193</sup>

It was also established beyond reasonable doubt that he was transferred by air, in particular considering "the short time that elapsed between the applicant's abduction in Moscow and his sudden emergence in the hands of the police in Khujand, and in view of the long distance between the two cities (approximately 3,500 km by road)".<sup>1194</sup>

The Court found that the authorities were aware, in light of previous cases, of the risk that a person released from extradition proceedings and subject to the Court's interim measures, would be kidnapped, and that they failed to take the necessary preventive steps to avoid the abduction as required by their obligations under article 3 ECHR.<sup>1195</sup> It further found that there was a presumption that "his forcible transfer to Tajikistan could not have happened without the knowledge and either passive or active involvement of the Russian authorities".<sup>1196</sup>

#### 6.5.2.2 *Yusup Salimakhunovich Kasymakhunov*

In the case of Yusup Salimakhunovich Kasymakhunov, an Uzbek national, the only information available was that his lawyer "lost contact with [him], and that in the evening of the same day the applicant took a flight from Moscow Domodedovo Airport to Tashkent".<sup>1197</sup> The Court concluded that, on 14 December 2012, he "was forcibly transferred to Uzbekistan by an unknown person or persons, and (b) his transfer through the Russian State border at Domodedovo Airport took place with the authorisation, or at least acquiescence, of the State

<sup>1188</sup> *Ibid.*, para. 165.

<sup>1189</sup> *Ibid.*, para. 165.

<sup>1190</sup> *Ibid.*, para. 38.

<sup>1191</sup> *Ibid.*, para. 39.

<sup>1192</sup> *Ibid.*, para. 40.

<sup>1193</sup> *Ibid.*, para. 138.

<sup>1194</sup> *Ibid.*, para. 137.

<sup>1195</sup> *Ibid.*, para. 185.

<sup>1196</sup> *Ibid.*, para. 201.

<sup>1197</sup> *Kasymakhunov v. Russia*, ECtHR, Application No. 29604/12, 14 November 2013, para. 104.

agents in charge of the airport".<sup>1198</sup> In this case, the Court found responsibility by acquiescence or authorization of the Russian authorities, since he was not subject to detention and there was no basis on which to identify or presume the identity of any of the persons involved in the abduction.<sup>1199</sup>

### 6.5.3 Kazakhstan

In Kazakhstan, while the ICJ is not aware of any reports of abductions occurring after 2011, there have been some accounts before that date.

In November 2005, in the Southern Kazakh city of Shymkent, nine Uzbeks, some of whom were asylum seekers formally registered with UNHCR, "disappeared" and were reportedly forcibly returned to Uzbekistan. According to available information, they were detained by Kazakh police or more likely national security service officials and transferred the same night across the Kazakh–Uzbek border at checkpoint Chernyaevka to Uzbekistan, where they were subsequently detained, tried and sentenced to imprisonment.<sup>1200</sup> It appears that the Kazakh authorities did not follow any official extradition procedure and did not permit any judicial review of the cases before the handover.<sup>1201</sup> Most of the "disappeared" persons were allegedly involved with groups considered as radical Islamists groups that are banned in both Uzbekistan and Kazakhstan. However, at least one of them was reportedly charged with illegal exit from the Uzbek territory and "infringement on the constitutional regime".<sup>1202</sup>

Reports of the circumstances of their "disappearance" from Kazakhstan raise suspicions of involvement of Kazakh national security personnel in both their detention and transfer at the border.<sup>1203</sup> The Kazakh security forces have always denied involvement. But in August 2007, in an interview posted on the website of the Kazakh security services, Major Absametov, head of the Committee for National Security of South-Western Kazakhstan, stated that more than 50 members of Islamic parties or banned groups had been arrested and sent back to Uzbekistan.<sup>1204</sup>

Further unconfirmed reports from 2007 allege the abduction and transfer from Kazakhstan of Uzbek and Uighur asylum seekers to Uzbekistan<sup>1205</sup> and China<sup>1206</sup> respectively.

### 6.5.4 Protection measures

In the context of repetitive patterns of enforced disappearances, States have an obligation of prevention. The European Court of Human Rights has ruled that such a pattern must "trigger the authorities' special vigilance and require

<sup>1198</sup> *Ibid.*, para. 110.

<sup>1199</sup> *Ibid.*, para. 139.

