

# ICJ Guidance on Extraditions and Expulsions in Central Asia

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International Commission of Jurists  
P.O. Box 91  
Rue des Bains 33  
Geneva  
Switzerland

# **ICJ Guidance on Extraditions and Expulsions in Central Asia**

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## Introduction

*"as 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"*

(European Court of Human Rights, *Calovskis v. Latvia*, para. 129)

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, including in respect of cross border criminal prosecution through extradition, deportations and other forms of international transfer of persons.

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. 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 also been evident in the Commonwealth of Independent States (CIS),<sup>1</sup> 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. In a number of such cases, both in extradition and expulsion proceedings, international human rights bodies have found the transfers to have involved violations of human rights.

Whether embedded in law or in practice, mutual confidence in each other's legal systems is crucial to the effectiveness and lawfulness of a transfer, be that an extradition or an expulsion.

It is an obligation of international law to ensure that any transfer of a person outside of the State's jurisdiction does not expose them to serious violations of their human rights (see principle VI).

Based on this principle, it is usual practice that States and their institutions will allow transfers on the assumption that the receiving State's legal system will allow an equivalent standard of rights protection.

It is therefore essential for any requesting State to keep under consideration this factor when formulating an extradition request or prompting an expulsion as this may be thwarted by the low level of human rights protection in one of its institutions. Furthermore, it should be stressed that a presumption of equivalence does not exempt the State and its officers to take into consideration any risk of violation of the principle of non-refoulement in the individual case (see principle VI).

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<sup>1</sup> Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Uzbekistan, Ukraine.

### **Box 1. Comparative examples of mutual confidence and human rights compliance**

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” (2 BVR 2236/04, B, I, para. 80). 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 ... ” (2 BVR 2236/04, B, I, para. 120) 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” (Judgment no. 4614).

## **Methodology**

This Guidance continues the long-term work of the International Commission of Jurists (ICJ) to bring proceedings for the transfer of suspects, in particular extraditions and expulsions, in Central Asian countries in line with the States’ obligations under international law, including international human rights and refugee law.

This Guidance addresses the judicial application of international law and standards in extradition and expulsion proceedings. It will be of particular relevance to judges and prosecutors as well as to lawyers and scholars.

This Guidance has been informed by a thorough comparative legal study conducted by the ICJ on the practices of national security-based transfers in countries of the Commonwealth of Independent States, the European Union and the United States of America. In this study, the ICJ identified shortcomings and provided recommendations to all the countries examined.

Following this mapping, the ICJ, together with the UN Office on Drugs and Crimes (UNODC), the Regional Office for Central Asia of the Office of the UN High Commissioner for Human Rights (OHCHR), the General Prosecutor’s Office of the Republic of Uzbekistan and the Constitutional Chamber of the Supreme Court of Kyrgyzstan convened two Central Asia international expert workshops for judges and prosecutors from Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, with the participation of international experts from several European countries.

This Guidance is the fruit of this work and consultations to provide practical working solutions for judges and prosecutors in the region to uphold international law while securing the efficiency of their national security-based transfers of persons.

The purpose of this project is not only to promote the legal compliance of such measures and the rights of those subject to them, but also their effectiveness, in particular in the fight against impunity. As argued above and demonstrated by the experience of many countries, it is only through compliance with the international legal framework that States can have confidence in other State’s cooperation with their transfer measures, i.e. execution of an extradition request or acceptance of an expelled person.

## I. Pay attention to the role of international law

- a) *International law governs and places constraints on domestic law*
- b) *There should be an international law-oriented interpretation of domestic law*

### Explanation:

**It is a fundamental principle of law that a State cannot use its domestic law as an excuse for the failure to perform an international legal obligation. In other words, international law must be respected even where it may appear to conflict with the State's domestic law.**

Globally, there are different systems of incorporation of international law into national law. Broadly, these can be identified as monist and dualist. In monist systems, international law is directly applicable in national law, although this may vary depending on whether the law is formed by international treaty or custom. Dualist systems typically require an additional legislative act or acts of legal incorporation for international law obligations to have legal force within the national legal system. The main difference, therefore, is whether the ratification of an international treaty is sufficient for it to become part of the national legal system, or whether an additional legal act is required for this.

In both monist and dualist countries, it is important that not only the treaties but the decisions of international judicial and non-judicial authorities, like the International Court of Justice or UN treaty monitoring bodies, are implemented by national authorities, including courts and prosecutors' offices.

In countries that are dualist, where international law does not take direct effect, it is recommended that national courts and other authorities, including prosecutors, interpret and apply the national legal standards in light of the international law obligations of the State. All efforts must be undertaken to construe legal obligations in a way that implements and does not contradict international legal obligations undertaken by the country. Where an irreconcilable conflict is identified between a national legal obligation and an international one in terms of human rights protection, a mechanism must exist — whether by ruling of a Supreme or Constitutional Court or via the legislative process — to modify the national rule in line with international law obligations

For requesting States, it is important to assess the status of international law in the legal system of the sending country and the manner in which their courts ensure compliance with international law.

For more information see, [Oppenheim's International Law, 9<sup>th</sup> Edition](#).

*Human Rights Committee, Concluding Observations on Kyrgyzstan, 2014*

#### **Applicability of the Covenant in domestic courts**

The Committee notes that according to article 6 (3) of the Constitution of the Kyrgyz Republic, international human rights treaties are part of the domestic law. However, it regrets the lack of evidence that domestic courts apply the provisions of the Covenant (art. 2).

**The State party should take appropriate measures to raise awareness among judges, lawyers and prosecutors about the Covenant and the direct applicability of its provisions in domestic law, so as to ensure that they are taken into account before domestic courts. The State party should include detailed examples of the application of the Covenant by the domestic courts in its next periodic report.**

*Human Rights Committee, Concluding Observations on Tajikistan, 2019*

5. While taking note of the direct applicability of the Covenant to the domestic legal order and the guidelines set out by the Supreme Court on 18 November 2013 on the application by courts of ratified international legal instruments, the Committee regrets that the State party was not able to provide any specific examples of application of the Covenant in court judgments, as requested in its previous concluding observations (CCPR/C/TJK/CO/2, para. 4) (art. 2).

**6. The State party should take appropriate measures to raise awareness of the Covenant and its applicability in domestic law among judges, prosecutors and lawyers, including by providing specific and adequate training on the Covenant and by making the Covenant and the work of the Committee part of legal education.**

**Specific human rights guarantees during expulsion procedures**

**Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

## II. Transfers should be only requested for the most serious offences (principle of proportionality in extradition)

a) *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.*

### **Explanation:**

The principle of proportionality in the field of extradition dictates that transfers of suspects or convicted persons be undertaken only for the most serious of offences (see [UNODC Revised manual on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters](#)).

