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Challenges faced in expediting the extradition process, including addressing health and safety and other human rights issues, as well as litigation strategies utilized by defendants to delay the resolution of an extradition request

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Background paper prepared by the Secretariat

I. Introduction

1. The present background paper was prepared by the Secretariat in order to facilitate discussions under item 2 of the provisional agenda of the tenth meeting of the Working Group on International Cooperation. It presents an overview of practical considerations and aspects relating to the length of extradition proceedings and the need to expedite cooperation between the requested and the requesting State parties in this field, bearing in mind human rights issues and their interplay with efforts to expedite international cooperation.

2. The present paper is intended to provide support for further discussions of the Working Group on extradition-related issues. In that context, item 2 of the provisional agenda can be seen in conjunction with item 3 of the agenda ("Discussions and challenges faced in the course of extradition processes", with a focus on consultations and sharing of information in extradition proceedings and technical assistance in support of central authorities), which was discussed at the ninth meeting of the Working Group (CTOC/COP/WG.3/2018/2). The two items represent a "thematic continuum" since both of them shed light on particular features of the extradition process, relevant legal and practical considerations, and practices to overcome challenges, delays and shortcomings.

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** CTOC/COP/WG.3/2018/4.

II. Time management and simplification trends in extradition proceedings

3. Extradition treaties usually do not contain provisions on the procedures for examining extradition requests. As a general rule, national legislation in the requested State determines the procedure as well as the authorities that are responsible for examining the extradition request. Such an examination includes determining whether the request meets applicable requirements, both substantive and procedural, and/or whether the request should be granted or denied.

4. Procedures established under national law differ, depending on the legal system in place. The decision to surrender a person to another State is usually the result of a bifurcated system involving both the judiciary and the executive branch.[1] In many States, the extradition process involves several stages and different sets of authorities. First, there is an initial administrative phase, which usually consists of an examination of technical requirements and sometimes also includes a preliminary assessment of whether the request has a chance of being granted. Such requirements typically include the following: whether the request is addressed to the responsible authority; whether it is duly signed; whether it contains the information required for the purpose of identifying the person sought and the offences imputed to him or her; and whether it is accompanied by the documents required under the applicable extradition treaty and/or legislation of the requested State. Secondly, a judicial determination is made, as to whether the extradition request satisfies the substantive conditions set out in the relevant national legislation and/or applicable extradition treaty. Lastly, a final executive decision on whether or not to grant the request is issued.[2] In most countries, the ruling by the competent judicial authority that the legal requirements for granting extradition are not met is binding on the executive, and extradition must be refused. Where extradition is authorized by the courts, the competent executive authority still has the discretion to decide whether the person sought is to be surrendered to the requesting State. The decisions of either the court or the executive can be appealed or reviewed, with further litigation arising as a result.

5. Differences in the time needed to complete extradition proceedings often depend on the circumstances in which the request has been submitted. Common reasons for delay relate to the complexity of the case, translation requirements, the duration of appeal proceedings, parallel asylum proceedings and back-and-forth communication required because of the lack of clarity of the extradition request. The only “measurable” information available within the framework of United Nations intergovernmental processes regarding the time frame of extradition proceedings in different requested States stems from the results of the country reviews carried out within the first reporting cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption. Thus, with regard to paragraph 9 of article 44 of the United Nations Convention against Corruption (which is identical to article 16, paragraph 8, of the United Nations Convention against Transnational Organized Crime) and the requirement to endeavour to expedite extradition procedures, substantial divergences emerged as to the average duration of the relevant proceedings, which ranges from as little as one to two months to as much as 12 to 18 months.[3]

6. In many cases, the time limit set in the domestic legislation for the detention of the person sought in view of extradition is considered as the “ultimate deadline” for

[1] See United Nations Office on Drugs and Crime (UNODC), *Manual on Mutual Legal Assistance and Extradition* (2012), para. 95.

[2] See, on an indicative basis, Albin Eser, Otto Lagodny and Christopher L. Blakesley, eds., *The Individual as Subject of International Cooperation in Criminal Matters: A Comparative Study*, Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft Series, vol. 27, (Baden-Baden, Germany, Nomos Publishers, 2002), p. 701.

[3] UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), p. 205.

the completion of the extradition process. It should be recalled that, according to article 5, paragraph 1(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a person can only be lawfully deprived of his or her liberty when it is done in accordance with law, is proportionate and is carried out for deportation or extradition purposes. Detention will cease to be lawful if proceedings for deportation or extradition are not actually in process or not carried out diligently.[4]

7. However, practitioners in extradition practice in different regions are often involved in extreme cases of delays to grant extradition requests. These individual cases, which are uncommon but nonetheless cause frustration and further implications in bilateral cooperation, have emerged as a result of both the lack of responsiveness and the complicated procedures for the examination — at different levels and instances — of extradition requests in many requested States.