<sup>1200</sup> See e.g.: Human Rights Watch, 'Kazakhstan: Uzbeks Sent Back At Risk of Torture', 2 December 2005; FIDH, "Kazakhstan/Kyrgyzstan: Exploitation of migrant workers, protection denied to asylum seekers and refugees", p. 70.

<sup>1201</sup> See: HRW, "Kazakhstan: Uzbeks Sent Back At Risk of Torture", *op. cit.*

<sup>1202</sup> A list of names and charges pressed is available at Memorial's website at <http://www.memo.ru/hr/politpr/asia/2005/pres-uz/uz20051205.htm>.

<sup>1203</sup> See: NGO Memorial, "Special services of Kazakhstan are trying to hide their relation to abduction of Uzbek Muslims".

<sup>1204</sup> FIDH, "Kazakhstan/Kyrgyzstan: Exploitation of migrant workers, protection denied to asylum seekers and refugees", *op. cit.*, p. 70.

<sup>1205</sup> Based on Institute for War and Peace Reporting information, available at <https://iwpr.net/ru/global-voices/kazakhstan-neopredelennost-v-otnoshenii>.

<sup>1206</sup> See news in Russian at [http://rus.azattyq.org/a/Uigurskie\\_bezhentsy\\_v\\_Kazakhstane/1329413.html](http://rus.azattyq.org/a/Uigurskie_bezhentsy_v_Kazakhstane/1329413.html).

appropriate measures of protection in response to this special situation”.<sup>1207</sup> In *Savridin Dzhurayev v. Russia*, the Court held that the establishment of “an appropriate mechanism, tasked with both preventative and protective functions should be put in place to ensure that ... applicants benefit from immediate and effective protection against unlawful kidnapping and irregular removal from the national territory”.<sup>1208</sup> Among CIS and European countries, it appears that only the Russian Federation has attempted to put in place a mechanism of this kind, and that this was done in direct response to decisions of the European Court.

In its action plans presented to the Committee of Ministers of the Council of Europe for the execution of the European Court’s judgments in abduction cases, the Russian Federation has explained that its authorities have arranged a series of meetings with persons subject to interim measures of the European Court, during which the situation of the applicant is clarified,<sup>1209</sup> and further have aimed to protect the physical safety of these persons and to prevent the risk of forced removal. Russian authorities reportedly explain to such individuals that, in case of any real threat of a criminal offence against them, they should apply to the nearest competent body, and request special State protective measures within the framework of criminal proceedings.<sup>1210</sup> The Russian authorities, when asked about the legal basis of this protection mechanism, have referred to Federal Law No. 119-FZ “On the State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings” and the Resolution of the Russian Government of 27 October 2006 No. 630 “On the Approval of the Rules of Application of Certain Security Measures for Victims, Witnesses and Other Participants in Criminal Proceedings”.<sup>1211</sup>

Under the Law on State Protection, the authorities responsible for deciding on protection requests are those in charge of the stage of criminal procedure in which the person is involved.<sup>1212</sup> They decide on such requests within three days or immediately in cases of emergency.<sup>1213</sup> Protection measures may be issued before the institution of criminal proceedings<sup>1214</sup> and must respect the rule of law, uphold individual rights and freedoms and ensure the mutual responsibility of authorities and individuals in the protection provided.<sup>1215</sup> Protection measures are supervised and monitored by prosecutors.<sup>1216</sup> According to the action plan of 2013, prosecutors take prompt responsive measures to all detected violations<sup>1217</sup> and must inform the concerned persons of the possibility of requesting protection upon their release.<sup>1218</sup> Protection is ensured by police

<sup>1207</sup> *Kasymakhunov v. Russia*, ECtHR, *op. cit.*, para. 136.

<sup>1208</sup> *Savridin Dzhurayev v. Russia*, ECtHR, *op. cit.*, para. 262 (emphasis added).

<sup>1209</sup> Committee of Ministers of the Council of Europe, Action plan of 13 April 2015 (DH-DD (2015) 424) — but a regular control was already mentioned in the 2 July 2013 (DH-DD (2013) 763) Action plan; DH-DD (2017) 177, 20 February 2017, para. 7.

<sup>1210</sup> Committee of Ministers of the Council of Europe, Action plan of 11 November 2014 (DH-DD (2014) 1357); Action plan of 13 April 2015 (DH-DD (2015) 424).

<sup>1211</sup> See: Committee of Ministers of the Council of Europe, Action plans DH-DD (2013) 763, DH-DD (2014) 887.