This principle has been often translated in multilateral treaties as a threshold of at least one or two years of imprisonment as a minimum penalty for the offence for which a suspect can be extradited; and a threshold of six months to one year for the transfer of a convicted person.

Regardless of the minimum threshold to request an extradition, it is extremely important that the authorities requesting it carefully weigh the seriousness of the offence with the heaviness of the procedure requested as excessive extradition requests for minor offences will discourage the authorities of sending countries to meet them.

### III. Respect the rule of specialty and do not waive it without the suspect's or accused person's consent

#### Explanation:

The rule of specialty ensures that the person extradited will answer only for the criminal offences for which she or he has been extradited and no more. It affirms that 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 (see [UNODC Revised manual on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters](#)).

It is a global trend in extradition treaties and national laws governing extradition to provide that sending States can renounce the application of this rule.

According to international human rights law and prevalent practice in extradition law, the suspect must consent to or have the possibility to oppose before a court of law the waiver of the rule of specialty.

#### **Box 2. Human Rights Committee, *Rakesh Saxena v. Canada*,**

The case of Rakesh Saxena, a national of India, concerns his extradition in 2009 from Canada to Thailand to face criminal charges for conspiracy to embezzle money. He alleges that after he was extradited to Thailand, Canada consented to his prosecution for two other offences against him, thereby allowing his prosecution for charges not listed in the original extradition request and surrender order, in breach of the specialty rule.

The Human Rights Committee found that *"by depriving the author of the possibility to comment on the request to waive the specialty rule and closing off the possibility for the author to seek a review of such a request by a court, the State party violated his rights under article 13 of the Covenant."* (para. 12)

## IV. Respect the principle of double criminality: extradite only for an offence that exists in both countries concerned

- a) *The principle requires an equivalence of the criminal offences in the criminal systems of the two countries (receiving and sending).*
- b) *The equivalence need not be in the precise name or definition of the offence, but must be in the actual conduct criminalised.*
- c) *There must be equivalence in terms of the elements of the crime, including, as applicable, to the mens rea element of the offence, (i.e. intention, recklessness or negligence)*
- d) *The equivalence must be assessed not only in relation to the terms of the text of the criminal offence, but also of the established jurisprudential interpretation*
- e) *The prohibition of non-retroactivity in criminal law must be assessed and applied also with regard to the law of the requested country*

### Explanation:

The principle of double criminality requires that the criminal offence for which the person's extradition is sought be a criminal offence in both countries' legal systems (see [UNODC Revised manual on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters](#)).

The assessment of the equivalence of the criminal offence must be carried out with regard to the actual conduct or omission that is criminalised and not merely the name of the criminal offence. It is important to consider not only the elements relating to conduct (actus reus), but also to the mental element (mens rea), such as intent, special intent or recklessness. If those differ, the dual criminality principle cannot be respected.

While the considerations may be relatively straightforward for traditional criminal offences, this may be less so for more recently established offences and, in particular, for ancillary criminal offences.

For example, terrorism-related offences are often difficult to reconcile with the principle of double criminality. Globally there is no single accepted definition of terrorism, apart from a certain set of terrorist acts specifically criminalised under international treaties adopted under the auspices of the United Nations (see list of treaties below in box ...).

Even more problems have been recorded with regard to ancillary or preparatory terrorism-related offences, such as glorification, incitement, membership of "terrorist" organization, association with terrorism, for which countries have different understandings of the elements of the crime, including the mental elements that constitute the offence.

Offences of separatism and extremism are not offences generally accepted globally, and where they exist, have varied and often unclear definitions. They will therefore often fail to meet the dual criminality principles.

Finally, and besides considerations with regard to the principle of double criminality, one should not fail to consider that in assessment of compliance with the principle of non-refoulement (see below), it is possible to consider implications for the principle of legality when the offences for which extradition is requested is excessively vague or broad. These considerations may trigger the breach of the principle for flagrant denial of a fair trial.

### **Box 3. Findings of UN treaty bodies on Central Asian countries' national security offences**

#### *Kazakhstan, Human Rights Committee, Concluding Observations, 2016*

13. The Committee is concerned about 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. It is also concerned about reports that counter-terrorism activities continue to target in particular members or presumed members of banned or unregistered Islamic groups, such as the Tabligh Jamaat (arts. 9, 14, 18, 19 and 21).

**14. The State party should bring its counter-terrorism and counter-extremism legislation and practices in to full compliance with its obligations under the Covenant, inter alia, by revising the relevant legislative provisions, with a view to clarifying and narrowing the broad concepts referred to above to ensure that they comply with the principles of legal certainty and predictability and that the application of such legislation does not suppress protected conduct and speech. It should also ensure that the rights to a fair trial and access to justice are respected in all prosecutions for "extremism" .**

#### *Tajikistan, Human Rights Committee, Concluding Observations, 2019*

23. The Committee is concerned about: (a) the broad and vague definitions of terrorism (Counter-Terrorism Act of 1999), extremism (Anti-Extremism Act of 2003) and public justification of terrorist and extremist activity (amendments to the Criminal Code adopted on 14 November 2016) that may lead in practice to arbitrariness and abuse; (b) the reported misuse of such legislation to limit and repress the freedom of expression of political dissidents and religious groups; and (c) the wide powers granted to the security services to block access to the Internet and mobile communications during a state of emergency, including in connection with counter-terrorism operations, without a court order (pursuant to the Counter-Terrorism Act as amended in 2015 and to article 33 of the Electronic Communications Act). The Committee notes that amendments to the Criminal Code and revised versions of the Counter-Terrorism Act and the Anti-Extremism Act have been prepared (arts. 2, 4, 14, 18 and 19).

**24. The State party should bring its current counter-terrorism and counter-extremism regulations and practices into full compliance with the Covenant, including with the requirements of article 4. Inter alia, it should clarify and narrow the broad definitions of terrorism, the public justification of terrorist and extremist activity, and extremism (including by adding a requirement of violence or advocacy of hatred), and ensure that they comply with the principles of legal certainty and predictability and with relevant international standards, and that any limitations of human rights for national security purposes ensuing from the application of such regulations serve legitimate aims, are necessary and proportionate and are subject to appropriate safeguards. The State party should also ensure that any newly adopted counter-terrorism and counter-extremism regulations fully comply with the above principles.**

#### *Turkmenistan, Human Rights Committee, Concluding Observations, 2017*

14. The Committee is concerned about 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 (arts. 2, 9, 18, 19, 21 and 25).

