|  |  |  |  |
| --- | --- | --- | --- |
|  |  | A/HRC/43/35 | |
|  | **Advance Unedited Version** | | Distr.: General  25 February 2020  Original: English |

**Human Rights Council**

**Forty-third session**

24 February–20 March 2020

Agenda item 3

**Promotion and protection of all human rights, civil,**

**political, economic, social and cultural rights,**

**including the right to development**

Integrity of the judicial system

Report of the United Nations High Commissioner for Human Rights[[1]](#footnote-2)\*

|  |
| --- |
| *Summary*  The present report is submitted pursuant to Human Rights Council resolution 37/3. In the report, the UN High Commissioner for Human Rights examines the implications of the lack of integrity of the judicial system for human rights, in particular for persons kept in detention facilities outside the territory of States. |
|  |

I. Introduction

1. In its resolution 37/3 regarding the integrity of the judicial system, the Human Rights Council requested the UN High Commissioner for Human Rights, in consultation with States, relevant UN agencies, special procedures, treaty bodies, non-governmental organizations and other relevant stakeholders, to submit a comprehensive study on the implications of the lack of integrity of the judicial system for human rights, in particular for persons kept in detention facilities outside the territory of States. The Council requested that the report be presented at its forty-third session.[[2]](#footnote-3) In preparation for this report, contributions were sought from Member States and other relevant stakeholders.[[3]](#footnote-4) In addition to these contributions, the High Commissioner also draws on a range of public sources.

2. The integrity of the judicial system, together with its independence and impartiality, is an essential prerequisite for the protection of human rights and fundamental freedoms, for upholding the rule of law and democracy and ensuring that there is no discrimination in the administration of justice. All States must ensure that their obligations under international law (including international and regional human right instruments to which they are party) are applied to every person kept in detention facilities under their jurisdiction, including when those facilities are situated abroad. With regards to State Parties to the ICCPR, the Human Rights Committee has stated, in its General Comment No.31, that “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.”[[4]](#footnote-5)

3. The report examines different types of extraterritorial detention that may impact the integrity of the judicial system with implications for human rights. These include extraterritorial detention by law enforcement and intelligence agencies; extraterritorial detention in armed conflicts; and detention by third parties that States facilitate outside their territory.

II. Impact of extraterritorial detention outside of armed conflict on integrity of the judicial system

4. In the course of law enforcement, intelligence gathering and counterterrorism operations outside of armed conflict, some States have sometimes resorted to detaining individuals outside their territory.[[5]](#footnote-6) Experience has shown that, in cases in which they act extraterritorially, States can be more prone to detain in a manner that falls short of their obligations under international human rights law, including requisite judicial guarantees and procedural safeguards. While some States have disputed the extraterritorial applicability of international human rights treaties;[[6]](#footnote-7) and opined that human rights protections established in domestic constitutional law are not necessarily applicable abroad,[[7]](#footnote-8) the International Court of Justice and human rights treaty bodies’ have affirmed that international human rights instruments apply to acts by a State in the exercise of its jurisdiction outside its own territory.[[8]](#footnote-9) As detention conducted abroad brings the detained person within the State’s effective control, the detaining State must therefore ensure respect for the rights of the detainee emanating from international human rights treaties to which the State is party and from otherwise applicable rules of international law.[[9]](#footnote-10) The prohibitions of arbitrary deprivation of life, of torture and cruel, inhuman or degrading treatment, of arbitrary deprivation of liberty, as well as of certain aspects of the right to a fair trial, constitute part of customary international law and as such must be respected by State agents wherever they territorially act.[[10]](#footnote-11) Accordingly, States must not arbitrarily or unlawfully detain individuals nor may they subject persons outside their territory to, inter alia, prolonged incommunicado detention or deprive them of access to review of the lawfulness of their detention.[[11]](#footnote-12)

5. While international human rights law does not foreclose the possibility of subjecting a person to non-criminal detention on security grounds (such as administrative detention or internment), such detention can entail serious risks of arbitrary deprivation of liberty. Such detention would amount to arbitrary detention where other less intrusive, effective measures addressing the threat, including the criminal justice system, are available. According to the Human Rights Committee, if, under exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures.[[12]](#footnote-13) The burden to prove such justification rests with the detaining authority and increases with the length of the detention. Furthermore, the Human Rights Committee has stated that the detaining authority must ensure that the detention will not last longer than absolutely necessary, that its overall length will be limited and that the right to challenge the lawfulness of the detention before a court will be respected in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is also deemed a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.[[13]](#footnote-14)

6. The risk that extraterritorial detention entails human rights violations is compounded when detention is implemented by intelligence agencies, whose operations are, by their nature, rarely subject to effective judicial oversight and whose authority to detain and detention practices are not always adequately regulated by law.[[14]](#footnote-15) In a joint study on global practices in relation to secret detention, [[15]](#footnote-16) five Special Procedures mandate holders stated that there was a heightened risk that extraterritorial detentions would be conducted without a legal basis, or contrary to the principle of *habeas corpus*; or that detainees may be deprived of due process of law, of access to legal counsel and/or of an opportunity to challenge the legality of their detention before a court that is an integral part of the State’s judicial system.

7. In these respects, secret detentions and extraordinary renditions, two practices expressly mentioned in Human Rights Council Resolution 37/3, present specific challenges for the integrity of the judicial system when conducted by States operating outside their national territory.

(i) Extraterritorial secret detention

8. Secret detention has been defined as instances in which State authorities, or other agents whose actions or omissions are attributable to the State, detain a person while denying any contact with the outside world (“incommunicado detention”); and refuse to provide or actively conceal information about the fact that the person is detained, or about the fate or whereabouts of the detainee.[[16]](#footnote-17) As noted in the Special Rapporteurs’ joint study, such detention has the inherent consequence of placing the detainee outside the protection of the law and amounts to a manifold human rights violation that cannot be justified under any circumstances, including during states of emergency.[[17]](#footnote-18)

9. By effectively depriving detainees of the protection of the law, including the right to take proceedings before a court to review the lawfulness of detention, a right essential to the protection of non-derogable rights,[[18]](#footnote-19) secret detention violates the right to personal liberty and security and the prohibition of arbitrary detention.[[19]](#footnote-20) According to the joint study, when used to circumvent criminal proceedings, it further entails a violation of the right to a fair trial.[[20]](#footnote-21) The mandate holders also concluded that every instance of secret detention also constitutes an enforced disappearance. This amounts to “a grave and flagrant human rights violation”[[21]](#footnote-22) characterized by a detention by the State, “followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.[[22]](#footnote-23) As such it violates the right to recognition as a person before the law.[[23]](#footnote-24) Furthermore, the General Assembly and UN human rights mechanisms have found that secret detention facilitates the commission of acts of torture, and may itself amount to torture or ill-treatment of the detainee,[[24]](#footnote-25) or of his/her family members on whom it inflicts suffering.[[25]](#footnote-26)It may also entail violations of the protection of the family.[[26]](#footnote-27)