8. Trends and developments in extradition law and practice over the last 25 years have focused on, inter alia, simplifying requirements with respect to the examination and assessment of the extradition request and the process followed for the surrender of the person sought. Simplification of the extradition process appears to be taking place in two areas. The first area pertains to the simplification of the substantive and procedural conditions for extradition, which appears to occur through the relaxing of the following elements:

(a) The strict application of certain grounds for refusal of extradition requests, including nationality of the offender and the political offence exception to extradition;

(b) Extradition conditions such as dual criminality and the rule of specialty;

(c) Specific evidentiary requirements applicable in the extradition process.[5]

The second area focuses on “fast-track” extradition procedures through the consistent practice of providing for a streamlined process of extradition (simplified extradition) as an available option subject to certain requirements and on the understanding that the person sought consents to such a simplified process.

9. Among other things, article 16, paragraph 8, of the Organized Crime Convention provides that States parties shall, subject to their domestic laws, endeavour to expedite extradition procedures in respect of the extraditable offences covered by the article. According to the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime*, one example of implementation of article 16, paragraph 8, would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State party, for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State party and the consent of the person in question. The consent, which should be expressed voluntarily and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself.[6] However, the interpretative notes in the *Travaux Préparatoires* also indicate that paragraph 8 of article 16 should not be interpreted as prejudicing in any way the fundamental legal rights of the person sought.

10. Implementing legislation is necessary to enable the use of simplified extradition procedures. Such legislation could provide that if a person consents to extradition, there is no need to go through all stages of a typical extradition process. Consent — and, where appropriate, renunciation of entitlement to the rule of specialty — is established before the competent judicial authority of the requested Party. As to the legal consequences of consent, the information given to the person should include the implications of renunciation of the guarantees of the ordinary procedure, as well as

[4] See European Court of Human Rights, *Quinn v. France*, Application No. 18580/91, Judgment of 22 March 1995; *Sanchez-Reisse v. Switzerland*, Application No. 9862/82, Judgment of 21 October 1986; *Bozano v. France*, Application No. 9990/82, Judgment of 18 December 1986.

[5] See A/CONF.203/9, paras. 35–39.

[6] United Nations publication, Sales No. E.06.V.5, p. 162.

the possible irrevocability of the consent given.[7] It is important for States parties to take all necessary measures in order to ensure in practice that such legal consequences are made clear to the person sought, including through the provision of legal aid where necessary.

11. The practice of simplification of extradition proceedings at the national level had been confirmed already in the early years of the work of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, while reporting on the implementation of its provisions at the national level. On the question of whether they were able in certain cases to expedite extradition, most States indicated that a summary or simplified procedure was available when the individual concerned did not intend to contest the extradition (CTOC/COP/2005/2/Rev.1, para. 83).

12. At the policymaking level, the Working Group on International Cooperation took stock at its third meeting, in October 2010, of initiatives to expedite and simplify extradition proceedings and recommended that States should consider providing for simplified extradition procedures, as well as simplified extradition in cases where the individual sought has consented to extradition, and also recommended that States should consider the use of procedures for simplified extradition at the regional level (CTOC/COP/WG.3/2010/1, para. 3 (m) and (n)).

13. From a comparative perspective, about half of the States parties under review within the framework of the first reporting cycle of the Mechanism for the Review of Implementation of the Convention against Corruption envisage simplified proceedings in their domestic laws, typically based on the sought person's consent to be extradited; or have taken concrete measures to streamline the extradition process and establish more effective cooperation networks in order to exchange information with foreign authorities in real time, either before a formal extradition request is submitted or during the submission process.[8]

14. Simplified proceedings and shorter time frames are also prescribed under multilateral or regional arrangements, including the following: the London Scheme for Extradition; the European arrest warrant;[9] the CARICOM arrest warrant

[7] See "Explanatory report to the Third Additional Protocol to the European Convention on Extradition" (*Council of Europe Treaty Series*, No. 209), paras. 33–35.

[8] *State of Implementation of the United Nations Convention against Corruption*, p. 206.