<sup>1212</sup> See: Federal Law No. 119-FZ of the Russian Federation, article 3.2.

<sup>1213</sup> See: *Ibid.*, article 18.21. The decision can be appealed to a higher authority, prosecutor or court and a decision is taken within 24 hours, see: article 18.3.

<sup>1214</sup> See: *Ibid.*, article 2.2.

<sup>1215</sup> See: *Ibid.*, article 4.1.

<sup>1216</sup> See: *Ibid.*, article 4.2.

<sup>1217</sup> Committee of Ministers of the Council of Europe, Action plan of 2 July 2013 (DH-DD (2013) 763).

<sup>1218</sup> Committee of Ministers of the Council of Europe, Action plan of 20 November 2014 (DH-DD (2014) 1431).

authorities, the Federal Security Service (FSB) or other assigned authorities.<sup>1219</sup> They select the protection measures, at their own discretion, and, once decided upon, they must reach agreement with the person under protection on the terms and conditions of their implementation and the rights and responsibilities of the executing body and the protected individuals.<sup>1220</sup>

However, the Law "On State Protection" expressly applies only to "actors in criminal proceedings", including victims of violations linked to the criminal proceedings.<sup>1221</sup> It is not tailored to all victims of human rights violations or persons covered by interim measures of the European Court of Human Rights. There is no reference whatsoever in the law to the European Court of Human Rights, its interim measures or the situation of vulnerable persons at risk of abduction. It is therefore not clear whether these measures in fact apply to persons subject to interim measures. Contradictory statements have appeared in the Russian Federation's action plans of 2013<sup>1222</sup> and of 2014.<sup>1223</sup> What is coherent throughout the action plans is that such a protection system is applicable only "after assessment of each particular situation in case of a real risk of a criminal offence in respect of a person".<sup>1224</sup> However, currently, no internal investigation has concluded that a provision of Russian criminal law has been violated in any of the cases of abductions presented before the European Court of Human Rights. These cases include all extraditions, expulsions and abductions of suspects of security-related offences from the Russian Federation to Central Asian States. Furthermore, the Russian authorities have not yet clearly explained which criminal law provisions would be applicable to these cases.

The latest statistics provided by the Russian Federation on the functioning of this protection mechanism are from 2013, when it was applied to 3,300 persons. However, no person subject to interim measures of the Court applied for this protection scheme.<sup>1225</sup> The situation appears to have remained the same as of 20 February 2017.<sup>1226</sup> In 2015, after the communications from the Russian Federation regarding the Law on State Protection, the European Court found that no effective protection mechanism had been put in place.<sup>1227</sup>

Finally, the Russian authorities have stated that a practice is now in place, which ensures at least temporary protection to persons who are at risk of persecution if sent to their country of origin and are subject to the European

<sup>1219</sup> See: Federal Law No. 119-FZ of the Russian Federation, article 3.3.

<sup>1220</sup> See: *Ibid.*, article 18.5–6, and Resolution of the Russian Government of 27 October 2006 No. 630 "On the Approval of the Rules of Application of Certain Security Measures for Victims, Witnesses and Other Participants in Criminal Proceedings", articles 2–3. The implementing secondary law, however, mentions this agreement only in relation to the measure of replacing identity documents or changes in physical appearance. See: Resolution of the Russian Government of 27 October 2006 No. 630, article 11.

<sup>1221</sup> Federal Law No. 119-FZ "On the State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings", article 2.1 (unofficial translation). Among these are the victim, witness, private prosecutor, suspect, accused, defendant, defence counsel and any other accessory actors in a criminal trial or investigation.

<sup>1222</sup> Committee of Ministers of the Council of Europe, Action Plan, DH-DD (2013) 763, para. 6.1.

<sup>1223</sup> Committee of Ministers of the Council of Europe, Action Plan, DH-DD (2014) 58E, para. 4.

<sup>1224</sup> Committee of Ministers of the Council of Europe, Action Plans, DH-DD (2013) 763, para. 6.1; DH-DD (2014) 58E, para. 4.

<sup>1225</sup> Committee of Ministers of the Council of Europe, Action plan, DH-DD (2014) 887.

<sup>1226</sup> Committee of Ministers of the Council of Europe, Action plan, DH-DD (2017) 177, 20 February 2017, para. 7.2.

<sup>1227</sup> *Mukhitdinov v. Russia*, ECtHR, *op. cit.*, para. 94; *Mamazhonov v. Russia*, ECtHR, *op. cit.*, para. 216–217.