10. While secret detention is prohibited in all circumstances, in practice the risk that a detainee may be deprived of the protection of the law and placed beyond the reach of the State’s courts is likely to increase in cases of extraterritorial secret detention. In addition, to the human rights concerns detailed above, the UN Working Group on Enforced or Involuntary Disappearances observed that extraterritorial detention by its very nature heightens the risk of disappearance and renders it especially difficult for the detainees’ families and legal representatives to obtain information about their whereabouts, or to secure remedies or reparations.[[27]](#footnote-28)

(ii) Extraordinary renditions and comparable transfers

11. Some States have resorted to practices labelled “extraordinary renditions”, an expression not as such defined in international law, which has been used to describe apprehension of a person often sponsored by one State in the territory of another State, with or without that State’s cooperation, and the subsequent extrajudicial transfer of the person from the territory in which he was abducted to another State for detention and interrogation.[[28]](#footnote-29) Since such actions deliberately circumvent due process safeguards and are conducted without recourse to legal procedures used in extraditions, deportations, or expulsions, the European Court of Human Rights has stated that they are anathema to the rule of law and to the values that international human rights law seeks to protect.[[29]](#footnote-30) Other practices whereby States bypass ordinary legal procedures by detaining or abducting persons outside their territory and extra-judicially transferring them to face trial elsewhere, have been similarly criticized by the European Court.[[30]](#footnote-31) According to the UN Working Group on Arbitrary Detention, every case of apprehension and transfer of individuals, occurring outside the confines of any legal procedure and without access to counsel or to any judicial body to contest the transfer, amounts per se to a violation of the prohibition of arbitrary and unlawful detention.[[31]](#footnote-32) To the extent that an individual is subsequently detained outside the normal legal framework in the receiving state, the right to liberty and prohibition of arbitrary detention is also necessarily violated.[[32]](#footnote-33) Indeed, the Human Rights Committee and the Committee against Torture have expressed concern that protracted and indefinite extrajudicial detention further entails a violation of the detainee’s rights to a fair trial, to be treated with humanity and with respect for the inherent dignity of the human person and to recognition as a person before the law, as well as of the prohibition on torture and other ill-treatment.[[33]](#footnote-34) When conducted in secrecy, extraterritorial detention in the context of extraordinary renditions may, in the view of the European Court, also amount to an enforced disappearance or secret detention with the associated violations that these practices entail.[[34]](#footnote-35)

12. Additionally, the extraterritorial and extrajudicial nature of such practices is conducive to coercive interrogations, in many instances amounting to violations of the prohibition of torture and ill-treatment.[[35]](#footnote-36) Such violations may be perpetrated directly by agents of the rendering state, or of third States to which the person is transferred without any adequate risk assessement procedure. The Human Rights Committee and the Committee against Torture have found that extraordinary rendition is often accompanied by a risk of torture[[36]](#footnote-37) and implicates the principle of *non-refoulement*.[[37]](#footnote-38) According to this principle, a State detaining persons extraterritorially may not transfer them to another State where there are substantial grounds for believing that there is a real risk of irreparable harm such as being subjected to torture or ill-treated,[[38]](#footnote-39) that their right to life may be violated.[[39]](#footnote-40) or that their liberty and security of person will be violated in a manner amounting to inhuman treatment.[[40]](#footnote-41) The principle of *non-refoulement* also prohibits transfer to a State when it is foreseen that that State will in turn transfer a person to a third State where there are substantial grounds for believing that there is a real risk of irreparable harm.[[41]](#footnote-42) In evaluating this risk, States should give consideration to a number of human rights situations that may constitute an indication of a risk of torture.[[42]](#footnote-43) Furthermore, according to the Committee against Torture, the person being transferred must be given a possibility to challenge the transfer.[[43]](#footnote-44) Diplomatic assurances and other guarantees assuring that a person will not be tortured or suffer other irreparable harm upon transfer are not, of themselves sufficient to satisfy the principle of *non-refoulement* where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[[44]](#footnote-45) Such assurances should be accompanied by a prior thorough examination of the merits of each individual case, be obtained following clear procedures, with adequate judicial mechanisms for review and effective monitoring mechanisms in place to assess that they are honoured.[[45]](#footnote-46)

13. Extraordinary renditions raise extensive and complex human rights concerns, with clear implications for the integrity of the judiciary. By definition, they are often conducted secretly, extraterritorially and outside normal legal procedures, challenging the judicial system and the practical enjoyment through it of the right to a remedy. The Human Rights Committee and the Committee against Torture have found that persons subjected to extraterritorial detention following extraordinary renditions endured prolonged and indefinite deprivation of liberty without access to the ordinary criminal justice system.[[46]](#footnote-47) While victims of such violations of human rights are entitled to reparations and effective remedy,[[47]](#footnote-48) attempts to obtain remedies through domestic civil and criminal judicial proceedings have been hampered because key information was deemed covered as State secret or otherwise too sensitive to disclose.[[48]](#footnote-49) According to the Convention against Torture, States are required to carry out prompt, independent and effective investigations whenever there is ground to believe that an act of torture or ill-treatment was committed in their jurisdiction, and are obliged to prosecute or extradite persons suspected of engaging in such acts.[[49]](#footnote-50) In practice, however, the Committee against Torture has raised concerns that allegations of torture and ill-treatment of persons detained extraterritorially have not been adequately investigated.[[50]](#footnote-51) States have, in some cases, been reticent to prosecute agents who allegedly perpetrated violations in the course of extraterritorial detention or[[51]](#footnote-52) to surrender their own agents for such prosecution in other jurisdictions. On other occasions, criminal charges have only been brought against a limited number of lower-level operatives.[[52]](#footnote-53)

III. Impact of extraterritorial detention in armed conflict on integrity of the judicial system

14. Armed conflicts may amount to emergency situations. While derogations from certain human rights norms including the right to liberty of person are permissible, when such situations constitute a threat to the life of the nation, the Human Rights Committee has clarified that measures derogating from the provisions of the ICCPR must be of an exceptional and temporary nature, and subject to a number of strict conditions.[[53]](#footnote-54) Further, some peremptory norms including the prohibition on arbitrary detention, cannot be derogated from,[[54]](#footnote-55) and procedural rights instrumental to the effective protection of non-derogable rights, such as the right to take proceedings before a court to review the lawfulness of detentionand fundamental requirements of the right to fair trial, must also be respected in all circumstances.[[55]](#footnote-56) In addition to international human rights law, which continues to apply during periods of armed conflict, the outbreak of armed conflict also brings complementary norms of international humanitarian law into play.[[56]](#footnote-57) These include provisions regulating detention in armed conflict and protecting detainees, inter alia, via procedural safeguards and judicial guarantees.[[57]](#footnote-58) Despite the consistent position of international and regional courts and human rights mechanisms that international human rights law remains applicable in this context, some of States continue to dispute the extent of its applicability in armed conflict and its interplay with international humanitarian law. This can give rise to concern that applicable human rights obligations may not be adequately respected.[[58]](#footnote-59) This comprehensive legal framework notwithstanding, extraterritorial detention in the context of an armed conflict raises a number of concerns regarding human rights and the integrity of the judicial system.