[9] Framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States of the European Union (Official Journal of the European Communities, L. 190, 18 July 2002). The framework decision removes the condition of verifying double criminality with respect to a very broad list of 32 generic types of offence, including offences related to transnational organized crime. Based on the European arrest warrant, this surrender procedure has been moved outside the realm of the executive and into the hands of the judiciary. For more information, see Michael Plachta, "European arrest warrant: revolution in extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 11, No. 2 (2003), pp. 178 ff; Nicola Vennemann, "The European arrest warrant and its human rights implications", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 63 (2003), pp. 103 ff; Rob Blekxtoon and Wouter van Ballegooij, eds., *Handbook on the European Arrest Warrant* (Cambridge, Cambridge University Press, 2004).
Despite the criticism for, among other things, the disproportionate use of the European arrest warrant for trivial offences (see Nina M. Schallmoser, "The European Arrest Warrant and Fundamental Rights: risks of violation of fundamental rights through the EU Framework Decision in light of the ECHR", *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 22, No. 2 (2014), p. 137; Michaela del Monte, *European Added Value of Revising the European Arrest Warrant*, European Added Value Assessment, EAVA 6/2013 (Brussels, European Parliament Research Service, 2014, p. 19), a speedy procedure ensured by strict time limits is one of the major added values of the EAW in comparison to the system of extradition with third countries. According to available statistical data, the average time of surrender procedures in cases where the person consented to the surrender was 14.7 days in 2005; 14.2 days in 2006; 17.1 days in 2007; 16.5 days in 2008; and 16 days in 2009. And in cases where the person did not consent to the surrender: 47.2 days in 2005; 51 days in 2006; 42.8 days in 2007; 51.7 days in 2008; and 48.6 days in 2009. See "Report from the European Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States" (Brussels, 2011).

(established through the CARICOM Arrest Warrant Treaty); the Inter-American Convention on Extradition (art. 21); the Third Additional Protocol to the European Convention on Extradition; the backing of warrants system in Commonwealth countries; [10] and the multilateral agreement on extradition between the Nordic countries. In addition, arrangements on simplified extradition proceedings are increasingly and consistently incorporated in bilateral treaties or agreements on extradition.[11]

III. Human rights considerations in extradition proceedings

A. Requested State

1. Fair trial standards in extradition proceedings in the requested State

15. Article 16, paragraph 13, of the Organized Crime Convention refers to human rights with regard to due process and the fairness of the domestic extradition proceedings in the requested State party, reading as follows:

> Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

16. In many countries, certain rights and guarantees that are applicable under the domestic legal systems to ordinary criminal proceedings are normally considered to be extendable — or tailor-made — to other judicial proceedings, including extradition. The trend to strengthen the rights and legal position of the individual in proceedings relating to international cooperation, including extradition proceedings, was reflected in the outcome document of the sixteenth Congress of the International Penal Law Association, held in Budapest from 5 to 11 September 1999, which reads:

> In extradition proceedings and in mutual assistance proceedings that involve coercive measures in the requested State, the individuals involved in such proceedings should have the following minimum rights:
>
> - The right to be informed of the charges against them and of the measures that are requested, except where providing such information is likely to frustrate the requested measures
> - The right to be heard on the arguments they invoke against measures on international cooperation
> - The right to be assisted by a lawyer and to have the free assistance of a lawyer if he does not have sufficient means to pay for his own lawyer as well as the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court
> - The right to expedited proceedings
> - In case of detention for the purpose of extradition, the individual subject to this procedure should have the same rights as any other person who is deprived of his liberty in a domestic criminal case

17. According to section 23, paragraph 1, of the Model Law on Extradition,[12]

> the extradition hearing before the [competent judicial authority of country adopting the law] shall be conducted in accordance with any specific procedural

[10] See Edmund P. Aughterson, *Extradition: Australian Law and Procedure* (Sydney, Law Book, 1995), p. 235, on the surrender of fugitives between New Zealand and Australia.

[11] See article 6 of the Model Treaty on Extradition (General Assembly resolutions 45/116, annex, and 52/88, annex).

[12] UNODC, *Model Law on Extradition* (2004).

rules that may be applicable mutatis mutandis in extradition proceedings in [country adopting the law][option: reference to specific rules].

The provision is accompanied by a footnote which indicates — by means of guidance and recommended approach — that legislative drafters at the national level should take into account that the rationale of this provision is not to turn the extradition proceedings into a mini-trial prior to the surrender of the person sought to the authorities of the requesting State. Indeed, the purpose of an extradition hearing is not to decide ultimate guilt or innocence, but rather to decide whether or not the person sought should be sent to the requesting State to answer, by way of trial or sentence, criminal charges in that State. Evaluating the strength of the evidence in determining the guilt or innocence of the person is to be left to the trial court in the requesting State.

2. Multiple appeal reviews in extradition proceedings: the challenge of striking a balance between due process and international cooperation in extradition proceedings

18. Two competing priorities underlie the judicial review and appeals process in extradition practice, which impact differently on the speed and predictability of extradition. On the one hand, the authorities in the requested State should ensure that extradition proceedings take place in strict accordance with the law and in line with procedural requirements of that State's domestic legislation. On the other hand, the extradition process should be effective and efficient and should serve the administration of justice and the interests of law enforcement, taking account of the need to protect the rights of the person sought. Thus, the balance to be struck in extradition cases is to ensure that an extradition request submitted by a requesting State is dealt with in a timely and efficient manner, while also ensuring that access to justice rights are properly addressed.