**15. The State party should bring its counter-extremism legislation and practices into full compliance with its obligations under the Covenant by, inter alia, narrowing the broad range of activities considered extremist and ensuring their conformity with the principles of legal certainty, predictability and proportionality, and by ensuring that the definition of extremism contains an element of violence or advocacy of hatred.**

## V. Procedural rights of suspects must be respected throughout the process and subject to judicial review

- a) *When they request an extradition or execute one, law enforcement officers and prosecutors — depending on their respective competence — must inform promptly anyone arrested or detained on or anyway subject to a criminal charge, in detail, and in a language that they understand, of the nature and grounds of the charge against them. In extradition requests this information must be provided by the requesting state via the drafting of the extradition request to allow the executing state's officials to secure the suspect's right to information.*
- b) *Law enforcement officers and prosecutors — depending on their respective competence — must inform anyone arrested or detained pending extradition or on arrival after an extradition request is executed, in a language they understand, of their right to (a) legal representation; (b) examination and treatment by a doctor; (c) have a relative or friend notified of their arrest or detention; (d) communicate with or notify their consulate (in the case of foreign nationals) or a competent international organisation (in the case of refugees or persons who are stateless or under the protection of an intergovernmental organisation), and (e) be provided with information on how to avail themselves of such rights.*
- c) *Law enforcement officers and prosecutors — depending on the respective competence — must ensure that anyone arrested or detained pending extradition or on arrival after an extradition request is executed has access to the immediate assistance of a lawyer during any pre-trial detention, interrogation and/or preliminary investigation*
- d) *Law enforcement officers and prosecutors — depending on the respective competence — must ensure that anyone arrested or detained pending extradition or on arrival after an extradition request is executed can appoint a lawyer of their choice.*
- e) *Prosecutors and judges — depending on their respective competences — must verify that the rights and guarantees enlisted above are provided within the time limits and the manner required by law, including, where applicable, the States' international legal obligations. With regard to the right to a lawyer of one's choice, in principle, a court may not assign a lawyer to the accused if he or she already has a lawyer of their choosing.*
- f) *Judges must ensure that, in extradition proceedings as well as in the subsequent trial, each party is treated in a manner that ensures the principle of equality of arms. This entails that the same procedural rights be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.*
- g) *Law enforcement officers, judges and prosecutors — depending on their respective competence — must ensure that anyone subject to the execution of an extradition or on arrival after an extradition request is executed is able effectively to enjoy the right to the assistance of a competent interpreter, free of charge, if they do not understand or speak the language used in court. They must also ensure the effective enjoyment of the right to have any documents used during the proceedings translated.*
- h) *Law enforcement officers and prosecutors, including during the extradition process, must remind the individual concerned that he or she has the right to be presumed innocent until found guilty by a court of law*
- i) *Judges must conduct the proceedings and, where necessary, remind parties to the proceedings that, including during extradition proceedings, everyone has the right to be presumed innocent until found guilty by a court of law.*

- j) *Law enforcement and prosecutors must respect the principle of criminal law and criminal procedure and of human rights, that everyone has the right not to be compelled to incriminate him- or herself, and judges must ensure that this principle is respected.*

## **Explanation**

Extradition procedures may involve two different sets of rights and procedural guarantees depending on whether detention or other forms of deprivation of liberty are involved (article 9 ICCPR) or not, in which case the reference will be sought in the right to a fair trial and article 14 ICCPR.

Procedural guarantees of the right to a fair trial or 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. This right entails the right to equal access to courts and equality of arms and ensures that the parties to the proceedings in question are treated without any discrimination. Consequently, parties must enjoy the right to legal assistance, including, when needed, free legal aid (see, [Human Rights Committee, General Comment no. 32](#)).

The extradition request must not be formulated in such a way as to presume the guilt of the person, as 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. If the execution of the extradition requests entails the arrest and detention of the person, the guarantees provided by the right to liberty in articles 9.2, 9.3 and 9.4 ICCPR must be respect. Details are provided here below.

### Right to information on the charges

Both when requesting an extradition and when executing one, the reason(s) for the arrest must be provided at the time of arrest or detention or of notification of the extradition request, and must have therefore have been previously asserted in a clear and accessible way in the extradition request. The reasons:

- i. should include a clear explanation of both the legal and factual basis for depriving the person of their liberty;
- ii. should be sufficiently detailed to allow the person deprived of liberty to challenge their arrest or detention before a court in order for it to decide promptly whether it is lawful and, if not, to order the person's release; and iii. if the person does not understand or adequately speak the language used by the authorities responsible for the arrest or detention, they must without delay, be provided the above-mentioned information in a language that he or she understands.

The accused must be informed of any charges against them in simple non-technical language that they can understand.

The information provided should include details of the offences or acts imputed to the person in question and their possible criminal liability, the charges or criminal complaints that have been brought, as well as all applicable legislation. The accused must be informed in a manner that allows them to prepare a defence and to take immediate steps to secure his or her release. The accused has the right to state whether they admit or deny the alleged offence as well as to remain silent.

### Right to a lawyer

All persons who are arrested or detained, whether at the time of the execution of the extradition request or when apprehended upon arrival in the requesting country, have the right to the immediate assistance of a lawyer during any pre-trial detention, interrogation and/or preliminary investigation.

They have the right to a lawyer of their choice. If they are unable to afford a lawyer, then a defence counsel must be assigned to them free of charge.

The right to be assisted by a lawyer includes the right to communicate and consult with the lawyer without interception or censorship and in full confidentiality:

- i. access to a lawyer may be delayed only in exceptional circumstances and must comply with strict criteria determined by law or legally-established regulations, if a judge or other authority deems it essential to maintain security and order. In any event, the person deprived of liberty should have access to a lawyer within 48 hours of their arrest or detention even in a procedure of execution of an extradition request;
- ii. any such restrictions should not amount to prolonged incommunicado detention or prolonged solitary confinement, both of which are forbidden under international law.

If a person who is arrested or detained does not have a lawyer of their own choice, they are entitled to have a lawyer assigned by a judicial or other authority in all cases where the interests of justice so require and without payment by them if they do not have sufficient means to pay.

When appointing defence counsel, the interests of justice should be determined by

considering (i) the seriousness of the offence; and (ii) the severity of the sentence. In this assessment, the principles outlined above in regard to the assessment of the double criminality may assist the judge.

In the event that defence counsel is assigned by a court, the lawyer appointed should:

- i. be qualified to represent and defend the accused;
- ii. have the required training and experience that is consistent with the nature and severity of the case in question;
- iii. be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference from the State authorities, including the judiciary;
- iv. assist the accused in every appropriate way and take legal action to protect their interests; and
- v. always fully respect the interests of their clients.

It may occur that judges do not have at their disposal either the legislative grounds or the organisational and procedural tools to implement these international law obligations on the right to access to a lawyer. International obligations are placed upon States and they often require the Executive and Legislative powers to work for their implementation. However, judges should do all in their power to implement these obligations.