Court's interim measures.<sup>1228</sup> This temporary protection under Russian law is a form of international protection issued to those who do not qualify for refugee status and lasts for renewable terms of one year.<sup>1229</sup> While some of the victims of the "Garabayev" group of cases have been granted this status, the Russian Government reported that "a number of applicants . . . preferred not to apply . . . for the extension of temporary asylum previously granted to them".<sup>1230</sup>

### 6.5.5 Accountability and remedy

In response to the abduction cases from the Russian Federation of the kind described above, investigations have been carried out by the Russian authorities but have generally failed to produce any meaningful results.<sup>1231</sup> The investigations reveal a series of shortcomings. For example, in the case of Mukhitdinov, the victim was interrogated about the abduction while in the custody of the Uzbek authorities, serving a criminal sentence. It was in this context that he affirmed that he arrived 'voluntarily' in Uzbekistan.<sup>1232</sup> Russian authorities have closed the case, a decision that they stress was not appealed.<sup>1233</sup> Investigations into the Kasymakhunov case were conducted in a similar manner.<sup>1234</sup> The Russian action plans reveal that no effective investigation was carried out in the case of Abdulkhakov, who allegedly remains at liberty in Tajikistan.<sup>1235</sup> Savriddin Dzhurayev is in detention in Tajikistan, but the Russian investigations found no information regarding his 'disappearance' and the investigation has been closed.<sup>1236</sup> The same is true for Iskandarov.<sup>1237</sup>

The investigations into the alleged abduction of Savriddin Dzhurayev ended with investigative authorities closing them for 'lack of evidence' and Dzhurayev 'having staged his abduction'. The decision to close investigations was subsequently quashed by senior investigators. The European Court of Human Rights considered these hypotheses as "devoid of any sense".<sup>1238</sup> On 25 February 2013, with investigations still pending in Russia, the Russian authorities told the European Court of Human Rights that "the inquiry found that the applicant had illegally crossed the Russian State border, surrendered to the Tajik authorities".<sup>1239</sup> This version is based on accounts by the Prosecutor General of Tajikistan that Savriddin Dzhurayev had "'voluntarily surrendered' on 3 November 2011 to the Sogdiyskiy Regional Department for the Fight against Organized Crime

<sup>1228</sup> Committee of Ministers of the Council of Europe, Action plan, DH-DD (2017) 177, 20 February 2017, para. 4.

<sup>1229</sup> Refugees Act of the Russian Federation, article 12.2.

<sup>1230</sup> Committee of Ministers of the Council of Europe, Action plan, DH-DD (2017) 177, 20 February 2017, para. 4.1.

<sup>1231</sup> Committee of Ministers of the Council of Europe, Action plan of 15 July 2014 (DH-DD (2014) 887).

<sup>1232</sup> Committee of Ministers of the Council of Europe, Action plan, DH-DD (2017) 177, 20 February 2017, para. 12.2. See, for the latest assessment of the investigations at, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016806e43fb](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb).

<sup>1233</sup> *Ibid.*, para. 12.2.

<sup>1234</sup> *Ibid.*, para. 12.7.

<sup>1235</sup> *Ibid.*, para. 12.3. Nizomhon Dzhurayev's well-being is supported by a video in which Russian authorities say he declared that he arrived 'voluntarily'. He is reported to have been arrested once in Tajikistan. However, he has since reportedly absconded; behaviour that contradicts his alleged willingness to return to the country and hand himself in to the authorities. Action plan, DH-DD (2017) 177, 20 February 2017, para. 12.4.

<sup>1236</sup> *Ibid.*, para. 12.5.

<sup>1237</sup> *Ibid.*, para. 12.6.

<sup>1238</sup> *Savriddin Dzhurayev v. Russia*, ECtHR, *op. cit.*, para. 195.

<sup>1239</sup> *Ibid.*, para. 64.