19. There are different national approaches regarding the legal remedies in extradition proceedings. In most countries, the recourse is limited to the judicial stage of extradition proceedings; in others, it is restricted to the administrative stage, so that the courts are considered to be administrative ones. Some countries, however, allow recourse at both stages. Countries adopting the latter two-tier judicial review system in extradition proceedings may include in their extradition legislation a separate provision enabling the person sought to have recourse to the competent administrative court, challenging (usually by virtue of domestic constitutional provisions) the decision of the competent executive authority on his or her surrender to the requesting State.

20. Concerns have been raised by practitioners that in some cases successive appeals may be utilized by persons sought for the purpose of delaying and prolonging the process, thus resulting in abuses of the right to judicial review in extradition proceedings. In this context, litigation strategies against the extradition request that can be used by the person sought include human rights considerations revolving around the possibility of his or her exposure to various forms of mistreatment, or other human rights violations, in the requesting State; and arguments challenging the adequacy of the evidence in support of the extradition request, as presented by the requesting State.[13]

21. To address the risk of potential abuses of the right to judicial review in extradition proceedings, section 25 of the UNODC Model Law on Extradition on "Appeal/petition for judicial review" is accompanied by the following recommendation: in order to achieve judicial economy and accelerate the extradition

[13] There are differences in the relevant evidentiary requirements needed for granting an extradition request. These differences may arise from the legal traditions and systems of cooperating States and may also be affected by the specific requirements of an applicable treaty. As stated in art. 16, para. 8, of the Organized Crime Convention, States parties should endeavour to simplify evidentiary requirements relating to extradition proceedings (see CTOC/COP/WG.3/2018/2, paras. 22–24).

process without prejudicing the effectiveness of judicial review, a single appeal mechanism be adopted, whenever consistent with basic constitutional principles, that would review appropriate factual and legal issues with a view to eliminating repeated and partial reviews. [14]

3. Parallel refugee/asylum proceedings

22. Extradition and asylum intersect in a number of ways if the person whose extradition is sought is a refugee or an asylum seeker. Extradition and refugee status determination are distinct procedures, which have different purposes and are governed by different legal criteria. This does not mean that the two processes should be conducted in isolation. Whether or not the person sought qualifies for refugee status has important consequences for the scope of the requested State's obligations under international law with respect to that person, and hence for the decision on the extradition request. At the same time, information related to the extradition request may have an impact on the determination of the asylum claim. In order to reach a proper decision in both the refugee or asylum proceedings, and the extradition proceedings, the responsible authorities need to consider all relevant elements.[15]

23. From an international protection point of view, the principal concern in extradition cases concerning refugees or asylum seekers is to ensure that those in need and deserving of international protection have access to and benefit from such protection, while at the same time avoiding the abuse of the institution of asylum by persons who seek to hide behind it for the purpose of evading being held responsible for serious crimes.

24. Extradition procedures and refugee and asylum processes should be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner that is fully consistent with their international protection obligations. Doing so requires, on the one hand, a rigorous assessment of the eligibility of the person sought for refugee protection, based on a careful examination of all relevant facts and with due observance of procedural fairness requirements in accordance to the international obligations of States and their domestic law.

(a) Impact of the interplay between refugee and asylum proceedings and extradition

25. If the extradition of a refugee has been sought by his or her country of origin, the requested State is precluded under article 33, paragraph 1, of the Convention relating to the Status of Refugees, adopted in 1951, or customary international law, from extraditing the wanted person. The prohibition of return to a danger of persecution under international refugee law is applicable to any form of forcible removal, including extradition, deportation, informal transfer or "renditions". This is evident from the wording of article 33, paragraph 1, of the Convention, which refers to expulsion or return "in any manner whatsoever".

26. The principle of non-refoulement applies to any person who is a refugee under the terms of the Convention relating to the Status of Refugees, that is, anyone who meets the inclusion criteria of article 1A, paragraph 2, of the Convention and does not come within the scope of one of its exclusion provisions.[16] It establishes a mandatory bar to extradition, unless it has been established by the authorities of the requested State that the wanted person comes within one of the exceptions provided for in article 33, paragraph 2, of the Convention.[17]

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[14] See also the UNODC report on the meeting of the informal expert working group on effective extradition casework practice held in Vienna from 12 to 16 July 2004, p. 15.

[15] United Nations High Commissioner for Refugees (UNHCR), "Guidance note on extradition and international refugee protection" (Geneva, 2008), paras. 61–62.

[16] These include article 1F, which applies to those for whom there are serious reasons for considering that they have committed certain serious crimes or acts.