### Equality of arms

Both during the execution of the extradition request and in the ensuing trial in the requesting country, it is essential that the principle of equality of arms be respected. This means that:

- i. Both parties must have adequate time and facilities to prepare the case and a genuine opportunity to present arguments and evidence and challenge or respond to opposing arguments or evidence. In case of execution of an extradition request, this applies to the challenge of the request itself and, if applicable, of the related detention;
- ii. Both parties are entitled to consult and be represented by a legal representative or other qualified persons chosen by them at all stages of the proceedings, including during the execution of the extradition request;

- iii. If either of the parties cannot understand or speak the language used during the proceedings and their preparation, then they should be assisted by an interpreter;
- iv. Both parties are entitled to have their rights and obligations affected only by decisions based solely on evidence presented to the court; and
- v. Both parties have the right to appeal decisions taken by the trial court before a higher judicial body.

#### The right to a Public Hearing

It is a principle of criminal law and of human rights law that, except in narrowly defined circumstances, court hearings in criminal proceedings should be open to the public and court judgments should be published. This principle should be applied in the trial following the execution of the extradition request and as well as, as far as applicable, to the extradition proceedings. International standards prohibit the extradition of a person if the original trial in the requesting State was held *in absentia*, without sufficient guarantees to enable the person's presence and with no possibility of retrial upon return.

During the execution of an extradition, if issues concerning the deprivation of liberty or with regard to the criminal charges issued by the sending country for the extradition, as a general principle of good governance such proceeding should be public.

#### Resources

Most of the detailed standards, legal references and sources for this guidance can be found in the following publications:

- Human Rights Committee, [\*General Comment no. 32\*](#)
- UNODC, [Revised Manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters](#)
- UNODC, [Manual on Mutual Legal Assistance and Extradition](#)
- ICJ, Practitioners Guide 5, [A Manual on trial observation](#).

## VI. The Principle of Non-Refoulement must be respected in all decisions concerning transfer to another country

- a) *Judges or prosecutors should not permit or support expulsion or extradition of a person for whom there are substantial grounds to believe:*
  - a. *that he or she may be at real risk of a serious violation of her or his human rights (torture; cruel, inhuman or degrading treatment or punishment; right to life; flagrant denial of justice; flagrant denial of the right to liberty — other rights may fall within the definition)*
  - b. *that his or her life or freedom are threatened on grounds of race, political opinion, membership of a particular group, national origin, religion*
- b) *No exception is allowed for those who face a risk of serious violation of human rights, including for reasons of national security, public order, public health, public policy, terrorism, extremism or separatism.*
- c) *Officials, prosecutors or judges dealing with extradition or expulsion procedures must assess the existence of the risk of non-refoulement by their own initiative without expecting that it be raised by the concerned person*
- d) *Officials, prosecutors and judges must verify the existence of the "substantial grounds to believe" that the risk exists and not the effective existence of the risk itself*
- e) *Officials, prosecutors and judges must remain updated on the evolution of the interpretation of the principle in international law and Ministries of Justice or self-governance bodies of the judiciary and public prosecution should equip them with updates in this regard.*

### Explanation

The principle of non-refoulement in international law applies in all instances of transfer of a person outside the jurisdiction of one country (for more on this principle, see [ICJ, Migration and international human rights law, Practitioners Guide no 6](#)).

There are two principles. One of **international refugee law** that applies to refugees only and that prohibits the removal and the extradition of a refugee to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (article 33.1, Geneva Convention 1951). This prohibition applies in all cases unless "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 judgment of a particularly serious crime, constitutes a danger to the community of that country." (article 33.2, Geneva Convention 1951).

Second, States are bound by the **international human rights law** principle of non-refoulement, which admits no exception — not even for national security reasons — and protects from transfer to another jurisdiction all persons for which there are substantial grounds to believe that as a result of the transfer they may be at real risk of being subject to a serious violation of their human rights.

For any person subject to an extradition request or an expulsion order, the national authority responsible for the decision or its review must consider:

- Whether "**there are grounds that are substantial to believe**" there is a risk: the test is not one of proof beyond reasonable doubt or certainty nor of a balance of probabilities but merely that of a reasonable suspicion.
- Whether the person is "**at real risk**": the test does not require evidence that the rights of the person concerned will be violated following transfer. Rather the question is whether there will

be a risk of such a violation that is real, i.e. it can be deduced from objective circumstances. Whether the risk concerns **"a serious violation of their human rights"**: the violation must be a serious one. So far, international human rights courts and monitoring bodies have found that the principle encompasses the prohibition of torture and cruel, inhuman or degrading treatment or punishment, violations of the right to life, the risk of flagrant denial of justice through unfair trial and flagrant denial of the right to liberty. The interpretation is in constant development and legal updates must be consulted regularly. So far, for example, the prohibition of degrading treatment has been interpreted as prohibiting transfers of persons where they would face overcrowding in detention, destitute conditions of reception and ineffective asylum systems, but this prohibition could also apply to other circumstances. The European Court of Human Rights holds that "a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition [and that] in a removal case, a violation would arise if the applicant were able to demonstrate that he or she was at a real risk of receiving a grossly disproportionate sentence in the receiving State" (Babar, para. 237–238) Finally, the prohibition related to flagrant denial of justice may include transfers to face trials based on charges that have varied and often unclear definitions.

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. Furthermore, international law prohibits transfers from States that have abolished the death penalty or have a moratorium on its use, to States where there is a risk of the death penalty.

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. 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", that is, the suffering caused by the long wait before the carrying out of the execution itself.

### **Excerpts from UN treaty bodies' General Comments**

#### Human Rights Committee, General Comment no. 31

*12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.*

#### Human Rights Committee, General Comment no. 35 (article 9 ICCPR)

*Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.*

#### Human Rights Committee, General Comment no. 36 (article 6 ICCPR)

*30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6*

of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases. For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty. Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed; or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language. In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, *inter alia*, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases, and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards.

31. The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.

...

34. States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before. States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

Kazakhstan, Committee on Enforced Disappearances, Concluding Observations, 2016

18. The Committee recommends that the State party ensure that the principle of non-refoulement enshrined in article 16 (1) of the Convention is strictly respected in all circumstances. In

*particular, the Committee recommends that the State party adopt the measures necessary to ensure in practice that: ... (b) Before it proceeds to an expulsion, return or extradition, all relevant procedures have been exhausted and a thorough individual examination has been carried out to determine whether there are substantial grounds for believing that the person concerned would be in danger of being subjected to enforced disappearance and that, if there are such grounds, the person concerned is not expelled, extradited or returned*

### **The European Court of Human Rights on extradition to face death penalty or life-imprisonment**

Case of [Al-Nashiri v Poland](#) (death penalty)

576. Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see, mutatis mutandis, Soering, cited above, § 111; Kaboulov v. Ukraine, cited above, § 99 and Al Saadoon and Mufdhi, cited above, § 123; see also paragraph 456 above).

577. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. ...

Case of Babar Ahmad and Others v United Kingdom (life imprisonment)

241. For ... a discretionary sentence of life imprisonment without the possibility of parole, the Court observes that normally such sentences are imposed for offences of the utmost severity, such as murder or manslaughter. In any legal system, such offences, if they do not attract a life sentence, will normally attract a substantial sentence of imprisonment, perhaps of several decades. Therefore, any defendant who is convicted of such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence. It follows, therefore, that, if a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3 issue cannot arise at the moment when it is imposed. Instead, ... an Article 3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) ... the sentence is irreducible de facto and de iure.

242. For ... a mandatory sentence of life imprisonment without the possibility of parole, ... such a sentence is much more likely to be grossly disproportionate than any of the other types of life sentence, especially if it requires the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems ...

The Court concludes therefore that, in the absence of any such gross disproportionality, an Article 3 issue will arise for a mandatory sentence of life imprisonment without the possibility of parole in the same way as for a discretionary life sentence, that is when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible de facto and de iure (Kafkaris, cited above).

## VII. No refugee can be extradited or expelled for grounds not allowed by international law

- a) *For anyone who is a refugee, there is a prohibition of extradition or expulsion to their country of origin or habitual residence or to any country that may transfer them there*
- b) *Any person that might be at risk of persecution in their country of origin or habitual residence is a prima facie refugee even if not officially recognized as such, and even if the person concerned has not asked for status or been granted such status*
- c) *It is the duty of the official, prosecutor or judge dealing with the extradition or expulsion to assess whether a person may fulfil the criteria of refugee regardless of their status having been declared. This assessment must be made taking into account international refugee law*
- d) *Even when the person concerned is found to be excluded from refugee status or where his or her refugee status has ceased in accordance with international refugee law, the person enjoys other forms of international protection and is protected by the principle of non-refoulement under international human rights law.*

### Explanation

All States must respect the status of refugees under international refugee law. This means that they are prohibited from acting to expel or extradite a refugee to their country of origin or habitual residence or to any country where there are substantial grounds to believe that she or he may be returned or extradited to her or his country of origin or habitual residence (see [Geneva Convention relating to the status of refugee](#)).

No bilateral or multilateral treaty on extradition may override this obligation.

No exception to this rule is possible besides those allowed by refugee law, i.e. when the person is not entitled to international protection because the refugee status has expired — under the cessation clauses of [article 1C of the Geneva Convention on the status of refugees 1951](#) — or has been excluded — under the exclusion clauses of its article 1F.

It is important to recall that a person is a refugee whenever she or he has a well-founded fear to be persecuted in her or his country of origin or habitual residence on grounds of race, religion, national origin, membership in a particular group or political opinion. This means that it is not the result of the procedure of refugee status determination (RSDP) that qualifies one as refugee. Any person for whom there are grounds to hold that he or she could have a well-founded fear of persecution must be presumed a refugee until found otherwise through a fair procedure.

For this reason, any authority dealing with an expulsion or extradition request must assess *proprio motu* whether the person is a potential refugee, in which case he or she should undergo a proper RSDP before a decision may be taken (see guidance no...).

Relevant material:

UNHCR Guidelines and Handbooks to determine refugee status and forms of complementary protection are available at <https://www.unhcr.org/search?comid=4a27bad46&cid=49aea93ae2&tags=RSDguidelines>

## Geneva Refugee Convention 1951

### Cessation clauses (1C)

- 1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence

### Exclusion clauses (article 1F)

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he 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;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

## VIII. Diplomatic assurances should not be relied on to protect against torture or other ill-treatment following transfer

- a) *Judges and prosecutors reviewing requests for extradition should take into account that diplomatic assurances are not an effective protection when there are grounds to believe that the person may be at real risk of being subject to torture or cruel, inhuman or degrading treatment or punishment, in the receiving state. This will also be the case for certain other serious violations, such as deprivation of the right to life and enforced disappearance.*
- b) *Diplomatic assurances in other domains — such as assurances that the death penalty will not be sought — must be effective and guarantees must be included in the assurance that they will not be disregarded. Judges and prosecutors should scrutinise such assurances carefully to ensure that they meet these criteria*
- c) *Where diplomatic assurances are relied on, it is essential that an independent and impartial mechanism — preferably a court — will have jurisdiction in the country issuing the diplomatic assurance to ensure its effective implementation and reverse authorities' decisions that would attempt to disregard it, and that the transferred person will have effective access to this mechanism.*

### Explanation

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.

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, including arrangements for the monitoring of the transferred person in custody. Diplomatic assurances may constitute as an acceptable means to avert a risk of the imposition of the death penalty, provided they are verifiable in practice and provided by a reliable government authority.

International human rights bodies, including 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.

Such assurances cannot provide a sufficient guarantee that the individuals concerned would be protected against the risk of prohibited treatment to allow a transfer to those countries where there are reliable reports that the authorities resort to or tolerate torture or other ill-treatment; or when they are not given by an authority of the destination State empowered to provide them; or where the destination State does not have an effective system of torture prevention.

*Uzbekistan, Committee against Torture, Concluding Observations, 2020*

**60. The State party should collect and publish data on the implementation of the presidential decree with regard to the procedure for granting political asylum; take measures to establish a comprehensive national asylum system that is in conformity**

**with international standards and which provides all individuals under the State party's jurisdiction with an in-country right to appeal an expulsion order in order to determine whether there are substantial grounds for believing that they would be at risk of being subjected to torture; and establish an early detection system for victims of torture and ill-treatment. It should seek the assistance of the United Nations High Commissioner for Refugees in taking these measures and should consider ratifying the Convention relating to the Status of Refugees and its 1967 Protocol.**

*Kazakhstan, Committee on Enforced Disappearances, Concluding Observations, 2016*

**18. The Committee recommends that the State party ensure that the principle of non-refoulement enshrined in article 16 (1) of the Convention is strictly respected in all circumstances. In particular, the Committee recommends that the State party adopt the measures necessary to ensure in practice that: ... Diplomatic assurances are evaluated with the utmost care and that they are not accepted in any case where there are substantial grounds for believing that a person would be in danger of being subjected to enforced disappearance.**

## IX. There should be a presumption against transfer for “political” offences

- a) *Generally, persons who are subjected to prosecution for a “political offence” should not be subject to transfer, and in some jurisdictions such transfers are prohibited by domestic law*
- b) *Even if a national legal system does not provide for an exception for political offences, the official, prosecutor or judge will have to ascertain whether the offence for which the person is sought may be considered as “political” in the requested country to avoid unsuccessful transfer requests*
- c) *Often a person whose transfer may be requested for a political offence may qualify as refugee for persecution on grounds of political opinion.*

Under international extradition law, the widely recognized rule has been that a person should not be extradited for “political” offences. Numerous treaties recognize this rule either explicitly or as a consequence of the application of the principle of *non-refoulement*. Even though Central Asian countries do not contemplate the prohibition of extradition for political offences, many countries where requests for extraditions are sent may make use of it.

