



General Assembly

Distr.: General
24 July 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*

Summary

In the present report, submitted pursuant to Human Rights Council resolution 37/3, the United Nations 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.

* The present report was submitted after the deadline in order to reflect the most recent information.



I. Introduction

1. In its resolution 37/3 regarding the integrity of the judicial system, the Human Rights Council requested the United Nations High Commissioner for Human Rights, in consultation with States, relevant United Nations 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 submitted at its forty-third session.¹ In preparing the report, contributions were sought from Member States and other relevant stakeholders.² In addition, the High Commissioner draws on a range of public sources.

2. The integrity of the judicial system, together with its independence and impartiality, is an essential prerequisite to protecting human rights and fundamental freedoms, 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 rights 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. The Human Rights Committee has stated that States parties to the International Covenant on Civil and Political Rights are required by article 2 (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.³

3. In the present report, the High Commissioner examines different types of extraterritorial detention that may have an impact on 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 on the integrity of the judicial system of extraterritorial detention outside of armed conflict

4. In the course of law enforcement, intelligence gathering and counter-terrorism operations outside of armed conflict, some States have sometimes resorted to detaining individuals outside their territory.⁴ 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 treaties⁵ and opined that human rights protections established in domestic constitutional law are not necessarily applicable abroad,⁶ 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

¹ Human Rights Council resolution 37/3, para. 15.

² Submissions were received from El Salvador, Italy, Jordan, Kyrgyzstan, Romania and the Russian Federation, as well as from the Ukrainian Parliament Commissioner for Human Rights, the United Nations Office on Drugs and Crime, Physicians for Human Rights and the At-sik-hata Nation of Yamassee Moors.

³ General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10. See also general comments No. 35 (2014) on liberty and security of person, para. 63; and No. 36 (2018) on the right to life, para. 63.

⁴ See, e.g., A/HRC/4/40, paras. 33, 35 and 37; A/HRC/42/40, para. 56; CAT/C/USA/CO/2, paras. 16–17.

⁵ See, e.g., CCPR/C/USA/4, para. 5; “Human Rights Committee, draft general comment No. 35: article 9: liberty and security of person – comments by the Government of Canada”, 6 October 2014, para. 7.

⁶ Federal Court of Appeal, *Amnesty International Canada v. Canada (Canadian Forces)*, Case No. [2009] 4 F.C.R. 149, 17 December 2008; High Court of Justice, *Adalah Legal Center for Arab Minority Rights in Israel and others v. Minister of Defense and State of Israel*, Case No. 8276/05 (2006), 12 December 2006, para. 22; Constitutional Court, *Kaunda v. President of South Africa and others*, Case No. CCT 23/04, 4 August 2004.

jurisdiction outside its own territory.⁷ 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 a party and from otherwise applicable rules of international law.⁸ The prohibitions of arbitrary deprivation of life, of torture and cruel, inhuman or degrading treatment, of arbitrary deprivation of liberty and 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.⁹ 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.¹⁰

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.¹¹ The burden to prove such justification rests with the detaining authority and increases with the length of the detention. Furthermore, the 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. The 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 the disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.¹²

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.¹³ In a joint study on global practices in relation to secret detention,¹⁴ five special procedure 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 might 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. Secret detentions and extraordinary renditions, two practices expressly mentioned by the Human Rights Council in its resolution 37/3, present specific challenges for the integrity of the judicial system when conducted by States operating outside their national territory.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, paras. 108–113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, para. 216.

⁸ Human Rights Committee, general comment No. 31, para. 10; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 16.

⁹ A/HRC/22/44, para. 38; A/HRC/19/57/Add.2, para. 94; and Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, para. 8.

¹⁰ Human Rights Committee, general comment No. 35, para. 63; CCPR/C/USA/CO/3, paras. 12 and 18.

¹¹ Human Rights Committee, general comment No. 35, para. 15.