[17] "The benefit of the present provision [art. 33, para. 1] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in

27. The application of the latter provision requires an individualized determination by the country of asylum that the person concerned constitutes a present or future danger to the security or the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself mean that he or she also meets the "danger to the community" requirement. Whether or not this is the case will depend on the nature and circumstances of the particular crime and other relevant factors (e.g., evidence or likelihood of recidivism).[18]

28. If the country seeking extradition is a country other than the refugee's country of origin, the requested State must nonetheless examine whether the surrender of the refugee would be consistent with its non-refoulement obligations under international refugee and human rights law. For this to be the case, the requested State would need to ascertain that extradition would not expose the refugee to a risk of persecution, torture or other irreparable harm in that country, or of subsequent removal to the country of origin or to a third country where such a risk exists.

29. Asylum seekers are protected against refoulement by virtue of article 33, paragraph 1, of the Convention relating to the Status of Refugees and customary international law for the entire duration of the asylum proceedings. The requested State may not extradite an asylum seeker to his or her country of origin while his or her refugee claim is being considered, including at the appeal stage. If the country seeking the extradition of an asylum seeker is not the country of origin, the requested State is required under international refugee and human rights law to evaluate any risks resulting from the person's surrender to that country.

30. Where an extradition request is made by the country of origin in relation to a refugee who has been recognized as a refugee within the meaning of the 1951 Convention in the requested State, the determination of refugee status by the asylum authorities should be binding for those State organs and institutions that deal with the extradition request. Depending on the circumstances of the particular case, the extradition authorities may, however, need to examine whether the person sought falls within one of the exceptions to the principle of non-refoulement provided for in article 33, paragraph 2, of the Convention. If this determination is made as part of the extradition process, the relevant authorities should assess the situation of the person sought in light of the substantive criteria contained in article 33, paragraph 2, while the extradition procedure should offer the procedural safeguards and guarantees required for the application of this provision.

31. Questions with regard to eligibility for refugee status may also be raised as a consequence of extradition proceedings concerning a refugee. Depending on the circumstances, this may trigger a re-examination of the person's refugee status in cancellation or revocation proceedings. Not every extradition request concerning a refugee triggers cancellation or revocation considerations. Whether or not a re-examination of the wanted person's refugee status is required depends on the nature of the information available. The authorities of the requested State need to assess the reliability of the extradition request and any information submitted in connection with it, as well as its significance with regard to the wanted person's eligibility for international protection as a refugee. National legislation may impose time limits and/or other requirements for the re-opening of a final refugee status determination.

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which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". Unlike article 1F, which is concerned with persons who are not eligible for refugee status, article 33, paragraph 2, is directed to those who have already been determined to be refugees. Article 1F and article 33, paragraph 2, are thus distinct legal provisions serving very different purposes. Article 33, paragraph 2, applies to refugees who become an extremely serious threat to the country of asylum owing to the severity of crimes perpetrated by them. It is aimed at protecting the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, article 33, paragraph 2, has always been considered to be a measure of last resort. See UNHCR, "Background note on the application of the exclusion clauses: article 1F of the 1951 Convention relating to the Status of Refugees" (2003), para. 10.

[18] See UNHCR, "Note on diplomatic assurances and international refugee protection" (2006), para. 12.

32. An asylum application should not be declared inadmissible solely because it has been submitted after an extradition request has been received by the authorities of the requested State, or after the asylum seeker learned of a request for his or her extradition. Admission into asylum procedures may be denied only if it is established that the individual concerned has already found protection in line with the standards of the Convention relating to the Status of Refugees in another country or that he or she would have access to an asylum determination procedure and protection in another country. In all other cases, a substantive assessment of the applicant's asylum claim in the requested State is required.[19]

(b) Sequencing of refugee and asylum proceedings and extradition proceedings

33. If the extradition request was submitted by the authorities of the asylum seeker's country of origin, the question of his or her refugee status needs to be resolved for the requested State to be in a position to decide whether the person sought may be lawfully extradited. This follows from the requested State's obligation to ensure respect for the principle of non-refoulement under international refugee and human rights law. On the one hand, as an asylum seeker, the wanted person enjoys protection against refoulement to the country of origin for the entire duration of the asylum proceedings, including on appeal. On the other hand, the scope of the requested State's non-refoulement obligations under international law differs depending on whether or not the wanted person is a refugee. It follows that the question of refugee status would need to be clarified before it can be established whether the legal requirements for extradition are met. As a consequence, in cases which may result in the surrender of an asylum seeker to his or her country of origin, asylum proceedings must be conducted and a final determination on the asylum claim made prior to the decision on the extradition request.