There is no universal definition under international law as to what constitutes a political offence. 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. 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.

Crimes such as the attempted murder of a Head of State, crimes against humanity, war crimes, genocide and enforced disappearance, 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 being extradited. 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. 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 Convention for the Prevention of Terrorism 2005 oblige Member States not to consider the offences therein contained as political offences for the purpose of extradition.

## **X. Extradition or expulsion should not be carried out if it has a discriminatory basis**

- a) *Any official, judge or prosecutor in making decisions or taking action regarding a request for extradition must ascertain that no discrimination – whether direct or indirect – is at the basis of the request of extradition*
- b) *It is important to assess this with reference to all grounds of discrimination that bind the State under international law and the national laws of both the requesting and requested countries to ensure that an effective transfer in line with international law*
- c) *The principle of non-discrimination is a general rule of law principle, provided for in virtually all international human rights instruments, and applicable to all conduct of the State. It is a non-derogable right so it cannot be dispensed with for any reason, not even under a state of emergency or for national security reasons*

Several international extradition 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. Non-discrimination is protected under article 26 of the ICCPR in respect of any State conduct, including in the context of extradition.

Contemporary international human rights law contains as impermissible grounds of discrimination race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status.

Closely related to the principle of non-discrimination are the principles of equality before the law and equal protection of the law, which are protected among other sources in article 26 of the ICCPR.

These exceptions exist to ensure coherence between extradition laws and refugee law, and with international human rights law restrictions on extradition and other transfers. They must therefore be respected whether or not the State concerned has ratified the specific extradition treaties enshrining this exception, as the prohibition on discrimination arises from the State's obligations under international refugee and human rights law.

## XI. The rights of the child and the right to family life must not be violated in the context of extradition or expulsion

- a) *When assessing an expulsion or an extradition request, it is important that adjudicators assess its potential impact on the right to family life of the concerned person and of their family members, and to pay particular attention to the impact on children*
- b) *The transfer may not be possible for family life reasons if the family life could not be possible in any way in the country of destination. The consideration of the case must be guided by the principles of necessity and proportionality.*
- c) *It is important to consider the meaning of "family" not only under national but also under international law*
- d) *The best interest of the child — if any person under the age of 18 is concerned in the case — must be the paramount guiding principle in consideration of all decisions affecting the child*

### The right to family life

In international law, the meaning of "family" for the purposes of the right to respect for family life is a broad one, which has been progressively extended by the jurisprudence of international courts and tribunals, reflecting changing social values, and may continue to develop in the future (see [article 17 of the International Covenant on Civil and Political Rights](#); for more information, check [ICJ, Migration and international human rights law, Practitioners Guide no 6](#)).

In the context of relationships between minor children and their parents, family life will always be considered to exist between a child and the parent(s) with whom the child cohabits. Where a child's parents are married or cohabiting, this family relationship will continue to exist even where, due to parental separation, the child ceases to live with one of the parents. Where a child's parents have never been married or cohabiting, other factors may serve to demonstrate that the child's relationship with the parent with whom the child does not live, amounts to a family relationship. These factors will include the nature and duration of the parents' relationship prior to the birth of the child, and in particular whether they had planned to have a child, contributions made to the child's care and upbringing, and the quality and regularity of contact.

In the context of adult partnerships, family life will be held to exist in relation to both opposite-sex and same-sex marital relationships and stable and committed cohabiting non-marital relationships.

Even where a relationship is found not to amount to family life, however, the right to respect for private life may apply to prevent removal from the jurisdiction. The right to respect for private life extends to protection of personal and social relationships.

Any expulsion or extradition that interferes with the right to private and family life, must be **in accordance with the law**. This requires that it 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

The expulsion or extradition must also **pursue a legitimate aim**. The maintenance and enforcement of immigration control is considered to constitute a legitimate aim for restrictions to the rights of

family and private life, as are the prevention of disorder or crime and reasons of national security and public order.

The decision to extradite or 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. The decision would be disproportionate if it is *de facto* impossible to continue family life outside of the expelling country. In addition, when the children are remaining in the expelling country and the expellee has a proven family relationship with them, the children's best interest must be taken into account.

### The rights of the child

Article 3.1 of the Convention on the Rights of the Child (CRC) affirms that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This is an overarching principle that must be respected in all situations involving or having an impact on a child, including during procedures of extradition or expulsion.

For example, Article 9.1 CRC provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." Thus, in any decision making process regarding expulsion of a child's parent(s), the principle of the best interests of that child must be paramount.

The UN Committee on the Rights of the Child has stated that "the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status" ([Joint General Comment no. 22/3](#), para. 30)

It has clarified that "a "best-interests assessment" involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A "best-interests determination" is a formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment. In addition, assessing the child's best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves." (ibid., para.31)

Therefore, States should "conduct a best-interests determination in cases that could lead to the expulsion of migrant families due to their migration status, in order to evaluate the impact of deportation on children's rights and development, including their mental health" (ibid, para.32)

Finally, "[w]here the expulsion of parents is based on criminal offences, their children's rights, including the right to have their best interests be a primary consideration and their right to be heard and have their views taken seriously, should be ensured, also taking into account the principle of proportionality and other human rights principles and standards" ([Joint General Comment 23/4](#), para 29).

## XII. Apply human rights considerations to all expulsion procedures, including when based on national security grounds

- a) *Interpretation and application by officials, prosecutors and judges must provide a clear and narrow definition of national security grounds for expulsion in line with international standards (see explanation).*
- b) *Where an expulsion is sought for a national security related offence, judges and national courts must use the existing procedures, as far as possible, to permit the concerned person both in law and in practice to challenge the application and validity of the national security grounds before national courts in open proceedings with all fair trial guarantees, prior to extradition.*
- c) *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 should be disregarded as in violation of international human rights law, and should be challenged before the court or appealed where necessary.*
- d) *Judges, prosecutors and officials responsible for expulsions should perform a thorough assessment of the risk of human rights violations involved in the expulsion of the concerned person, during and following the transfer.*

### Explanation:

#### Restrictions and derogations

Under international human rights law, while no human rights can ever be wholly abrogated, certain rights can be made subject to restrictions in terms of their scope, including for national security or public order reasons. Thus, the ICCPR and other human rights treaties provide for “limitation clauses”, which allow for certain rights to be restricted on grounds such as national security, public health and public order. With regard to treaties binding on European and CIS countries, these rights subject to restriction include procedural safeguards relating to expulsion of aliens ([article 13 ICCPR](#)).