*Factors detrimental to the integrity of the judicial system*

15. While detention in peacetime is generally implemented by the State’s law enforcement agencies and overseen by its civilian courts, detention in the context of armed conflict is often carried out by the State’s armed forces or, on occasion, intelligence agencies. In such contexts, law enforcement and regular judicial systems may not be available or have limited legal or practical capacity to address all cases of deprivation of liberty. Oversight, where it takes place, is often exercised by military justice or administrative bodies. This renders it more likely that the ordinary operation of the judicial system will be deviated from and raises concern that procedural safeguards may be breached and that rights violations may ensue.

16. These concerns are enhanced when States are involved in an armed conflict outside their territory. States often have only provisional infrastructure, limited personnel and scarce resources at their disposal outside their own territory, all of which may be inadequate for the effective operation of detention facilities and related judicial procedures. Personnel deployed to implement detention operations in extraterritorial conflict zones may lack sufficient expertise or training (e.g. regarding gathering of evidence, or treatment of detainees), and their ability to attend to detainees is at times further compromised by language barriers and cultural divides. Inadequate infrastructure and expertise can have a particularly detrimental effect when it comes to safeguarding the rights of detainees who are particularly vulnerable or have special needs, such as children or persons requiring medical attention.[[59]](#footnote-60)

17. Further problems may arise where detaining authorities operating extraterritorially lack the information and means necessary to facilitate family links and other contacts. Failure to record personal details of detainees[[60]](#footnote-61) makes it more difficult to track them and to inform their families of their whereabouts and wellbeing. Because of the often transitory nature of extraterritorial detention facilities as well as security concerns resulting from proximity to battle-zones, humanitarian agencies may also have limited access to them. Absences of records and lack of contact outside the places of detention increases the risk of human rights violations including enforced disappearances, as such detainees have reduced access to medical and educational services, for example, and enjoyment of effective protections and remedies to which they are entitled, including through the judicial system.

18. Furthermore, while detention in peacetime is normally linked to criminal offences, in armed conflict, it is lawful, under certain conditions discussed below,[[61]](#footnote-62) for belligerent parties to detain individuals in order to prevent a security threat they are considered to pose from materializing,[[62]](#footnote-63) or to hold them as prisoners of war (POWs) solely because of their status as combatants, irrespective of their actual conduct.[[63]](#footnote-64) Additionally, armed conflicts frequently involve transfers of detainees between cobelligerents, giving rise to further concerns that human rights may be violated in the transition from one detaining authority to another, or that receiving authorities may afford substantially lesser levels of human rights protection.[[64]](#footnote-65)

*Lack of legal basis or defined grounds and procedures for extraterritorial detention*

19. While detention authorized, and consistent with international humanitarian law is in principle not arbitrary,[[65]](#footnote-66) extraterritorial detention in armed conflict when carried out without legal basis becomes arbitrary and violates the right to personal liberty. In international armed conflicts, waged between States and usually involving extraterritorial operations by at least one party to the conflict, international humanitarian law authorises status-based extraterritorial internment of combatants as POWs;[[66]](#footnote-67) and permits criminal detention[[67]](#footnote-68) and internment of protected persons[[68]](#footnote-69) in occupied territory when deemed necessary for imperative security reasons.[[69]](#footnote-70) By contrast, in non-international armed conflicts, waged between a State and one or more organized non-State armed groups or between non-State armed groups, international humanitarian law does not explicitly establish a legal basis for detention. While according to the International Committee of the Red Cross parties to a non-international armed conflict have an inherent power to intern persons on the grounds of imperative reasons of security;[[70]](#footnote-71) this position is not unanimous.[[71]](#footnote-72)

20. In any event, the prohibition on arbitrary deprivation of liberty requires that, in all circumstances, detention be implemented pursuant to substantive grounds as well as appropriate procedures established by law.[[72]](#footnote-73) With respect to international armed conflicts, international humanitarian law specifies permitted grounds for detention as well as procedures to ensure that those grounds are met.[[73]](#footnote-74) However, as international humanitarian law does not itself establish specific grounds and procedures for extraterritorial internment in non-international armed conflicts, [[74]](#footnote-75) such detention would be arbitrary unless relevant grounds and procedures, consistent with international law, are specified in an applicable binding instrument, such as, for example, the applicable domestic law of the State in whose territory the detention takes place or of the detaining State, or a specific agreement between the host State and the detaining State whereby established grounds and procedures for internment would be set out and made public.

21. The integrity of the judicial system is further at risk when States conduct extraterritorial detentions inconsistent with applicable domestic law of the host State. This may occur, for instance, in cases of internment when the host State’s applicable law does not permit administrative detention and only foresees detention in relation to the criminal justice process, leading to lack of clarity as to applicable legal regimes. This can also be the case when detainees are transferred to the host State for criminal prosecution after detention periods that exceed those permitted by the domestic criminal process or without collecting evidence, admissible before the courts of the host State, to support criminal proceedings. Concerns may also arise when States detain extraterritorially in contravention of their own domestic law, or when host States amend their legislation to expand the scope of permissible detention beyond, or amend criminal procedures in a manner incompatible with, international human rights law.

22. In addition, in practice, procedural safeguards against arbitrary deprivation of liberty are often lacking in extraterritorial internment in armed conflict. These include failure to properly notify internees and their families of the reasons for internment or of its expected duration; absence of independent and impartial mechanisms for challenging the grounds for internment and securing release where internment is not, or is no longer, justified; and failure to explain proceedings to detainees in a language they understand.[[75]](#footnote-76)

*Lack of integrity of the judicial system and human rights violations in occupied territory*

23. Even when legal basis or grounds and procedures are established in law, extraterritorial detention amounts to arbitrary deprivation of liberty when it does not conform with these established grounds and procedures, or when it is prolonged more than necessary.[[76]](#footnote-77) Such instances include, for example, situations when a State, acting as an occupying power, detainees persons from an occupied territory without establishing that the interned persons pose a present, direct and imperative threat that cannot be addressed by alternative measures; when internment lasts indefinitely or longer than absolutely necessary; and the absence of prompt and regular review by an independent and impartial tribunal, with appropriate access to independent legal advice; and disclosure of, at least, the essence of the evidence on which the decision to detain was taken.[[77]](#footnote-78) Arbitrary detention in occupied territory has also involved arrests taking place entirely outside of any legal framework, combined with incommunicado detention and torture to obtain information or extract confessions, as well as apparent cases of enforced disappearances.[[78]](#footnote-79) Such practices are, by their nature, flagrantly inconsistent with the integrity of the judicial system.