34. It would generally be prudent to conduct extradition and asylum proceedings in parallel. This would be beneficial for reasons of efficiency and because the extradition process may result in the availability of information which has a bearing on the wanted person's eligibility for refugee status and would therefore need to be taken into consideration by the asylum authorities. It may however be necessary to withhold a decision on the extradition request until the asylum determination has become final.[20]

35. If the extradition of an asylum seeker is sought by a country other than his or her country of origin, the person sought may, under certain circumstances, be extradited before his or her asylum claim has been finally determined in the requested State. For such an occurrence to be consistent with international refugee and human rights law, the requested State should: (a) establish that extradition to the requesting State would not expose the asylum seeker to a risk of persecution, torture or other irreparable harm; and (b) in keeping with its primary responsibility for making certain that the asylum claim is determined in line with the criteria of the Convention relating to the Status of Refugees and internationally accepted standards of fairness and efficiency, ensure that the asylum seeker has access to asylum determination procedures that comply with these standards.

36. If both conditions are fulfilled, asylum procedures which have already been initiated in the requested State may be suspended. In such cases, consideration of the asylum application would be resumed and brought to its final conclusion after the resolution of the prosecution, whether by conviction and sentence, or by acquittal. The consideration of said application could be undertaken either in the requested State where the asylum application was initially pending, through an agreement on re-admission to that State, or through transfer of responsibility for examining the asylum application to the State requesting extradition, provided similar procedural standards are in place there.[21]

[19] Ibid., "Guidance note on extradition and international refugee protection", para. 88.
[20] Ibid., para. 66.
[21] Ibid., para. 68.

(c) Information-sharing

37. Information gathered for the purpose of extradition proceedings should be shared with immigration officials for the purpose of determining or revisiting a refugee claim. In the other direction, States should ensure the confidentiality of information related to a person's refugee status in the context of proceedings which may result in the extradition of that person. In such cases, the legitimate interest of the requesting State in prosecuting persons responsible for criminal acts may justify the disclosure of certain personal data. However, the requested State needs to consider the potential protection risks which may result from the sharing of information about the person sought with the authorities of the requesting State, especially where the latter is the refugee's country of origin.[22]

38. When dealing with an extradition request concerning an asylum seeker, the responsible authorities need to ensure due respect for confidentiality. As a general rule, no information regarding the asylum application, or the fact that such an application has been made, should be shared with the State requesting extradition, be it the country of origin of the person sought or a third country.[23]

B. Requesting State

1. Human rights protection in the requesting State: an overview of human rights involved

39. In a parallel but interrelated process, the simplification of the extradition procedure and the expansion of the rights of the person subject to that procedure have been occurring simultaneously.[24] The expansion of the human rights dimension in extradition appears to be linked to a closer scrutiny of a requesting State's criminal justice system. However, there are still contrasting views on the exact parameters of human rights in the extradition process, the validity of assurances, and whether the scrutiny should be a judicial or executive task. The rise of human rights in extradition also has a potentially paradoxical impact on the simplification of extradition: it may serve to slow down the extradition process by subjecting it to greater restrictions while at the same time justifying further simplification of the substantive and procedural conditions for extradition.[25]

40. The interests of both law enforcement and the administration of justice require that extradition processes be as efficient as possible, taking into account the need to protect the rights of the person sought. Human rights considerations are inherent in certain grounds for refusal of extradition requests prescribed in the domestic legislation of requested States or applicable extradition treaties to which such States are parties. Reflecting this reality, article 16, paragraph 7, of the Organized Crime Convention provides that grounds for refusal and other conditions to extradition (such as the minimum penalty required for an offence to be considered as extraditable) are governed by the applicable extradition treaty in force between the requesting and requested States or, otherwise, the law of the requested State. In some States, statutory grounds for refusal of extradition are linked to the constitutional obligations in relation to the protection of fundamental rights and freedoms of the person sought for extradition.

41. The requested State's non-refoulement obligations under international human rights law establish a mandatory ban on extradition if the surrender of the person sought would result in exposing him or her to a risk of torture or other serious human

[22] Ibid., para. 58.

[23] Ibid., para. 69.

[24] See John Dugard and Christine van den Wyngaert, "Reconciling extradition with human rights", *American Journal of International Law*, vol. 92, No. 2 (1998), pp. 187 ff.

[25] See Neil Boister, "Global simplification of extradition: interviews with selected extradition experts in New Zealand, Canada, the U.S. and E.U.", *Criminal Law Forum*, 15 November 2017, p. 10.

rights violations.[26] Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly provides that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The prohibition of refoulement to a risk of torture is also part of customary international law and has attained the rank of a peremptory norm of international law, or *jus cogens.* It imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments.