The determination as to the scope limiting rights of the grounds for on the basis of national security, and what constitutes a legitimate national security threat, is a case by case determination. The Human Rights Committee stresses that restrictions of human rights invoked on these grounds must be strictly construed (Human Rights Committee (CCPR), [General Comment no. 33](#), UN Doc. CCPR/C/GC/33, 25 June 2009, para. 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).

A fundamental reference in international law to interpret these concepts are the [Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights](#). According to them, such restriction clauses should be interpreted restrictively and in the following way:

22. The expression “**public order (ordre public)**” as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. *State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.*

25. **Public health** may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. *Due regard shall be had to the international health regulations of the World Health Organization. v. "public morals"*

...

29. **National security** may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. *National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.*

31. *National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.*

32. *The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.*

33. **Public safety** means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property. 34. *The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.*

In addition to ordinary limitations, in emergency situations, there is the possibility to resort to derogations in exceptional circumstances.

According to article 4 ICCPR and other similar clauses in other international human rights treaties, some civil and political rights may be derogated from "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." This however may occur only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

There are however human rights obligations that cannot be derogated from in any situation and these include the right to life, the prohibition of torture and other cruel, inhuman and degrading treatment or punishment, the prohibition of slavery and servitude, that of imprisonment for debts, the principle of legality in criminal law, the right to legal personality and the freedom of thought, consciousness and religion and the prohibition of discrimination. Furthermore, key procedural guarantees such as the prohibition of collective expulsions and the right to an effective remedies against violations of non-derogable rights must also be upheld.

As underlined by the Human Rights Committee in its General Comment no. 29, no human rights provision, however validly derogated from, will be entirely inapplicable.

A key guidance for interpretation is the [UN Human Rights Committee's General Comment no. 29](#).

### Guarantees from the prohibition of collective expulsions

In all cases, national authorities must respect the prohibition of collective expulsion (article 13 ICCPR as interpreted by the UN Human Rights Committee; [article 22 ICRMW](#)). This prohibition is effectively absolute under international human rights law, as it must be respected even in times of emergency, and has assumed the status of customary international law therefore binding all States, regardless of their being party to a treaty expressing such prohibition.

At the heart of the prohibition on collective expulsion is a requirement that individual, fair and objective consideration be given to each case. It encompasses any measure compelling non-nationals, 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.

The expulsion procedure must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account.

In addition to these guarantees, with regard to expulsions based on considerations of national security there are two cases to keep into consideration.

- a) Whether there is a potential risk of a serious human rights violation arising from the expulsion or the principle of *non-refoulement* is engaged

In order to comply with the right to an effective remedy, a person threatened with an expulsion which arguably violates another 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;
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotyped 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.

Where the State authorities fail to communicate effectively with the person threatened with expulsion concerning the legal proceedings in his or her case, the State may not justify a removal on the grounds of the individual's failure to comply with the formalities of the proceedings.

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. Judicial review constitutes, in principle, an effective remedy, provided that it fulfills these criteria. The appeal procedure must be 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 the prescribed time limit.

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.

A system where stays of execution of the expulsion order are at the discretion of a court or other body are not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.

Where national security considerations are the basis for the expulsion, the right to an effective remedy always requires an independent hearing and the possibility to access documents and reasons for expulsion and to contest them. Where cases involve the use of classified information, it must be in some way accessible to the applicant if that information was determinative in the expulsion decision. Executive claims of national security do not qualify or limit the obligation to ensure that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available.

- b) Cases where it is clear that there no possibility the principle of *non-refoulement* is engaged and the concerned person has not claimed its protection

These expulsion procedures are subject to procedural guarantees to be respected.

#### 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 legality. 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. To be in accordance with law, an expulsion must comply with both the substantive and the procedural requirements of the law, which must be interpreted and applied in good faith, taking into account all the circumstances of the individual case.

#### Right to submit reasons against expulsion

The person subject to expulsion has the right to make submissions against the expulsion. 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.

#### Right to legal representation

The right to representation before the authority competent to decide on the expulsion is specifically guaranteed. States should grant "free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary". 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".

#### Right to an appeal

States must guarantee the right to an appeal against expulsion decisions before an independent authority.

#### Public order and national security limitations

Limitations to the procedural guarantees set out above are permitted in expulsion proceedings where required by "compelling reasons of national security".

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). 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.

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." Notably, no one can be expelled "on a ground that is contrary to [the State's] obligations under international law".

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*).

### **XIII. Detention pending extradition or expulsion should will be arbitrary and unlawful, unless certain exceptional conditions are met**

- a) *Detention must not be provided for or executed as an automatic measure to execute an extradition request or an expulsion, even in case of national security grounds*
- b) *Alternatives to detention must be contemplated and assessed thoroughly and should generally be applied. A national authority must take into consideration these alternatives, Although restrictions to the right to freedom of movement should also be avoided, such restrictions are a permissible alternative to detention where strictly necessary*
- c) *Where detention is imposed at the exclusion of alternative measure, this decision must be justified in writing as well as the grounds for resorting to detention*
- d) *No bilateral or multilateral extradition treaty clause may be used to justify an automatic resort to detention to execute extraditions*
- e) *A decision to detain must be authorized by a judicial authority within 48 hours of the detention, so that an assessment may be made as to its lawfulness, necessity and proportionality. This must occur at a hearing with the presence of the detainee*
- f) *legal provisions that exclude any assessment by judicial authorities when an international arrest warrant is received from foreign judicial authorities must not serve as a basis to allow the national authorities to bypass their duty to consider alternatives to detention and assess individually the lawfulness, including necessity and proportionality, of the measure*
- g) *The detainee has the right to have her or his detention's lawfulness promptly assessed by a court of law at any time during detention, through habeas corpus or similar procedures*
- h) *The basis of any detention, with an assessment as to its lawfulness, including necessity and proportionality, of the pre-trial detention must be periodically reviewed by a judicial authority*
- i) *There must be a maximum period of detention and a periodic review of the necessity and proportionality of the detention*
- j) *If the expulsion is unlikely to happen in the foreseeable future the person must be released.*
- k) *Authorities must demonstrate all due diligence has been undertaken to execute the expulsion as soon as possible to maintain the foreseeability of the expulsion.*

#### **Explanation**

##### Extradition

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.