¹² *Ibid.*

¹³ A/HRC/13/42, para. 286.

¹⁴ *Ibid.*, paras. 98–164.

A. 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.¹⁵ As noted in the joint study by special procedures, 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.¹⁶

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 the detention, a right that is essential to the protection of non-derogable rights,¹⁷ secret detention violates the right to personal liberty and security and the prohibition of arbitrary detention.¹⁸ When used to circumvent criminal proceedings, secret detention further entails a violation of the right to a fair trial.¹⁹ In the joint study, it was concluded that every instance of secret detention also constitutes an enforced disappearance. This amounts to a grave and flagrant human rights violation²⁰ 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”.²¹ As such, it violates the right to recognition as a person before the law.²² Furthermore, the General Assembly and United Nations 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 detainee²³ or of the family members on whom it inflicts suffering.²⁴ It may also entail violations of the protection of the family.²⁵

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 Working Group on Enforced or Involuntary Disappearances has observed that extraterritorial detention by its very nature heightens the risk of disappearance and renders it especially difficult for detainees’ families and legal representatives to obtain information about their whereabouts or to secure remedies or reparations.²⁶

B. Extraordinary rendition 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 the apprehension of a person often sponsored by one State in the territory of another State, with or without the latter State’s cooperation, and the subsequent extrajudicial transfer of the person from the territory in which the person was abducted to another State for detention

¹⁵ Ibid., para. 8.

¹⁶ Ibid., paras. 17 and 36. Human Rights Committee, general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 13 (b).

¹⁷ Human Rights Committee, general comments No. 29, para. 16, and No. 35, para. 67.

¹⁸ International Covenant on Civil and Political Rights, art. 9 (1) and (4); Human Rights Committee, general comment No. 35, para. 46. A/HRC/13/42, paras. 18–19.

¹⁹ A/HRC/13/42, paras. 24–27. International Covenant on Civil and Political Rights, arts. 9 (2)–(3) and 14. The fundamental requirements of a fair trial must be respected even during a state of emergency (Human Rights Committee, general comment No. 29, para. 16).

²⁰ A/HRC/13/42, para. 28; General Assembly resolution 47/133, para. 1; Human Rights Committee, general comment No. 35, para. 17.

²¹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

²² A/HRC/19/58/Rev.1, para. 42.

²³ General Assembly resolution 60/148, para. 11; *Tharu and others v. Nepal* (CCPR/C/114/D/2038/2011), para. 10.6; CAT/C/USA/CO/2, paras. 17–18.

²⁴ Human Rights Committee, *Quinteros Almeida v. Uruguay*, communication No. 107/1981, para. 14.

²⁵ International Covenant on Civil and Political Rights, arts. 17 (1) and 23 (1).

²⁶ A/HRC/42/40, paras. 46, 56, 69 and 92; A/HRC/39/46, para. 136.

and interrogation.²⁷ Since such actions deliberately circumvent due process safeguards and are conducted without recourse to the 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.²⁸ Other practices whereby States bypass ordinary legal procedures by detaining or abducting persons outside their territory and extrajudicially transferring them to face trial elsewhere have been similarly criticized by the European Court.²⁹ According to the Working Group on Arbitrary Detention, every case of apprehension and transfer of individuals occurring outside the confines of any legal procedure and without providing the individual access to counsel or to any judicial body to contest the transfer amounts to a violation of the prohibition of arbitrary and unlawful detention.³⁰ To the extent that an individual is subsequently detained outside the normal legal framework in the receiving State, the right to liberty and the prohibition of arbitrary detention are also necessarily violated.³¹ 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 the recognition as a person before the law, and a violation of the prohibition on torture and other ill-treatment.³² 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.³³