42. Similarly, the prohibition of arbitrary deprivation of life and of torture and other cruel, inhuman or degrading treatment or punishment under articles 6 and 7, respectively, of the International Covenant on Civil and Political Rights and other regional human rights treaties[27] also encompasses a prohibition of refoulement to a risk of such treatment as part of the absolute and non-derogable proscription of such treatment under the relevant provisions. The prohibition under international human rights law of refoulement to a real risk of "irreparable harm" also applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.

43. The European Court of Human Rights has held in consistent jurisprudence that a non-refoulement obligation is inherent in the obligation not to subject any person to torture or to inhuman or degrading treatment or punishment under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that this obligation is engaged whenever there is a real risk of exposure to such treatment as a result of forcible removal, including extradition.[28] Similar jurisprudence has been developed in the framework of the United Nations Human Rights Committee.[29]

44. Depending on the circumstances, extradition may also be refused for humanitarian reasons (such as the advanced age or severe illness of the person sought)[30] through the use of special hardship clauses in domestic laws;[31] or on the

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[26] See Guy Goodwin-Gill, *The Principle of Non-Refoulement: Its Standing and Scope in International Law* (Geneva, Division of International Protection, United Nations High Commissioner for Refugees, 1993), p. 2.

[27] The right to life is guaranteed, for example, under article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 4 of the American Convention on Human Rights, article 4 of the African Charter on Human and Peoples' Rights and article 5 of the Arab Charter on Human Rights. Provisions in regional human rights instruments which prohibit torture as well as other cruel, inhuman or degrading treatment or punishment, include art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 5, para. 2 of the Arab Charter on Human Rights; art.e 5 of the African Charter on Human and Peoples' Rights and art. 2 of the Inter-American Convention to Prevent and Punish Torture.

[28] See, for example, European Court of Human Rights, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, Series A, No. 161; *Cruz Varas and Others v. Sweden*, Application No. 15567/89, Judgment of 20 March 1991, Series A, No. 201; *Vilvarajah and Others v. the United Kingdom*, Application No. 13163/87 and others, Judgment of 30 October 1991, Series A, No. 215; *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, European Human Rights Reports 23 (1997), p. 413; *Ahmed v. Austria*, Application No. 25964/94, Judgment of 17 December 1996, European Human Rights Reports 23 (1997), p. 278.

[29] See Human Rights Committee, *Kindler v. Canada*, Communication No. 470/1991, Decision of 30 July 1993, *Human Rights Law Journal*, vol. 14 (1993), p. 307; *Chitat Ng. v. Canada*, Communication No. 469/1991, Decision of 5 November 1993, *Human Rights Law Journal*, vol. 15 (1994), p. 149; *Cox v. Canada*, Communication No. 539/1993, Decision of 31 October 1994, *Human Rights Law Journal*, vol. 15 (1994), p. 410.

[30] See art. 4 (h) of the Model Treaty on Extradition. See also sects. 26, para. 4 (c) and 29, paras. 1 (b) and 2 of the *Model Law on Extradition*.

[31] See, for example, sect. 73 (Limitations on assistance ("Ordre public") of the German Law (Gesetz über die internationale Rechtshilfe in Strafsachen–IRG [Act on international cooperation in criminal matters]); sects. 21 and 22 of the Austrian Law (Auslieferungs- und Rechthilfegesetz–

basis of the requested State's fundamental notions of justice and fairness.[32] Also relevant is the prohibition of extradition where serious violations of fair trial rights[33] are anticipated in the requesting State. The *Travaux Préparatoires* of the Organized Crime Convention state that, when considering a request for extradition pursuant to a sentence issued in absentia, which is possible in some States, the requested State party would take into due consideration whether or not the person whose extradition was sought had been sentenced following a fair trial (e.g., the same guarantees as he or she would have enjoyed had he or she been present at the trial and had voluntarily escaped from justice or failed to appear at the trial).

45. Article 16, paragraph 14, of the Organized Crime Convention specifically refers to particular human rights issues regarding discrimination by stating that there is no obligation on any State to extradite if that State believes that the extradition request was made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of those reasons. Inspired by the principle of non-refoulement contained in the Convention relating to the Status of Refugees, the provision enables a party to refuse extradition if it determines that the extradition request is discriminatory in its purpose or if the subject of the request may be prejudiced because of one of the enumerated discriminatory grounds.[34] It should be noted that, while the Organized Crime Convention is generally silent with regard to grounds for refusal of extradition regards, referring to the domestic legislation of States parties by virtue of article 16, paragraph 7, it does make an exception in two cases (both in mandatory terms): the discriminatory grounds in paragraph 14 and the fiscal nature of the offence ("considered to involve fiscal matters") in paragraph 15 of article 16.

