

To the members of
the Committee of Ministers
of the Council of Europe

31 October 2017

**Re : Execution of *Garabayev v. Russia* (Application no. 38411/02) and other
77 repetitive cases in the "Garabayev group"**

Dear members of the Committee of Ministers,

The International Commission of Jurists (ICJ) would like to address your Committee in relation to the execution of the judgement of the European Court of Human Rights in the abovementioned cases under Rule 9.2 of the Rules of Procedure of the Committee of Ministers, in accordance with its supervisory role on execution of judgments of the European Court of Human Rights.

The ICJ would like to present recent findings in its report *Transnational Injustices - National Security Transfers and International Law* (hereinafter the "ICJ report") that provides the most recent assessment of the systems of extradition, expulsion and abduction/rendition of the Russian Federation and States in Central Asia compared with the laws and practices in this field of EU Member States and the US rendition system.

The ICJ hopes that its findings in this report may assist the Committee of Ministers in the assessment of compliance with the judgments of the European Court of Human Rights with regard to the respect of the principle of *non-refoulement* (articles 3 ECHR) the lack of effective remedy against violations of this principle (article 3 and 13 ECHR) as well as the lack of compliance with the Court's interim measures (article 34 ECHR).

Summary of the ICJ report's conclusions

In general, the ICJ report has found that, as in other States it examined, Russian authorities appear to misuse 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.

With regard to extraditions

With regard to the extradition system, the ICJ report has found that 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.

According to the report's findings, all of the examined countries in the CIS region, including the Russian Federation, 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.

In CIS countries, and particularly in the Russian Federation and Central Asian States, the Shanghai Cooperation Organisation and the Minsk and Chisinau Conventions are part of a general plan to standardize laws and practices so as to speed up extradition procedures. 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.

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. States parties to the SCO, and the Minsk and Chisinau Conventions should put these criminal co-operation systems in line with human rights law.

Extradition procedures in the Russian Federation and Central Asian States include a limited role for courts and judges. 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.

With regard to expulsions

As for the system of administrative expulsions, the report has noted that persons resident in the Russian Federation in an irregular fashion, because of the wide variety

of administrative offences they are likely to commit as a result of their status, are 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. This appears to occur when criminal courts implement, though by no means uniformly across the country and in all cases, the rulings of the European Court of Human Rights. Examination of the practices surrounding such expulsions have further demonstrated that courts use accelerated procedures without assessing the human rights risks of expellees.

The reason for resorting to expulsion procedures appears to be the perception that administrative courts are slower to assess the human rights risks inherent in the transfer in such proceedings, compared to criminal courts in extradition proceedings. 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.

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.

Abductions

Finally, and importantly, the ICJ is concerned at the total lack of accountability for the human rights violations that the system of abduction from the Russian Federation to Central Asia States involves. 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.

The right 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 ICJ recalls that 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."¹

¹ *Abu Zubaydah v. Poland*, ECtHR, Application no. 7511/13, Judgment of 24 July 2014, para. 491.

Recommendations

To ensure that the overall system of transfer of national security suspects respects international human rights law, including the Convention rights, the ICJ has formulated a set of recommendations. Those applicable to the Russian Federation are:

1. 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. The Government, 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 Russian Federation's international human rights law obligations.
3. Courts must play a central role 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. The Government 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. The Russian Federation 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. The Government, 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.
11. State institutions 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. 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.
13. 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.

The ICJ hopes that these observations and the attached report will assist the Committee in its examination of the execution of these cases and related judgments. The ICJ remains at the Committee's disposal for any information needed.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Róisín Pillay'.

Róisín Pillay

Director, Europe Programme, ICJ

Annex: ICJ Report, *Transnational Injustices - National Security Transfers and International Law*, Geneva, 2017.