12. Additionally, the extraterritorial and extrajudicial nature of such practices is conducive to coercive interrogations, in many instances amounting to torture and ill-treatment.³⁴ 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 assessment procedure. The Human Rights Committee and the Committee against Torture have found that extraordinary rendition is often accompanied by a risk of torture³⁵ and implicates the principle of non-refoulement.³⁶ 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-treatment,³⁷ that their right to life would be violated³⁸ or that their liberty and security of person would be violated in a manner amounting to inhuman treatment.³⁹ The principle also prohibits the transfer of a person to a State when it is foreseen that that State will in turn transfer the person to a third State where there are substantial grounds for believing that there is a real risk of irreparable harm.⁴⁰ In evaluating this risk, States should consider a

²⁷ https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1249&context=faculty_articles; www.icj.org/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf, p. 80; A/HRC/13/42, para. 36.

²⁸ European Court of Human Rights, *Husayn (Abu Zubaydah) v. Poland* (application No. 7511/13), 24 July 2014, para. 452.

²⁹ *Ibid.*, *Savriiddin Dzhurayev v. Russia* (application No. 71386/10), 25 April 2013, para. 205.

³⁰ A/HRC/4/40/Add.1, paras. 13, 17 and 22; International Covenant on Civil and Political Rights, art. 9 (1) and (4); Silvia Borelli, "Extraordinary rendition, counter-terrorism and international law" in *Research Handbook on International Law and Terrorism*, Ben Saul, ed. (Edward Elgar, 2014), pp. 361 and 364.

³¹ Borelli, "Extraordinary rendition", pp. 361 and 364.

³² Human Rights Committee, general comment No. 35, para. 56; Committee against Torture, general comment No. 2, para. 13; CCPR/C/USA/CO/4, para. 21; CAT/C/USA/CO/2, para. 22; International Covenant on Civil and Political Rights, arts. 7, 10 (1), 14 and 16.

³³ European Court of Human Rights, *El-Masri v. the former Yugoslav Republic of Macedonia* (application No. 39630/09), 13 December 2012, para. 240.

³⁴ CAT/C/USA/CO/3-5, para. 11.

³⁵ CAT/C/AZE/CO/3, para. 22.

³⁶ CAT/C/USA/CO/2, para. 20; *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.5.

³⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 (1); Human Rights Committee, general comment No. 31, para. 12.

³⁸ Human Rights Committee, general comment No. 36, paras. 30–31.

³⁹ *Ibid.*, general comment No. 35, para. 57.

⁴⁰ *Ibid.*, general comment No. 31, para. 12; Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, paras. 9–17.

number of human rights situations that may constitute an indication of risk of torture.⁴¹ Furthermore, according to the Committee against Torture, the person being transferred must be given a possibility to challenge the transfer.⁴² Diplomatic assurances and other guarantees assuring that a person will not be tortured or suffer other irreparable harm upon transfer are not, in 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.⁴³ Such assurances should be accompanied by a prior thorough examination of the merits of each individual case and be obtained following clear procedures, with adequate judicial mechanisms for review and effective monitoring mechanisms in place to assess whether they have been honoured.⁴⁴

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 of the right to a remedy through the use of that system. 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.⁴⁵ While victims of such violations of human rights are entitled to reparations and effective remedy,⁴⁶ attempts to obtain remedies through domestic civil and criminal judicial proceedings have been hampered because key information was deemed a State secret or otherwise too sensitive to disclose.⁴⁷ In accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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.⁴⁸ 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.⁴⁹ In some cases, States have been reticent to prosecute agents who allegedly perpetrated violations in the course of extraterritorial detention⁵⁰ or to surrender their own agents for such prosecution in other jurisdictions. On other occasions, criminal charges have been brought against only a limited number of low-level operatives.⁵¹

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

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 International Covenant on Civil and Political Rights must be of an exceptional and temporary nature and subject to a number of strict conditions.⁵² Furthermore, some peremptory norms, including the prohibition on arbitrary detention, cannot be derogated from,⁵³ and procedural rights

⁴¹ Committee against Torture, general comment No. 4, para. 29.

⁴² CAT/C/USA/CO/2, para. 20.