(РОБОП) and had been detained in temporary detention facility No. 2 (СИЗО № 2) of Khujand".<sup>1240</sup>

The Secretariat of the Committee of Ministers has stressed that "any discrepancies between the domestic investigations' results and the findings of the Court must be convincingly explained".<sup>1241</sup> It has pointed out that, "due to the applicants' vulnerable situation, statements made by them through the authorities of the requesting States do not obviate the need for effective investigations capable of establishing a convincing account of the events, with due regard for the Court's findings".<sup>1242</sup>

The European Court of Human Rights did not accept the explanations of the Russian authorities and found that the complaint of abduction should have "triggered the authorities' utmost attention, inasmuch as [his] representatives claimed that State agents had been actively or passively involved in that operation".<sup>1243</sup> Instead, the results of the investigation were "incomprehensible".<sup>1244</sup> There was no effective participation of the victim or his representatives and the pre-investigative inquiry — the only investigations carried out — was ineffective.<sup>1245</sup> The Court found that "the process of repeated quashing and renewal of identical decisions by the investigation division resulted in the proceedings being stalled . . . Not only was valuable time lost, but also the vicious circle within the investigation division deprived the applicant of any reasonable opportunity to challenge the investigators' decisions in court. . . ." <sup>1246</sup> The investigations were therefore found in breach of article 3 of the ECHR.

With regard to Lutpiddin Bakhritdinovich Mukhitdinov, the Tyumen Regional Investigations Committee began an investigation into his disappearance promptly.<sup>1247</sup> This was welcomed by the European Court, which stated that the "institution of criminal proceedings is the best, if not the only, procedure in the Russian criminal-law system that is capable of meeting the Convention requirements of an effective investigation".<sup>1248</sup> However, despite its promptness, the Court found that "since the beginning of the investigation, little has been done to establish the applicant's whereabouts and to identify those responsible for his disappearance".<sup>1249</sup> Indeed, "the investigation adopted as the only working hypothesis that of the applicant's death or abduction by private parties. There is no information that any consideration has been given to the plausible version of his forced transfer to Uzbekistan by State agents".<sup>1250</sup> These restrictive investigations were held to breach article 3 of the ECHR.<sup>1251</sup>

The investigation into the abduction of Mirsobir Mirsobitovich Khamidkariyev began on 9 July 2014, one month after his alleged enforced disappearance.<sup>1252</sup> It "concluded that there was no evidence to prove any direct or indirect

<sup>1240</sup> *Ibid.*, para. 44.

<sup>1241</sup> See at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016806e43fb](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb).

<sup>1242</sup> See at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016806e43fb](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb).

<sup>1243</sup> *Savridin Dzhurayev v. Russia*, ECtHR, *op. cit.*, para. 191.

<sup>1244</sup> *Ibid.*, para. 193.

<sup>1245</sup> *Ibid.*

<sup>1246</sup> *Ibid.*, para. 194.

<sup>1247</sup> *Mukhitdinov v. Russia*, ECtHR, *op. cit.*, para. 28.

<sup>1248</sup> *Ibid.*, para. 66. See: *Savridin Dzhurayev v. Russia*, ECtHR, *op. cit.*, para. 193, and *Lyapin v. Russia*, ECtHR, Application No. 46956/09, 24 July 2014, paras. 135–137.

<sup>1249</sup> *Ibid.*, para. 67.

<sup>1250</sup> *Ibid.*, para. 67.

<sup>1251</sup> *Ibid.*, para. 68.

<sup>1252</sup> *Khamidkariyev v. Russia*, ECtHR, *op. cit.*, para. 156.

involvement of the Russian authorities in the applicant's alleged kidnapping and transfer to Uzbekistan".<sup>1253</sup> On 15 January 2015, the investigations were suspended and were subsequently reinstated before being suspended again on four separate occasions.<sup>1254</sup>

The European Court of Human Rights concluded that the investigation began with excessive delay "resulting in a loss of precious time, [that] in itself had a serious,<sup>1255</sup> adverse impact on the investigation's prospects of success".<sup>1256</sup> Furthermore, the repeated suspensions of the investigation and the "lack of cooperation between various State agencies in a potentially life threatening situation, where it could be expected that every means available to the State ought to be employed to elucidate the circumstances of a disappearance, [were] indicative of the lack of genuine intent on the part of the respondent State to investigate the incident thoroughly".

For the purpose of protection (see above), the European Court has stressed that the Russian authorities should put in place "appropriate procedures and institutional arrangements to ensure effective investigation into every case of breach of such measures [and c]lose scrutiny of such investigations at an appropriate official level ... in order to ensure that they are conducted with the necessary diligence and to the required standard of quality".<sup>1257</sup>

### **Box 19: The Central Asia Political Exiles Database**

In 2016, the University of Exeter launched its Central Asia Political Exiles Database gathering news and information on 125 individuals, nationals of Central Asian countries, that have been subject to transfers, whether by abduction, extradition or expulsion, for alleged political reasons.