24. Furthermore, applicable due process and fair trial guarantees prescribed under international human rights law and international humanitarian law have often been disregarded by occupying powers. In some instances, an occupying power applied its own domestic criminal legislation retroactively within occupied territory[[79]](#footnote-80) - in contravention of the principle of legality, with the obligation to maintain the penal legislation in force in the occupied territory and to apply it in court, and with the prohibition to arrest, prosecute or convict protected persons for acts committed or opinions expressed prior to the occupation.[[80]](#footnote-81) Persons prosecuted by the occupying power have also been pressured not to use independent legal counsel of their choice,[[81]](#footnote-82) been denied access to legal counsel for extended periods, and been coerced to provide incriminating information.[[82]](#footnote-83) In some contexts, violations of due process rights have occurred during the arrest, transfer, and detention of children, including not being adequately notified of their legal rights, in particular the right to counsel and the right to remain silent; being forced to sign confessions in a language they did understand; and not being accompanied by a parent or lawyer during their interrogation.[[83]](#footnote-84)

25. Additionally, persons detained in occupied territory have endured unlawful conditions of detention without obtaining protection from the judicial authorities and in a manner compromising the judicial process. Detainees in occupied territory have been subjected to torture and ill-treatment as a punishment or to extort confessions or to obtain specific information.[[84]](#footnote-85) They have also been held in incommunicado detention or under conditions amounting to cruel, inhuman or degrading treatment, and have been denied access to medical care and deprived of food and water before court hearings.[[85]](#footnote-86) Children detained have likewise endured ill-treatment, including physical abuse during arrest and interrogation, deprivation of adequate food and water, and exposure to harsh weather conditions during arrest and transfer to interrogation.[[86]](#footnote-87) Detainees from other vulnerable groups, such as elderly and persons with disabilities, have also endured ill-treatment.[[87]](#footnote-88)

*Transfers*

26. International humanitarian law contains provisions regulating the transfer of detainees in international armed conflict. With regard to POWs and protected persons detained in the State’s own territory, international humanitarian law permits transfer for detention by another State only when the transferring State has satisfied strict obligations to ensure that detainee protection will be maintained in full. This includes an obligation on the transferring State to take effective measures to correct the situation if the receiving State fails to provide the required protection, including a duty to request return of the detainees, a request that must be complied with.[[88]](#footnote-89) With respect to occupied territory, it mandates that they be detained only in the occupied territory and prohibits forcibly transferring protected persons outside the occupied territory.[[89]](#footnote-90) The principle of *non-refoulement* in international human rights law is equally applicable to such transfers to the authority of another State.

27. While international humanitarian law does not contain specific rules on detainee transfers in non-international armed conflict,[[90]](#footnote-91) such transfers are subject to the general principle of *non*-*refoulement*. Accordingly, the transferring State is obliged to conduct assessments of relevant risks of irreparable harm and, where real risk exists, to sufficiently address and mitigate it. [[91]](#footnote-92) When risk assessments indicate that the transfer would violate the principle of *non*-*refoulement,* the State which detained extraterritorially will be required to either detain the individual on an alternative appropriate legal basis or to release the individual.[[92]](#footnote-93)

28. In practice, detainees have been transferred despite these obligations. In some instances, occupying powers have transferred protected persons for detention outside occupied territory.[[93]](#footnote-94) In other instances, detainees have been transferred to the custody of another detaining authority without sufficient steps to ensure they will not subsequently be subjectedtoviolations of their human rights. [[94]](#footnote-95) Consequently, detainees may not have been afforded due opportunity to express their view as to real risks of harm before they were transferred, and transferring States may have been unaware of such risks. In some cases this occurred when States conducted immediate handovers of detainees, notwithstanding that the principle of *non-refoulement* applies to all detentions undertaken by State actors, including of short-duration detention.[[95]](#footnote-96)

*Lack of accountability*

29. In some instances involving extraterritorial detention in armed conflict there has been a general lack of accountability for violations committed by State agents, creating a climate of impunity and depriving victims of access to justice and remedy.[[96]](#footnote-97) Human rights mechanisms have highlighted the limited number of investigations, prosecutions and convictions of members of members of armed forces for violations committed in the context of extraterritorial detention.[[97]](#footnote-98) In some instances, investigations that had been launched were found to have been too slow, insufficiently independent and lacking in transparency.[[98]](#footnote-99) In other instances, States were not sufficiently forthcoming about the measures they had implemented to investigate allegations that their armed forces had violated the rights of persons whom the State had detained in armed conflicts abroad; about steps taken to hold persons found responsible for such violations accountable; or about reparations provided to victims.[[99]](#footnote-100)

IV. State-facilitated extraterritorial detention by third parties

30. In addition to cases in which they directly detain individuals extraterritorially or transfer them for extraterritorial detention, States at times facilitate or contribute towards detention outside their territory carried out by other States or by non-State actors. This has occurred, for example, when migrants and asylum seekers were intercepted en route to destination States which facilitated their detention in the territory of a third State;[[100]](#footnote-101) and in cases when persons were subjected to security detention by a third party over which the facilitating State exercises direction, wields control or exerts influence, or to whom it provides relevant support.[[101]](#footnote-102) Such cases give rise to concern as to the applicable judicial systems from which remedy can be sought, with risk that detainees may not have due recourse to the judicial systems of either the facilitating State or the host State to challenge the legality of their detention or to seek redress for human rights violations they endure in detention. Relatedly, there are grounds for concern that such practices enable States to secure the extraterritorial detention of persons without duly respecting or ensuring their rights, and may result in lack of accountability for violations.

31. According to the International Law Commission, actions of a non-State actor that is a de-facto organ of the State are considered an act of the State itself.[[102]](#footnote-103) On that approach, when persons are detained by a non-State actor such as, for example, a private security company that has been empowered or authorised by a State to do so, that State can remain directly responsible for the detention and must ensure that it is conducted in accordance with its obligations under international human rights law,[[103]](#footnote-104) even when the detention occurs extraterritorially.[[104]](#footnote-105) The International Court of Justice has accepted, in the context of applicable international humanitarian law and international human rights law obligations, that when an armed group that is completely dependent on a State conducts detention, among other actions, in armed conflict occurring outside the territory of that State, such conduct is imputable to the State.[[105]](#footnote-106) Such cases raise concerns for the respect of human rights and in particular the right to a remedy if the State does not acknowledge its obligations and there is difficulty establishing that the detaining authority is in fact acting on its behalf.