⁴³ Committee against Torture, general comment No. 4, para. 20.

⁴⁴ CAT/C/USA/CO/2, para. 21.

⁴⁵ See, e.g., CCPR/C/USA/CO/4, para. 21; CAT/C/USA/CO/2, para. 22.

⁴⁶ General Assembly resolution 60/147, annex.

⁴⁷ Court of Appeals, Fourth Circuit, *El-Masri v. United States*, Case No. 06-1667, 2 March 2007; *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 191.

⁴⁸ Arts. 5, 7 and 12. General Assembly resolution 60/147, annex, para. 4; International Covenant on Civil and Political Rights, art. 2.

⁴⁹ CAT/C/GBR/CO/5, para. 15; CAT/C/USA/CO/3-5, para. 12.

⁵⁰ See, e.g., *El-Masri v. The Former Yugoslav Republic of Macedonia*, paras. 186–194.

⁵¹ CCPR/C/USA/CO/4, para. 5; Borelli, “Extraordinary rendition”, p. 372.

⁵² International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, general comment No. 29.

⁵³ A/HRC/22/44, paras. 51 and 75.

instrumental to the effective protection of non-derogable rights, such as the right to take proceedings before a court to review the lawfulness of detention and fundamental requirements of the right to fair trial, must also be respected in all circumstances.⁵⁴ 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.⁵⁵ These include provisions regulating detention in armed conflict and protecting detainees, inter alia, by means of procedural safeguards and judicial guarantees.⁵⁶ Despite the consistent position of international and regional courts and human rights mechanisms that international human rights law remains applicable in this context, some States continue to dispute the extent of its applicability in armed conflict and its interplay with international humanitarian law. This can give rise to the concern that applicable human rights obligations may not be adequately respected.⁵⁷ This comprehensive legal framework notwithstanding, extraterritorial detention in the context of armed conflict raises a number of concerns regarding human rights and the integrity of the judicial system.

A. Factors detrimental to the integrity of the judicial system

15. While detention in peacetime is generally implemented by State law enforcement agencies and overseen by civilian courts, detention in the context of armed conflict is often carried out by State 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 concerns 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 carry out detention operations in extraterritorial conflict zones may lack sufficient expertise or training (e.g., regarding the 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.⁵⁸

17. Further problems may arise when detaining authorities operating extraterritorially lack the information and means necessary to facilitate family links and other contacts. Failure to record the personal details of detainees⁵⁹ makes it more difficult to track them and to inform their families of their whereabouts and well-being. Because of the often transitory nature of extraterritorial detention facilities and security concerns resulting from proximity to battle zones, humanitarian agencies may also have limited access to detainees. The absence of records and lack of contact with places outside of the detention facility increase the risk of human rights violations, including enforced disappearances, as

⁵⁴ Human Rights Committee, general comment No. 29, para. 16.

⁵⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996; Legal Consequences of the Construction of a Wall; Armed Activities on the Territory of the Congo*; Human Rights Committee, general comments No. 29, para. 3; No. 31, para. 11; and No. 35, para. 64.

⁵⁶ With regard to detention in international armed conflicts, see the Geneva Conventions of 12 August 1949, Protocol I Additional to the Geneva Conventions and customary international law. For detention in non-international armed conflicts, see common article 3 of the Geneva Conventions, Protocol II Additional to the Geneva Conventions and customary international law.

⁵⁷ See, e.g., CCPR/C/USA/4, paras. 506–509; Comments by the Government of Australia on the draft Basic Principles of the Working Group on Arbitrary Detention, 17 March 2015, paras. 4–6.

⁵⁸ CRC/C/OPAC/USA/CO/2, para. 37; International Committee of the Red Cross (ICRC), “Strengthening legal protection for persons deprived of their liberty in relation to non-international armed conflict: regional consultations 2012–13”, background paper, 2013, pp. 6–7.