The research of the University of Exeter found "the widespread and increasing use of extra-territorial security measures by all Central Asian states but with more cases from Uzbekistan and Tajikistan".<sup>1258</sup>

In the absence of recent evidence on the abduction of suspects in Central Asian States, these States have not created a protection mechanism similar to that found in Russia and they cannot be analysed in this Chapter focusing on renditions. The role of these states in transfers, as noted by UN treaty bodies, has been to receive their nationals sent by the Russian Federation through abductions and/or extraditions or expulsions in breach of international human rights law.<sup>1259</sup> Nonetheless, this fact does not relieve them from the obligation to respect and protect the rights of the persons transferred, including to investigate violations of their rights that occurred in other States, for example the Russian Federation or Kazakhstan, at the alleged instigation or complicity of their authorities. To the ICJ's knowledge, no such investigations have ever been established.

<sup>1253</sup> *Ibid.*, para. 63.

<sup>1254</sup> *Ibid.*, paras. 80–82.

<sup>1255</sup> *Ibid.*, para. 158.

<sup>1256</sup> *Ibid.*, para. 156.

<sup>1257</sup> *Ibid.*, para. 263.

<sup>1258</sup> See: <http://www.centimedia.org/excas/exiles-project/about-cape/>.

<sup>1259</sup> CAT, *Concluding Observations on Uzbekistan*, UN Doc. CAT/C/UZB/CO/4, 10 December 2013; CCPR, *Concluding Observations on Tajikistan*, UN Doc. CCPR/C/TJK/CO/2, 22 August 2013, para. 13; CAT, *Concluding Observations on Kyrgyzstan*, UN Doc. CAT/C/KGZ/CO/2, 20 December 2013, para. 23.



## 6.6 Conclusions

The practice of renditions worldwide is a documented phenomenon. It appears to be a long-standing practice that States have resorted to from time to time in order to bypass extradition procedures in pursuit of criminal prosecutions. This form of transfer has been increasingly made use of both in States Parties to the Commonwealth of Independent States and by the United States of America with the collaboration of other States, notably in Europe.

Renditions, to the extent that they bypass ordinary procedures for transfers, are extremely troubling from a rule of law perspective, although not all are per se contrary to international law. In practice, most renditions have led to unlawful practices, including breaches of the *non-refoulement* principle and serious human rights violations, such as: torture or other cruel, inhuman or degrading treatment or punishment; arbitrary detention; the right to recognition as a person before the law; the right to a fair trial, including the presumption of innocence; and even the right to life. Experience demonstrates that resorting to informal transfers, i.e. renditions, almost inevitably leads to human rights violations as it lowers or even bypasses guarantees, including judicial guarantees, designed to ensure respect for and protection of these rights.

The rendition system operating between CIS countries and that of the United States after 9/11 differ considerably in many respects. While CIA renditions were aimed at intelligence gathering, the CIS system of rendition, as demonstrated above, is principally aimed at ensuring the criminal prosecution of suspects. The problem in the CIS system is the fact that the offences for which these persons are sought, as developed under the Shanghai Cooperation framework (i.e. terrorism, extremism, separatism), are extremely vague and are prone to abuse.

The CIS system appears to be an informal remnant of the practices of the security and secret services that used to be part of a single entity, the former Soviet Union. The post 9/11 US rendition system grew out of the US adoption of the war paradigm in countering terrorism. Finally, the international scale and level of complicity is different: the US rendition system was facilitated by the complicity of States at the global level, while the CIS system is centred mostly on former Soviet countries.

Nonetheless, there are also clear similarities. Both systems, whether created ad hoc (the US system) or out of existing practices (the CIS system), are centred on the removal of a person from the protection of the law and, hence, they are the source of multiple gross violations of human rights, including torture and inhuman or degrading treatment; incommunicado, arbitrary and prolonged detention; and breaches of the principle of *non-refoulement*. In both systems, victims have not been able to exercise their right to an effective remedy and reparation.

Finally, and importantly, both rendition systems are based on a total lack of accountability for the human rights violations they involve. It has been demonstrated that in the Russian Federation not a single case of abduction has been effectively investigated or criminally prosecuted. On the contrary, inquiries conducted after the European Court of Human Rights has ruled on the existence of the abduction have been directed at discrediting these findings. Other forms of reparation, not least guarantees of non-repetition are, at present, out of the question.