32. States also have the obligation to respect and ensure the detainees’ rights, even while they are held by a third party outside their territory, whenever the detainees are subject to its jurisdiction, i.e. when they are within its power or effective control.[[106]](#footnote-107) This is the case when the State occupies or otherwise holds overall effective control over the foreign territory where the detention occurs.[[107]](#footnote-108) The State is also responsible when it exercises control or authority over the detainees via a non-State actor detaining on the State’s instructions, or under its direction or control, thus functioning as its agent.[[108]](#footnote-109) Similarly, in the context of an armed conflict, the State bears responsibility for detention by an armed group, and for its related violations of international law, if the group is under its effective control.[[109]](#footnote-110) According to the Human Rights Committee, even if agents of a territorial State implement detention, a facilitating State may also have jurisdiction (alongside that of the territorial State) if it exercises significant levels of control and influence over the detention facility, such as control over its establishment, funding and operation.[[110]](#footnote-111)

33. When extraterritorial detention is carried out by third parties who are not agents of the State and where it does not appear to have jurisdiction, the State may nevertheless bear responsibility if it assists the detaining party in subjecting detainees to arbitrary or unlawful detention or ill-treatment. It has been advanced that such responsibility arises directly from international human rights law, not only when a State transfers a specific detainee from its jurisdiction in breach of *non-refoulement*, but also when there are substantial grounds for believing that there is a real risk that the rights of detainees generally are being or will be violated, and the State nevertheless provides a detaining authority with technical or financial support, intelligence, equipment, or other assistance which is connected to the subsequent violation, thereby contributing substantially to it.[[111]](#footnote-112) Indeed, the provision of such assistance may constitute a violation of the State’s obligation to ensure that activities undertaken in its jurisdiction that have a direct and reasonably foreseeable impact on the rights of detainees located outside its territory will be consistent with international human rights law.[[112]](#footnote-113)

34. The obligation that international humanitarian law imposes on States to respect and ensure respect for the Geneva Conventions implies that they may not knowingly assist in violations of international humanitarian law by a State or non-State party to an armed conflict.[[113]](#footnote-114) This obligation further imposes a positive duty on States to do everything reasonably in their power to stop ongoing international humanitarian law violations and to prevent those that are foreseeable.[[114]](#footnote-115) A State should therefore refrain from assisting a party to an armed conflict in any way that might contribute to an international humanitarian law violation, for instance by providing military support to a partner State performing arbitrary arrests in joint operations; and should further strive to ensure respect for the law by taking every possible measure to induce that party to desist from committing violations. A State assisting a party to a conflict to commit international humanitarian law violations towards persons it detains—even outside the State’s territory—would be in breach of this obligation.[[115]](#footnote-116)

35. Moreover, it is a general rule of customary international law that a State is internationally responsible for knowingly aiding and assisting another State in the commission of an internationally wrongful act, when the act would be internationally wrongful if committed by the assisting State itself.[[116]](#footnote-117) In assessing whether a State incurs such responsibility for facilitating the violations by another State against persons detained outside the assisting State’s territory, a number of factors may be relevant, including,  the significance of contribution of the assistance—including the provision of intelligence, equipment, financing, or technical support—towards a violation;  the opposability of the international obligation violated to the assisting State; and the knowledge of the assisting State of the circumstances of the assisted violation; being at  minimum, aware that the support provided would facilitate the commission of a violation. However, it has been advanced that the relevance of this last factor may depend on the gravity of the assisted violation, with the more serious the violation being, the lower the required knowledge threshold that would be appropriate.[[117]](#footnote-118) In cases when the detaining State breaches a peremptory norm—e.g. by systematically subjecting detainees to arbitrary detention or torture, or violating their fundamental fair trial rights—[[118]](#footnote-119)an assisting State might be considered responsible for aiding and assisting in the commission of an international wrongful act even if it was not shown to have actual or near certain knowledge of the violation, on basis instead of a presumption of knowledge.[[119]](#footnote-120) When assistance is provided to a non-State actor carrying out the detention and the aforementioned conditions have been met, international responsibility may likewise arise if that actor’s actions can be attributed to a State.[[120]](#footnote-121)

V. Conclusions and recommendations

36. **While there are situations that may require States to resort to extraterritorial detention, such measures bear a high risk of being implemented without the due protection of law, notably with respect to sufficiency of judicial oversight, with commensurate impact on the integrity of the judiciary. Whether undertaken in the context of counterterrorism or other law enforcement and intelligence operations, or during armed conflict, extraterritorial detention has often led to human rights violations such as arbitrary and unlawful deprivation of liberty, as well as torture and other forms of ill-treatment. Furthermore, some States operating outside their borders have transferred to other States persons whom they detained without satisfying the substantive and procedural requirements of the principle of *non-refoulement*, thereby exposing these persons to real risks of human rights violations. In other cases, States have facilitated detentions outside their territory by third parties without appropriate procedural safeguards and judicial guarantees required by international law, thus contributing significantly to risks of human rights violations. In order to ensure that extraterritorial detention does not compromise the integrity of the judicial system and to facilitate provision of effective remedies for human rights violations suffered in the course of such detention, a number of measures are recommended:**

37. **States should recognize and ensure that their human rights obligations apply to, and are fully enjoyed, by all persons under the effective control of their agents, wherever located in the world, including with respect to persons detained extraterritorially in the context of armed conflict.**

38. **Detention carried out outside of States’ borders, including in situations of armed conflict or emergency, must be under effective control of a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary. In relation to administrative detention, States should also ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees. Detained persons have a right to institute proceedings to challenge unlawful or arbitrary detention.**

39. **Victims of human rights violations in extraterritorial detention should be provided with judicial remedies and adequate, effective and prompt reparation proportionate to the gravity of the violations and the harm suffered.**

40. **Extraterritorial detention by intelligence services should be governed by law, and must be in conformity with international law. To ensure accountability, such detention should be subject to effective independent review and oversight mechanisms with access to all relevant information.**

41. **States should adopt all necessary measures to prohibit secret detention and other forms of unofficial detention in any territory under their jurisdiction.**

42. **States must ensure that independent institutions promptly investigate any allegations of secret detention, enforced disappearance and of unlawful acts committed in the context of extraterritorial detention.**

43. **All necessary measures should be adopted by States to prevent the recurrence of violations related to extraterritorial detention, in particular by providing adequate training and clear guidance to its personnel and contract employees, including with respect to access to judicial and administrative remedies, in line with their obligations under international law.**

44. **States should ensure the registration of all detainees held by them, in any territory, and the maintenance of appropriate records in all circumstances.**