⁵⁹ CAT/C/USA/CO/2, para. 16.

detainees in such contexts have reduced access to medical and educational services, for example, and to 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 (see paras. 20–23 below), for belligerent parties to detain individuals in order to prevent a security threat from materializing⁶⁰ or to hold them as prisoners of war solely because of their status as combatants, irrespective of their actual conduct.⁶¹ Additionally, armed conflicts frequently involve transfers of detainees between co-belligerents, 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 lower levels of human rights protection (see para. 28).

B. Lack of a legal basis or defined grounds and procedures for extraterritorial detention

19. While detention that is authorized, and that is consistent with international humanitarian law, is in principle not arbitrary,⁶² extraterritorial detention in armed conflict when carried out without a 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 authorizes status-based extraterritorial internment of combatants as prisoners of war⁶³ and permits the criminal detention⁶⁴ and internment of protected persons⁶⁵ in occupied territory when deemed necessary for imperative security reasons.⁶⁶ 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,⁶⁷ this position is not unanimous.⁶⁸

20. In any event, the prohibition on arbitrary deprivation of liberty requires that, in all circumstances, detention be implemented pursuant to substantive grounds and appropriate procedures established by law.⁶⁹ With respect to international armed conflicts, international humanitarian law specifies permitted grounds for detention and procedures to ensure that those grounds are met.⁷⁰ However, as international humanitarian law does not itself establish specific grounds and procedures for extraterritorial internment in non-international armed conflicts,⁷¹ such detention would be arbitrary unless relevant grounds and procedures, consistent with international law, are specified in an applicable binding instrument, such as 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

⁶⁰ Such non-criminal detention for security reasons is sometimes also referred to as “administrative detention” or “security detention”.

⁶¹ Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4.

⁶² Human Rights Committee, general comment No. 35, para. 64.

⁶³ Third Geneva Convention, art. 21 (1).

⁶⁴ Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), arts. 64 and 68.

⁶⁵ Protected persons are those protected by the Fourth Geneva Convention as defined in article 4 thereto.

⁶⁶ Fourth Geneva Convention, arts. 76 (1) and 78 (1).

⁶⁷ ICRC, Commentary of 2016 on the First Geneva Convention, para. 720.

⁶⁸ Court of Appeal of the Royal Courts of Justice, *Serdar Mohammed and others v. Secretary of State for Defence*, Case No. [2015] EWCA (Civ) 843, 30 July 2015; Supreme Court, *Abd Ali Hameed Al-Waheed v. Ministry of Defence*, Case No. [2017] UKSC 2, 17 January 2017.

⁶⁹ International Covenant on Civil and Political Rights, art. 9; Human Rights Committee, general comment No. 35, para. 11.

⁷⁰ Third Geneva Convention, arts. 5 (2), 21 (1) and 118; Fourth Geneva Convention, arts. 42–43, 78, 132 (1) and 133 (1); Additional Protocol I, art. 75 (3).

⁷¹ www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges.

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 the 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 a 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 the collection of 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 the arbitrary deprivation of liberty are often lacking in extraterritorial internment during armed conflict. These include the failure to properly notify internees and their families of the reasons for internment or of its expected duration; the absence of independent and impartial mechanisms for challenging the grounds for internment and securing release when internment is not, or is no longer, justified; and the failure to explain proceedings to detainees in a language they understand.⁷²

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

23. Even when a legal basis exists or when 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.⁷³ Examples include situations when a State, acting as an occupying power, detains 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; when there is an absence of prompt and regular review by an independent and impartial tribunal, with appropriate access to independent legal advice; and when there has been no disclosure of, at least, the essence of the evidence on which the decision to detain was taken.⁷⁴ Arbitrary detention in occupied territory has also involved arrests carried out 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.⁷⁵ 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 an occupied territory,⁷⁶ in contravention of the principle of legality and despite the obligation to maintain the penal legislation that is in force in the occupied territory and to apply it in court and the prohibition to arrest, prosecute or convict protected persons for acts committed or opinions expressed prior to the occupation.⁷⁷ Persons prosecuted by the occupying power have also been pressured not to

⁷² CAT/C/USA/CO/3-5, para. 14; <https://minusma.unmissions.org/malgr%C3%A9-la-mise-en-%C5%93uvre-de-l%E2%80%99accord-pour-la-paix-la-situation-des-droits-de-l%E2%80%99homme-demeure>; ICRC, "Strengthening legal protection", p. 10.