With regard to the US rendition system, the wall of legal doctrine enhancing impunity in the US is still standing. Some of the facts regarding the system have been established by the report of the US Senate's Intelligence Committee but the failure to publish the report in full has undermined its impact. Very few of the complicit States in Europe have pursued accountability and justice for the victims of these serious violations, and those that have pursued such ends have done so only partially. Only the action of international courts and institutions (the European Court of Human Rights, the Parliamentary Assembly of the Council of Europe, the inquiry of the Secretary General and the European Parliament of the EU), of some lawyers, judges and prosecutors, as well as of civil society and the media have ensured that these practices and violations are not officially confined to oblivion.

It is not easy to ensure accountability but it is necessary. First and foremost, being able to access effective remedies and obtain reparation, including in cases of gross violations of human rights via effective investigations and prosecution, is essential to ensuring that human rights are made a reality. The US approach of only "looking ahead" while failing to resolve past wrongs has left as its heritage the risk of repetition of past heinous practices.

The clearest testimony of the need for accountability and learning from the past comes from Senator Diane Feinstein, chairperson of the Senate's Intelligence Committee, who, in her introduction to the Report, stressed that, "prior to the attacks of September 2001, the CIA itself determined from its own experience with coercive interrogations, that such techniques "do not produce intelligence," "will probably result in false answers," and had historically proven to be ineffective. Yet these conclusions were ignored. We cannot again allow history to be forgotten and grievous past mistakes to be repeated."<sup>1260</sup> The US Senate report has clearly demonstrated that the lack of accountability not only led to impunity but also to the repetition—and aggravation—of the human rights violations committed through the rendition programme.

The European Court of Human Rights, while it reiterated the right of everyone and of the general public to the truth concerning gross violations of human rights, stressed that "[s]ecuring proper accountability of those responsible for the alleged, unlawful action is instrumental in maintaining confidence in the ... State institutions' adherence to the rule of law and the ... public has a legitimate interest in being informed of the investigation and its results. It therefore falls to the national authorities to ensure that, without unacceptably compromising national security, a sufficient degree of public scrutiny is maintained in the present case."<sup>1261</sup>

This report's comparative research on the practices of rendition has identified a common and fundamental lesson: the need for full accountability for human rights violations and the essential role of the rule of law and of an independent judiciary in ensuring that human rights are respected. The ICJ Eminent Jurists Panel, after sixteen regional hearing across the world as part of a five year research programme, had already concluded in 2009 that "[a]ccountability is not an obstacle to countering terrorism: it provides the crucial under-pinning of counter-terrorist measures if the latter are to secure the necessary public support and legitimacy to be truly effective."<sup>1262</sup> This lesson is as valid today as it ever was.

<sup>1260</sup> *US Senate's Executive Summary*, *op. cit.*, Introductory letter, p. 3.

<sup>1261</sup> *Abu Zubaydah v. Poland*, ECtHR, *op. cit.*, para. 491. Same para. in *Al Nashiri v. Poland*, ECtHR, *op. cit.*

<sup>1262</sup> ICJ, *Assessing Damage, Urging Action*, *op. cit.*, p. 162.

## VII. Conclusions

This report has surveyed and assessed some of the complex and increasingly sophisticated legal frameworks — national, regional and international — that have been established by States to govern the involuntary transfer of persons across borders, focussing in particular on the Commonwealth of Independent States (CIS) and parts of Europe.

While the frameworks governing extradition, expulsion and rendition, and their application in practice 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.

The report has shown the importance of international laws regulating the deportation of non-nationals, asylum and other forms of international protection in relation to such transfers. 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.

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. However, these efforts are self-defeating if they become the pretext for States, in their turn, to breach obligations under international human rights law or to disregard the laws and legal processes which they themselves have established.

Considerations of national security and of countering terrorism have understandably leant urgency to the development of criminal justice co-operation systems. Sometimes such measures of co-operation operate as they should to advance justice; at other times they are employed to cynically bypass the ends of justice. It is a matter of profound concern, for example, that such considerations 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."<sup>1263</sup> 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".<sup>1264</sup> 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, extra-judicial 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.

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.

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.

<sup>1263</sup> *Ibid.*, p. 16.

<sup>1264</sup> *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted on 28 August 2004, Preamble.

Finally, 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 Organization* 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.

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.

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.

To realize these goals, 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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