45. **Independent and impartial mechanisms should have timely access to all places where persons are deprived of their liberty at all times. States that have not already done so, should consider ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

46. **States must comply with the principle of *non-refoulement* at all times and with respect to all persons they detain. Accordingly, they should:**

(a) **conduct individualized risk assessments prior to transfers and desist from transfers to an authority in whose hands the detainee would face a real risk of torture, cruel, inhuman or degrading treatment or punishment or other irreparable harm, or who may in turn transfer them into a situation of such risk;**

(b) **ensure that detainees have the possibility effectively to challenge decisions of *refoulement* before competent administrative and judicial authorities;**

(c) **as recommended by the Committee against Torture, only rely on diplomatic assurances provided by States which do not systematically subject detainees to torture, ill-treatment or other violations of human rights, and after a thorough examination of the merits of each individual case to ensure that relevant assurances are effective to address real risks of harm;**

(d) **establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.**

47. **States engaging in extraterritorial armed conflict should, to the fullest extent possible, implement the following mitigating measures to preserve the integrity of the judicial system and prevent violations of international law:**

(a) **Plan in advance of operations to ensure that procedures will be set in place and that personnel deployed will be sufficient in number, adequately resourced, and with training and expertise necessary to operate detention facilities in conformity with norms and standards under international human rights law and international humanitarian law.**

(b) **Agree upon and maintain any detainee transfer procedures and effective subsequent monitoring of treatment by the transferring State in order to fully conform with the principle of *non*-*refoulement*.**

(c) **Establish binding agreements with the host State and other relevant States setting out legal parameters for detention that correspond with the requirements of international law, including access to effective remedies for violations of human rights.**

48. **In cooperating with third parties in activities involving detention, including detention of migrants and security detention, States should:**

(a) **prior to the start of cooperation, conduct human rights risk assessments, examining the impact their co-operation activities may have on the human rights of detainees including protection from *refoulement*;**

(b) **develop risk mitigation strategies, which should clearly set out the steps that will be taken to ensure that human rights violations do not occur and suspend the implementation of planned co-operation activities when risks of human rights violations cannot be sufficiently mitigated;**

(c) **subject co-operation activities to independent mechanisms to monitor their impact on the enjoyment of human rights of those affected and immediately suspend co-operation if it is shown that these activities have a detrimental human rights impact;**

(d) **ensure that persons potentially affected by co-operation activities have access to an effective system of redress, including before courts of competent jurisdiction.**

49. **The High Commissioner encourages all relevant stakeholders, including human rights mechanisms to continue to consider, within their respective mandates, the human rights impacts of deprivation of liberty carried out or facilitated by States outside their own territory.**