Detention also must not be abused for purposes other than that of extradition.

A person subject to extradition always enjoys 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. The reviewing court must have the power to order the release from unlawful detention. The concerned person can exercise this right from the moment of the arrest and has the right to appear in person before the court. These proceedings should be brought to a court within the judiciary. 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.

### Expulsion

Under international human rights law, detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out pursuant to a legal basis. International standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort, to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case.

The right to liberty and security of the person under international human rights law requires that deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary. Deprivation of liberty may be "arbitrary" either because it is not based on a legitimate basis for detention or because it does not follow procedural requirements. To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient.

The length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary. Detention of minors for immigration purposes is prohibited under the Convention on the Rights of the Child.

A person detained for any reason, including for purposes of immigration control, has the right to be informed promptly of the reasons for detention.

Migrants brought into detention have the right to prompt access to a lawyer, and must be promptly informed of this right. They should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided. Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.

On first entering into detention, there is also a right of prompt access to a doctor of one's choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.

The possibility to notify a family member, friend, or other person with a legitimate interest in the information, of the fact and place of detention, and of any subsequent transfer, is an essential safeguard against arbitrary detention, consistently protected by international standards.

Persons seeking asylum have the right, following detention, to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. Foreign nationals held in any form of detention have the right to consular access.

The right to challenge the lawfulness of detention judicially is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention.

The right to judicial review requires that they should have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative should have the opportunity to be heard before the court. The right requires that there be prompt access to court when a person is first detained, but also that thereafter there are regular judicial reviews of the lawfulness of the detention. Particular public interest concerns, such as national security, are not grounds to restrict the right to judicial review of detention, in the absence of derogation.

Human Rights Committee, General Comment no. 35 (Article 9)

*Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices.*

*Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction. After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives. If the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released. Pretrial detention of juveniles should be avoided to the fullest extent possible.*

Paragraph 4 of article 9 entitles anyone who is deprived of liberty by arrest or detention 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. It enshrines the principle of habeas corpus. Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.

The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests.

Human Rights Committee, General Comment no. 35 (Article 9)

*Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into*

*account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.*

## **XIV. Use of Interpol, CIS database and other criminal cooperation schemes**

- a) *Databases can be useful tools of communication of information, but may also be susceptible to abuse*
- b) *Criminal cooperation databases and coordination cannot substitute legal proceedings based on human rights law*
- c) *The existence of a notice or entry into a database or a request by a foreign authority outside of legally codified channels does not constitute a ground for any arrest or detention*
- d) *Any information present in any database or other criminal cooperation instrument must be verified at the moment of the taking of any measures in terms of its actuality and compliance with international human rights law and international refugee law*
- e) *Any insertion of a person in a list or database must be for serious offences in line with their right to privacy*
- f) *No database should be used that does not provide for an independent, effective and impartial mechanisms to request rectification of the entry by any affected person and reparation for the damage caused*

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.

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. Currently, even the most advanced system, that of Interpol, does not provide sufficient guarantees to ensure that it does not contribute to violations of the principle of *non-refoulement* by States.

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.

## XV. Practical coordination in criminal justice cooperation

- a) *While informal contacts with other States' authorities and checklists can be useful in the preparation of an extradition request or the procedure of execution of an expulsion, these cannot replace formal contacts and procedures established by law*
- b) *Respect of timeliness and deadlines is very important not only for the compliance with each other's extradition procedures but also in relation to the respect of the right to liberty of the transferee*
- c) *It is important to understand other legal traditions in countries from where extradition is sought to anticipate needed requirements and avoid misunderstandings in the procedure.*
- d) *The mutual understanding of each other's languages is fundamental. This concerns both the need of competent translation of documents and interpretation as well as of the specific technical terms which may differ in meaning from country to country*
- e) *Having a counterpart in the other country central authority assisting in the procedure and with the knowledge of language and legal system in both countries is a key asset.*
- f) *Before starting a formal procedure it is highly advisable to obtain legal advice from an independent lawyer of the other country on the requirements, including on the basis of human rights and refugee laws, and procedures of the transfer.*
- g) *The use of extradition and criminal cooperation international networks is useful. However, this cannot substitute the requirements needed under international and constitutional human rights and refugee law*

### Explanation

In general, when it is decided to resort to or request a person's transnational transfer — whether an extradition or an expulsion (be mindful that to perform an expulsion the acceptance in the country of destination must be assured) — it is often advisable to make use in the preparatory phase of informal contacts in the country of destination or of request to make sure that any procedure is executed in accordance with all requirements and practices of both countries.

This advice implies that it is important to have already established informal focal points in other countries with whom it is possible to discuss the practicalities of the procedure in relation to the individual case, e.g. documents required to demonstrate dual criminality, proportionality, etc. It also implies a good proficiency in the language of the two countries and, often forgotten, in their legal languages. It is often the case that same legal terms assume different contents or meanings in different legal systems or even only different countries. This may create obstacles and lack of compliance later in the formal procedure.

Some of these obstacles may be overcome through the use of international criminal cooperation networks or databases, such as those listed by the UNDOC and available in their website [here](#) and [here](#).

In any circumstances, it is essential to always remember that the use of these practical tips can never have the consequence of bypassing formal procedures and human rights law and refugee law requirements. It is demonstrated that, when that happens, then not only are human rights violated but the transfer itself may often be jeopardized at levels of judicial supervision of the procedure or at international level.

To ensure that legal requirements are upheld and, at the same time, make the procedure effective, it is therefore highly advisable to get legal advice from an independent lawyer who may be more versed in the national jurisprudence of the country and the obstacles raised by courts to extraditions. It is important that the advice be independent.

The advice is even more important because it is important to get acquainted with the legal framework of the State receiving the request: what are the procedures for arrest, search and seizure and surrender; how are extradition requests executed; what grounds of refusal are contemplated; what is the role of executive and judicial authorities; what evidentiary requirement, if any, are needed; what are the rules against risk of flight and the appeal and procedural rights applicable.

For example, evidentiary tests for extradition requests are different in different legal systems. Some countries require no evidence of the commission of the offence for which the transfer is sought, others require a probable cause or a prima facie evidence.

Finally, when requesting an extradition, it is important to remember the impact on human rights of the transferee as well. For example, if detention is not absolutely necessary to execute the extradition, other alternatives to detention may be sought in the extradition request. This will also have the advantage of keeping the option of detention for later in the procedure should any obstacle not due to human rights or refugee law arise, which would not be possible if a maximum time for detention under human rights law had already been reached.



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**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00  
**f** +41 22 979 38 01  
[www.icj.org](http://www.icj.org)