⁷³ Human Rights Committee, general comment No. 35, para. 15; Fourth Geneva Convention, art. 78 (1).

⁷⁴ A/HRC/37/42, paras. 17–18; CCPR/C/ISR/CO/4, para. 10; CAT/C/ISR/CO/5, paras. 22–23; A/HRC/39/CRP.4, para. 30.

⁷⁵ A/HRC/39/CRP.4, paras. 29 and 32–35.

⁷⁶ *Ibid.*, paras. 18–19; A/HRC/39/CRP.5, para. 109.

⁷⁷ Fourth Geneva Convention, arts. 64, 67 and 70.

use independent legal counsel of their choice,⁷⁸ been denied access to legal counsel for extended periods and been coerced into providing incriminating information.⁷⁹ 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 rights to counsel and to remain silent, being forced to sign confessions in a language they did not understand and not being accompanied by a parent or lawyer during their interrogation.⁸⁰

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 obtain specific information.⁸¹ 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.⁸² 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 places of interrogation.⁸³ Detainees from other vulnerable groups, such as the elderly and persons with disabilities, have also endured ill-treatment.⁸⁴

D. Transfers

26. International humanitarian law contains provisions regulating the transfer of detainees in international armed conflict. With regard to prisoners of war and protected persons detained in the State's own territory, international humanitarian law permits transfers 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 the return of the detainees, a request that must be complied with.⁸⁵ With respect to protected persons detained in an occupied territory, international humanitarian law mandates that they be detained only in the occupied territory and prohibits forcibly transferring them outside the occupied territory.⁸⁶ 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,⁸⁷ 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.⁸⁸ When risk assessments indicate that the transfer would violate the principle of non-refoulement, the State that detained extraterritorially is required to either detain the individual on an alternative appropriate legal basis or to release the individual.⁸⁹

28. In practice, detainees have been transferred despite these obligations. In some instances, occupying powers have transferred protected persons for detention outside the

⁷⁸ A/HRC/39/CRP.4, para. 21.

⁷⁹ A/HRC/37/42, paras. 28–29.

⁸⁰ A/73/907-S/2019/509, para. 86; www.unicef.org/sop/sites/unicef.org/sop/files/2019-12/Annual%20CAAC%20Bulletin%202018.pdf.

⁸¹ A/HRC/39/CRP.4, paras. 22–25.

⁸² *Ibid.*, para. 26.

⁸³ www.unicef.org/sop/sites/unicef.org/sop/files/2019-12/Annual%20CAAC%20Bulletin%202018.pdf.

⁸⁴ A/HRC/39/CRP.5, para. 102.

⁸⁵ Third Geneva Convention, art. 12 (2) and (3); Fourth Geneva Convention, art. 45.

⁸⁶ Fourth Geneva Convention, arts. 49 (1) and 76 (1).

⁸⁷ Arguably, however, common article 3 to the Geneva Conventions prohibits the transfer to another State when there are substantial grounds to believe that it will result in ill-treatment or arbitrary deprivation of life. See ICRC, *Commentary on the First Geneva Convention*, para. 708.

⁸⁸ Committee against Torture, general comment No. 4, para. 18.