1. \* The present report was submitted after the deadline in order to reflect the most recent information. [↑](#footnote-ref-2)
2. A/HRC/RES/37/3, para.15. [↑](#footnote-ref-3)
3. Submissions were received from El Salvador, Italy, Jordan, Kyrgyzstan, Romania, Russian Federation; as well as from the Ukrainian Parliament Commissioner for Human Rights, UNODC, Physicians for Human Rights and the At-sik-hata Nation of Yamassee Moors. [↑](#footnote-ref-4)
4. See, CCPR/C/21/Rev1/Add.13, para.10. See also CCPR/C/GC/35, para.63; CCPR/C/GC/36, para.63. [↑](#footnote-ref-5)
5. See, e.g., A/HRC/4/40, paras.33,35,37; A/HRC/42/40, para.56; CAT/C/USA/CO/2, paras.16,17. [↑](#footnote-ref-6)
6. E.g., CCPR/C/USA/4, para.5; Human Rights Committee, Draft General Comment No. 35: Comments by the Government of Canada, 6 October 2014, para.7. [↑](#footnote-ref-7)
7. *Amnesty International Canada v. Canada (Canadian Forces)* [2008] F.C.J. No. 356; 2008 FC 336; *Adalah v Minister of Defense* 827605 (2006) HCJ 8276/05 (Isr), para. 22; Kaunda v President of South Africa and ors, Appeal to Constitutional Court, Case CCT 23/04, [2004] ZACC 5, ILDC 89 (ZA 2004), 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC), (2005) 44 ILM 173, (2009) 136 ILR 452, 4 August 2004, South Africa; Constitutional Court [CC]. [↑](#footnote-ref-8)
8. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p.136, paras.108-113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p.168, para.216. [↑](#footnote-ref-9)
9. CCPR/C/21/Rev1/Add.13, para.10; CAT/C/GC/2, para. 16. [↑](#footnote-ref-10)
10. A/HRC/22/44 para.38; A/HRC/19/57/Add.2 para.94; CCPR/C/21/Rev.1/Add.6 para. 8. [↑](#footnote-ref-11)
11. CCPR/C/GC/35, para.63; CCPR/C/USA/CO/3, paras.12,18. [↑](#footnote-ref-12)
12. General Comment No.35, CCPR/C/GC/35, para.15. [↑](#footnote-ref-13)
13. *Ibid.* [↑](#footnote-ref-14)
14. A/HRC/13/42, para.286. [↑](#footnote-ref-15)
15. A/HRC/13/42, paras.98-164. [↑](#footnote-ref-16)
16. A/HRC/13/42, para.8. [↑](#footnote-ref-17)
17. Ibid., paras.17,36. See also CCPR/C/21/Rev.1/Add.11, para.13(b). [↑](#footnote-ref-18)
18. CCPR/C/21/Rev.1/Add.11, para.16; CCPR/C/GC/35, para.67. [↑](#footnote-ref-19)
19. Articles 9(1), 9(4) ICCPR; CCPR/C/GC/35, para.46. See A/HRC/13/42, paras.18-19. [↑](#footnote-ref-20)
20. Articles 9(2), 9(3),14 ICCPR; A/HRC/13/42, paras.24-27. Fundamental requirements of fair trial must be respected even during a state of emergency, CCPR/C/21/Rev.1/Add.11, para.16. [↑](#footnote-ref-21)
21. A/HRC/13/42, para.28; A/RES/47/133, OP 1. See also, CCPR/C/GC/35, para.17. [↑](#footnote-ref-22)
22. As defined in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. [↑](#footnote-ref-23)
23. A/HRC/19/58/Rev.1, para.42. [↑](#footnote-ref-24)
24. A/RES/60/148, para. 11; CCPR/C/114/D/2038/2011, para.10.6; CAT/C/USA/CO/2, paras.17-18. [↑](#footnote-ref-25)
25. CCPR/C/19/D/107/1981, para.14. [↑](#footnote-ref-26)
26. Articles 17(1) and 23(1) ICCPR. [↑](#footnote-ref-27)
27. A/HRC/42/40, paras.46,56,69,92; A/HRC/39/46, para.136. [↑](#footnote-ref-28)
28. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 Harv. Hum. Rts. J. 123,127 (2006); International Commission of Jurists, *Assessing Damage, Urging Action,* Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Geneva, 2009, p. 80. See also, A/HRC/13/42, para.36. [↑](#footnote-ref-29)
29. *Husayn (Abu Zubaydah) v. Poland*, ECtHR, Application No. 7511/13, 24 July 2014, para.452. [↑](#footnote-ref-30)
30. *Savriddin Dzhurayev v. Russia*, ECtHR, Application No. 38124/07, 25 April 2013, para.205. [↑](#footnote-ref-31)
31. Articles 9(1), 9(4) ICCPR; Mr. Ibn al-Shaykh al-Libi and 25 other persons v. United States, U.N. Working Group on Arbitrary Detention, Opinion No. 29/2006, A/HRC/4/40/Add.1, paras. 13,17,22; Silvia Borelli, *Extraordinary Rendition, Counter-Terrorism and International Law* in Ben Saul (ed.), Research Handbook on International Law and Terrorism 361, 364 (2014). [↑](#footnote-ref-32)
32. Ibid. [↑](#footnote-ref-33)
33. Articles 7, 10(1), 14, 16 ICCPR; CCPR/C/GC/35, para.56; CAT/C/GC/2, para.13; CCPR/C/USA/CO/4, para.21; CAT/C/USA/CO/2, para.22. [↑](#footnote-ref-34)
34. *El-Masri v Macedonia*, App. No. 39630/09 (ECtHR [GC], 13 December 2012), para.240. [↑](#footnote-ref-35)
35. CAT/C/USA/CO/3-5, para.11. [↑](#footnote-ref-36)
36. CAT/C/AZE/CO/3, para.22. [↑](#footnote-ref-37)
37. CAT/C/USA/CO/2, para.20; CCPR/C/88/D/1416/2005, para.11.5. [↑](#footnote-ref-38)
38. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3(1); CCPR/C/21/Rev.1/Add.11, para.12. [↑](#footnote-ref-39)
39. CCPR/C/GC/36, paras.30-31. [↑](#footnote-ref-40)
40. CCPR/C/GC/35, para.57. [↑](#footnote-ref-41)
41. CPR/C/21/Rev.1/Add.13 para.12; CAT/C/GC/4, paras.9-17. [↑](#footnote-ref-42)
42. CAT/C/GC/4, para.29. [↑](#footnote-ref-43)
43. CAT/C/USA/CO/2, para.20. [↑](#footnote-ref-44)
44. CAT/C/GC/4, para.20. [↑](#footnote-ref-45)
45. Ibid.,para. 21. [↑](#footnote-ref-46)
46. Eg. CCPR/C/USA/CO/4, para.21; CAT/C/USA/CO/2, para.22. [↑](#footnote-ref-47)
47. A/RES/60/147. [↑](#footnote-ref-48)
48. *El*-*Masri v*. *United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 552 U.S. 947 (2007); *El-Masri, supra* note 33, at para.191. [↑](#footnote-ref-49)
49. Articles 5,7, 12 CAT; A/RES/60/147, para.4. See also article 2 of ICCPR. [↑](#footnote-ref-50)
50. CAT/C/GBR/CO/5, para. 15; CAT/C/USA/CO/3-5, para.12. [↑](#footnote-ref-51)
51. E.g., *El-Masri, supra* note 47, paras.186-194. [↑](#footnote-ref-52)
52. CCPR/C/USA/CO/4, para.5; Borelli, *supra* note 30, p.372. [↑](#footnote-ref-53)
53. ICCPR, Article 4. CCPR/C/21/Rev.1/Add.11. [↑](#footnote-ref-54)
54. A/HRC/22/44 paras.51,75. [↑](#footnote-ref-55)
55. CCPR/C/21/Rev.1/Add.11, para.16. [↑](#footnote-ref-56)
56. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p.226; *The Wall case*, *supra* note 7, p.136; *Armed Activities case, supra* note 7, p.168. CCPR/C/21/Rev.1/Add.11, para. 3; CCPR/C/21/Rev.1/Add.13, para. 11; CCPR/C/GC/35, para.64. [↑](#footnote-ref-57)
57. With regard to detention in international armed conflicts are specified in the Geneva Conventions of 1949 (Geneva Conventions), First Additional Protocol of 1977 (Additional Protocol I) and customary international law. For detention in non-international armed conflicts see Common Article 3 of the Geneva Conventions, Second Additional Protocol of 1977 (Additional Protocol II), and customary international law. [↑](#footnote-ref-58)
58. E.g. CCPR/C/USA/4, 22 May 2012, paras.506–509; Working Group on Arbitrary Detention, The Draft Basic Principles: Comments by the Government of Australia, 17 March 2015, paras.4–6. [↑](#footnote-ref-59)
59. CRC/C/OPAC/USA/CO/2, para.37; ICRC, Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012-13, Background Paper, 2013, p.6-7. [↑](#footnote-ref-60)