46. Paragraph 14 of article 16 preserves the ability of the requested State party to deny extradition on such grounds, unless such ground of refusal is not provided for in its extradition treaty in force with the requesting State party, or in its domestic law governing extradition in the absence of a treaty.[35] The non-discrimination clause overlaps but does not fully coincide with the traditional extradition practice of precluding the return of individuals if extradition is sought in respect of an offence which is regarded by the requested State as an offence of political character.[36]

2. Diplomatic assurances

47. In certain circumstances, diplomatic assurances provided by the requesting State can function as the driving force for resolving problems related to the often time-consuming process of examining human rights considerations in the extradition process. Different practices on making such assurances may be followed in this regard, as reported already at the second meeting of the Working Group on International Cooperation, held in Vienna from 8 to 10 October 2008. Some countries agreed internally beforehand on certain types of guarantees by involving the authority

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ARHG); and art. 18 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99).

[32] This could apply, for example, where the prosecution of the person sought would be in breach of the principle *ne bis in idem* (see also art. 3 (d) of the Model Treaty on Extradition; and sect. 8 of the *Model Law on Extradition*).

[33] As guaranteed under art. 14 of the International Covenant on Civil and Political Rights, art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 of the American Convention on Human Rights, art. 7 of the African Charter on Human and Peoples' Rights and arts. 6, 7, 14 and 16 of the Arab Charter on Human Rights.

[34] See also art. 3 (b) of the Model Treaty on Extradition; and sect. 5 of the *Model Law on Extradition*.

[35] See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, para. 529.

[36] See the analysis under the corresponding provision of article 6, paragraph 6, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 at the *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations publication, Sales No. E.98.XI.5), para. 6.22.

that would be ultimately responsible. Other countries deferred the issue to their highest court to establish the guarantees when requested. In addition, some countries provided only assurances limited to the prosecution services, without affecting the sovereignty of their judiciary power (CTOC/COP/2008/18, para. 18).

48. The conditions under which the requested State is permitted to remove a person to another country on the basis of diplomatic assurances have been examined by international, regional and national courts in cases involving extradition to a risk of capital punishment or serious violations of fair trial as well as expulsion or deportation. That examination has led to the development of clear criteria, and it is now well established that diplomatic assurances may be relied upon only if: (a) they are a suitable means to eliminate the danger to the individual concerned; and (b) the requested State may, in good faith, consider them reliable.

49. In determining the weight which may be attached to diplomatic assurances, the requested State should consider a number of factors, including the degree and nature of the risk to the individual concerned, the source of the danger for the individual, and whether or not the assurances will be effectively implemented. This will depend, inter alia, on whether the undertaking provided is binding on those State organs which are responsible for implementing certain measures or providing protection, and whether the authorities of the requesting State are in a position to ensure compliance with the assurances given. The assessment should be made in light of the general human rights situation in the requesting State at the relevant time, and in particular, any practice with regard to diplomatic assurances or similar undertakings.[37]

50. While determining the suitability and reliability of diplomatic assurances in cases involving the death penalty is relatively straightforward, their use in cases involving a risk of torture or other forms of ill-treatment is often more problematic. In a report which addressed, inter alia, examples of State practice in cases involving diplomatic assurances, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has expressed the view that

> …assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur was therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return (A/60/316, para. 51).

IV. Conclusions and recommendations

51. The Working Group on International Cooperation may wish to recommend that the Conference of the Parties encourage States parties to consistently exchange best practices and lessons learned in the field of extradition with a view to overcoming practical problems and delays that hinder timely and effective cooperation. In doing so, the Working Group may wish to recommend that the Conference of the Parties to the Organized Crime Convention:

(a) Invite States parties that have not done so to trigger internal reviews for possible reform of their extradition regimes and for streamlining their extradition practice, with a view to, inter alia, addressing the following issues: how time pressure in extradition proceedings is handled to ensure that human rights are not

[37] See “Note on diplomatic assurances”, para. 21.

compromised; and how the need for urgency in processing the extradition request is balanced with human rights concerns;

(b) Without prejudice to the fundamental right to review or appeal by the person sought, or to the effectiveness of judicial review in extradition proceedings, encourage States parties to simplify or rationalize the procedure by providing for stricter statutory limits to expedite proceedings, executive actions and submissions by the person sought; and by limiting the number of appeals which may be sought within the extradition process and the number of courts in which such appeals may be brought in accordance with its legal principles;

(c) Given the extensive overlap between the extradition and refugee and asylum proceedings, encourage States parties to ensure that the decisions made in each of the proceedings can be reconciled with each other, and that parallel proceedings are managed on the basis of a model that has in-built flexibility to guarantee that unusual circumstances or complicated cases can be addressed efficiently;

(d) Encourage States parties to allocate sufficient resources to relevant authorities dealing with extradition in order to avoid or overcome delays encountered in extradition proceedings.