⁸⁹ *Ibid.*, para. 12; CAT/C/GBR/CO/5, para. 19.

occupied territory.⁹⁰ In other instances, detainees have been transferred to the custody of another detaining authority without sufficient steps to ensure that they will not subsequently be subjected to violations of their human rights.⁹¹ Consequently, detainees may not have been afforded due opportunity to express their views as to the real risks of harm before they were transferred, and transferring States may have been unaware of such risks. In some cases, this has occurred when States conducted immediate handovers of detainees, notwithstanding that the principle of non-refoulement applies to all detentions undertaken by State actors, including detention of short duration.⁹²

E. 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.⁹³ Human rights mechanisms have highlighted the limited number of investigations, prosecutions and convictions of members of armed forces for violations committed in the context of extraterritorial detention.⁹⁴ In some instances, investigations have been found to have been too slow, insufficiently independent and lacking in transparency.⁹⁵ 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 accountable persons found responsible for such violations or about reparations provided to victims.⁹⁶

IV. State-facilitated extraterritorial detention by third parties

30. In addition to directly detaining individuals extraterritorially or transferring them for extraterritorial detention, States at times facilitate or contribute to detentions 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,⁹⁷ and when persons were subjected to security detention by a third party over which the facilitating State exercised direction, wielded control or exerted influence, or to whom it provided relevant support.⁹⁸ Such cases give rise to doubts as to the applicable judicial systems from which remedy can be sought, with the 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 endured in detention. On a related point, 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 a 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.⁹⁹ On the basis of that approach, when persons are detained by a non-State actor, such as a private security company that has been empowered or authorized by a State to do so, that State can remain directly responsible for the detention and must ensure that it is conducted in accordance

⁹⁰ See, e.g., A/HRC/34/36, para. 18;

www.ohchr.org/Documents/Countries/UA/28thReportUkraine_EN.pdf, para. 97.

⁹¹ See, e.g., CED/C/FRA/CO/1, para. 28; CAT/C/CAN/CO/6, para. 11.

⁹² Cordula Droegge, "Transfers of detainees: legal framework, non-refoulement and contemporary challenges", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), p. 683.

⁹³ A/HRC/39/CRP.4, paras. 3 and 7.

⁹⁴ CCPR/C/USA/CO/4, para. 5.

⁹⁵ CAT/C/GBR/CO/5, paras. 15–16; CCPR/C/GBR/CO/7, para. 9.

⁹⁶ See, e.g., CAT/C/USA/CO/3-5, para. 13.

⁹⁷ A/HRC/37/50, para. 7; CAT/C/AUS/CO/4-5, para. 17; CCPR/C/AUS/CO/6, para. 35; CAT/C/ITA/CO/5-6, para. 22.

⁹⁸ A/HRC/10/3, paras. 47–57; A/HRC/42/17, paras. 70 and 79.

⁹⁹ Responsibility of States for internationally wrongful acts, art. 5 (General Assembly resolution 56/83, annex).

with its obligations under international human rights law,¹⁰⁰ even when the detention occurs extraterritorially.¹⁰¹ 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.¹⁰² 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 its territory, whenever the detainees are subject to its jurisdiction, that is, when they are within its power or effective control.¹⁰³ This is the case when the State occupies or otherwise holds overall effective control over the foreign territory where the detention occurs.¹⁰⁴ The State is also responsible when it exercises control or authority over the detainees through a non-State actor detaining on the State's instructions, or under its direction or control, thus functioning as its agent.¹⁰⁵ 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.¹⁰⁶ According to the Human Rights Committee, even when 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.¹⁰⁷

33. When extraterritorial detention is carried out by third parties that are not agents of the State and in locations 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 that is connected to the subsequent violation, thereby contributing substantially to it.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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

¹⁰⁰ Human Rights Committee, general comment No. 35, para. 8.

¹⁰¹ *Ibid.*, para. 63; and general comment No. 36, para. 63.

¹⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, paras. 391–393.

¹⁰³ Human Rights Committee, general comment No. 31, para. 10.

¹⁰⁴ *Ibid.*, general comment No. 36, para. 63; European Court of Human Rights, *Al-Skeini and others v. United Kingdom* (application No. 55721/07), 7 July 2011, para. 142.