60. CAT/C/USA/CO/2, para.16. [↑](#footnote-ref-61)
61. See. paras.20-23. [↑](#footnote-ref-62)
62. Such non-criminal detention for security reasons is sometimes also referred to as ‘administrative’ or ‘security detention’. [↑](#footnote-ref-63)
63. Third Geneva Convention, Article 4. [↑](#footnote-ref-64)
64. See para 28 below. [↑](#footnote-ref-65)
65. CCPR/C/GC/35, para.64. [↑](#footnote-ref-66)
66. Third Geneva Convention, Article 21(1). [↑](#footnote-ref-67)
67. Fourth Geneva Convention, Articles 64,68. [↑](#footnote-ref-68)
68. Protected persons are those protected by The Fourth Geneva Convention as defied in Article 4 thereto. [↑](#footnote-ref-69)
69. Fourth Geneva Convention, Articles 76(1),78(1). [↑](#footnote-ref-70)
70. ICRC, Commentary on the First Geneva Convention, 2016, para.720. [↑](#footnote-ref-71)
71. Serdar Mohammed v. Secretary of State for Defence[2015] EWCA(Civ) 843. See also, Al-Waheed v. Ministry of Defence [2017] UKSC 2. [↑](#footnote-ref-72)
72. ICCPR, Article 9; CCPR/C/GC/35, para.11. [↑](#footnote-ref-73)
73. The Third Geneva Convention 1949, Articles 5(2),21(1),118; The Fourth Geneva Convention of 1949, Articles 42,43,78,132(1),133(1); First Additional Protocol, Article 75(3). [↑](#footnote-ref-74)
74. ICRC, *Internment in Armed Conflict: Basic Rules and Challenges*, Opinion Paper (2014), pp.6-8. [↑](#footnote-ref-75)
75. CAT/C/USA/CO/3-5, para.14; MINSUMA, “Human Rights and the Peace Process in Mali (January 2016 –June 2017)”, 2018, para. 103; ICRC, *supra* note 58, p.10. [↑](#footnote-ref-76)
76. CCPR/C/GC/35, para.15; The Fourth Geneva Convention, Article 78(1). [↑](#footnote-ref-77)
77. A/HRC/37/42, para.17-18; CCPR/C/ISR/CO/4, para. 10; CAT/C/ISR/CO/5, paras. 22–23; OHCHR, Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine 13 September 2017 to 30 June 2018 (OHCHR Crimea Thematic Report), para.30. [↑](#footnote-ref-78)
78. OHCHR Crimea Thematic Report, paras.29,32-35. [↑](#footnote-ref-79)
79. Ibid., paras.18-19; OHCHR, Report on the human rights situation in Ukraine from 16 May to 15 August 2018, para.109. [↑](#footnote-ref-80)
80. The Fourth Geneva Convention, Articles 64,67,70. [↑](#footnote-ref-81)
81. OHCHR Crimea Thematic Report, para.21. [↑](#footnote-ref-82)
82. A/HRC/37/42, paras 28-29. [↑](#footnote-ref-83)
83. A/73/907–S/2019/509, para.86; UNICEF, Annual CAAC Bulletin 2018: Israel & the State of Palestine, p.5-6. [↑](#footnote-ref-84)
84. OHCHR Crimea Thematic Report, paras.22-25. [↑](#footnote-ref-85)
85. Ibid., para.26. [↑](#footnote-ref-86)
86. UNICEF Bulletin, *supra* note 82. [↑](#footnote-ref-87)
87. OHCHR, Report on the human rights situation in Ukraine from 16 February to 15 May 2019, para. 102. [↑](#footnote-ref-88)
88. Articles 12(2)-(3) (regarding transfer of POWs); The Fourth Geneva Convention, Article 45(2) (concerning transfer of protected persons detained in the territory of the State). [↑](#footnote-ref-89)
89. The Fourth Geneva Convention, Articles 49(1), 76(1). [↑](#footnote-ref-90)
90. Arguably, however, Common Article 3 prohibits transfer to another State when there are substantial grounds to believe that this will result in ill-treatment or arbitrarily deprivation of life. See, ICRC, Commentary on the First Geneva Convention, 2016, para.708. [↑](#footnote-ref-91)
91. CAT/C/GC/4, para.18. [↑](#footnote-ref-92)
92. Ibid, para.12; CAT/C/GBR/CO/5, para.19. [↑](#footnote-ref-93)
93. E.g., A/HRC/34/36, para.18; OHCHR, Report on the human rights situation in Ukraine 16 August to 15 November 2019, para.97. [↑](#footnote-ref-94)
94. E.g., CED/C/FRA/CO/1, para.28; CAT/C/CAN/CO/6, para.11. [↑](#footnote-ref-95)
95. Cordula Droege, *Transfers of detainees: legal framework, non-refoulement and contemporary challenges*, Int’l Rev. Red Cross, *90*(871), 669, 683 (2008). [↑](#footnote-ref-96)
96. OHCHR Crimea Thematic Report, paras.3, 7. [↑](#footnote-ref-97)
97. CCPR/C/USA/CO/4, para.5. [↑](#footnote-ref-98)
98. CAT/C/GBR/CO/5, paras.15-16; CCPR/C/GBR/CO/7, para.9. [↑](#footnote-ref-99)
99. E.g., CAT/C/USA/CO/3-5, para.13. [↑](#footnote-ref-100)
100. A/HRC/37/50, para.8; CAT/C/AUS/4-5, para.17; CCPR/C/AUS/CO/6, para.35; CAT/C/ITA/CO/5-6, para.22. [↑](#footnote-ref-101)
101. A/HRC/10/3, paras.47-57; A/HRC/42/17, paras.70, 79. [↑](#footnote-ref-102)
102. International Law Commission, Articles on Responsibility of States for International Wrongful Acts (Articles of State Responsibility), Article 5. [↑](#footnote-ref-103)
103. CCPR/C/GC/35, para.8. [↑](#footnote-ref-104)
104. Ibid., para.63; CCPR/C/GC/36, para.63. [↑](#footnote-ref-105)
105. ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, 26 February 2007, paras.391-393. [↑](#footnote-ref-106)
106. CCPR/C/21/Rev1/Add.13, para.10. [↑](#footnote-ref-107)
107. CCPR/C/GC/36, para. 63; *Al-Skeini v. United Kingdom*, App. No. 55721/07, 7 July 2011, para 142. [↑](#footnote-ref-108)
108. Supra note 105, Article 8. [↑](#footnote-ref-109)
109. *Genocide case*, *supra* note 104, para.400. [↑](#footnote-ref-110)
110. CCPR/C/AUS/CO/6, para.35. [↑](#footnote-ref-111)
111. See, Miles Jackson, *Freeing Soering*: The ECHR State Complicity in Torture and Jurisdiction, 27(3) Eur. J. Int’l L. 817 (2016); Magdalena Pacholska, *Complicity and the Law of International Organizations*, Edward Elgar 2020(forthcoming), Chapter 7, para.6. [↑](#footnote-ref-112)
112. CCPR/C/GC/36, paras.22 and 63. [↑](#footnote-ref-113)
113. 2016 ICRC Commentary to the First Geneva Conventions, paras.154,158; ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para.220. [↑](#footnote-ref-114)
114. ICRC Commentary ibid., at para.164. [↑](#footnote-ref-115)
115. Ibid. para.160. [↑](#footnote-ref-116)
116. Articles of State Responsibility, Article 16; *Genocide case*, *supra* note 104, para.420. [↑](#footnote-ref-117)
117. International Law Commission, Commentary, Articles of State Responsibility, Article 16; ICRC Commentary ibid., at para.160; Magdalena Pacholska, *Complicity and the Law of International Organizations*, Edward Elgar 2020(forthcoming), Chapter 4.c.; Crawford, *State Responsibility: The General Part*, Cambridge University Press 2013, p.408; Stefan Talmon, ‘A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority’ in Iraq in Phil Shiner, Andrew Williams (eds), *The Iraq War and International Law* (Bloomsbury 2008); Marco Sassòli, ‘State responsibility for violations of international humanitarian law’ (2002) 846 IRRC, p.413 [↑](#footnote-ref-118)
118. CCPR/C/21/Rev.1/Add.11, paras.11,16; CCPR/C/GC/35, paras.66-68. [↑](#footnote-ref-119)
119. Articles of State Responsibility, Article 41(2); Commentary, *supra* note 119, Article 41, para.11. [↑](#footnote-ref-120)
120. See para.30 above. [↑](#footnote-ref-121)