¹⁰⁵ Responsibility of States, art. 8.

¹⁰⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 400.

¹⁰⁷ CCPR/C/AUS/CO/6, para. 35.

¹⁰⁸ Miles Jackson, "Freeing Soering: the ECHR, State complicity in torture and jurisdiction", *European Journal of International Law*, vol. 27, No. 3 (August 2016); Magdalena Pacholska, *Complicity and the Law of International Organizations* (Edward Elgar, 2020), p. 251.

¹⁰⁹ Human Rights Committee, general comment No. 36, paras. 22 and 63.

¹¹⁰ ICRC, Commentary on the First Geneva Convention, paras. 154 and 158; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, para. 220.

prevent those that are foreseeable.¹¹¹ 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.¹¹²

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.¹¹³ In assessing whether a State incurs 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 the contribution of assistance – which can include the provision of intelligence, equipment, financing or technical support – towards a violation; the opposability of the violated international obligation to the assisting State; and the assisting State’s knowledge of the circumstances of the assisted violation, with that State 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: the more serious the violation, the lower the required knowledge threshold that would be appropriate.¹¹⁴ In cases when the detaining State breaches a peremptory norm, for example, by systematically subjecting detainees to arbitrary detention or torture or violating their fundamental fair trial rights,¹¹⁵ 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 the basis instead of a presumption of knowledge.¹¹⁶ 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 (see para. 30).

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 a commensurate impact on the integrity of the judiciary. Whether undertaken in the context of counter-terrorism 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, 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

¹¹¹ ICRC, Commentary on the First Geneva Convention, para. 164.

¹¹² Ibid., para. 160.

¹¹³ Responsibility of States, art. 16; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 420.

¹¹⁴ Commentary on art. 16 of the articles on the responsibility of States for internationally wrongful acts (A/56/10, chap. IV.E.2); ICRC, Commentary on the First Geneva Convention, para. 160; Pacholska, *Complicity and the Law of International Organizations*, pp. 129–167; James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 408; Stefan A.G. Talmon, “A plurality of responsible actors: international responsibility for acts of the coalition provisional authority in Iraq”, in *The Iraq War and International Law*, Phil Shiner and Andrew Williams, eds. (Hart Publishing, 2008); Marco Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, vol. 84, No. 846 (June 2002), p. 413.

¹¹⁵ Human Rights Committee, general comments No. 29, paras. 11 and 16; and No. 35, paras. 66–68.

¹¹⁶ Responsibility of States, art. 41 (2); Commentary on art. 41 of the articles on the responsibility of States (A/56/10, chap. IV.E.2), para. 11.

have facilitated detentions outside their territory by third parties without the 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 the provision of effective remedies for human rights violations suffered in the course of such detention, a number of measures are recommended, as outlined below.

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 those persons are located in the world, including 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 the 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 measures necessary 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 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 relevant personnel and contract employees, including with respect to access to judicial and administrative remedies, in line with States' 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, at all times, to all places where persons are deprived of their liberty. 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 to effectively challenge decisions of refoulement before competent administrative and judicial authorities;

(c) As recommended by the Committee against Torture, rely only on diplomatic assurances provided by States that 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, ensure that relevant assurances are effective in addressing the 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 the personnel deployed will be sufficient in number and adequately resourced and will have the 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 the detention of migrants and security detention, States should:

(a) Prior to the start of cooperation, conduct human rights risk assessments, examining the impact that their cooperation 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 cooperation activities when risks of human rights violations cannot be sufficiently mitigated;

(c) Subject cooperation activities to independent mechanisms to monitor their impact on the enjoyment of human rights by those affected and immediately suspend cooperation if it is shown that these activities have a detrimental impact on human rights;

(d) Ensure that persons potentially affected by cooperation 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 the deprivation of liberty carried out or facilitated by States outside their own territory.
