Committee on Legal Affairs and Human Rights

The obligation of member states of the Council of Europe to co-operate in prosecution of war crimes

Introductory memorandum
Rapporteur: Mr Miljenko Đorić, Croatia, Alliance of Liberals and Democrats for Europe

Contents:

1. Introduction ....................................................................................................................................................2
2. Data on war crimes extradition requests ....................................................................................................6
3. Convention exceptions to and conditions on extradition ........................................................................8
   3.1. Extradition prohibited for political offenses, but international humanitarian law obligation unaltered .................................................................................................................8
   3.2. Extradition prohibited for discriminatory prosecution or punishment ...............................................9
   3.3. Prior final judgment for same offences – ne bis in idem .........................................................................10
   3.4. Extradition prohibited where immunity due to lapse of time ...............................................................11
   3.5. Extradition based on in absentia judgments requires effective re-trial remedy ....................................11
   3.6. Non-extradition of citizens permitted ....................................................................................................12
   3.7. Non-extradition permitted where pending proceeding for same offense or competing requests ..........14
4. Reservations impose additional exceptions and conditions ......................................................................14
   4.1. Humanitarian bars to extradition ........................................................................................................14
   4.2. Human rights bars to extradition ........................................................................................................15
5. Personal immunity from foreign jurisdiction ............................................................................................17
6. Prosecution by foreign state denying extradition ....................................................................................18
7. Recommendations ........................................................................................................................................20

1 Declassified by the Committee on 31 May 2010.
2 While the title of the motion is limited to member states of the Council of Europe, the text of the motion also refers to observer states.
3 The rapporteur wishes to express his appreciation for help he obtained from Mrs Mary Wyckoff, Former Head, Rule of Law Unit, OSCE Mission to Croatia/Office in Zagreb. A background paper prepared by Mrs Wyckoff served as the principal source of this explanatory memorandum.
Summary

Justice and accountability for war crimes committed in the conflicts that occurred on the territory of the states of the former Yugoslavia (hereinafter “concerned states”) are essential to regional reconciliation. Hence, impunity should be avoided. In light of the Completion Strategy of the International Criminal Tribunal for the former Yugoslavia (ICTY), the concerned states have since 2005 borne the primary obligation to ensure accountability for both persons and crimes not addressed by the ICTY. As previously emphasized by the Parliamentary Assembly, co-operation between the concerned states is essential to combat impunity.

However, the motion highlights that co-operation from third countries is also needed, in particular when war crimes suspects are found on their territory. The European Convention on Extradition (Convention) and its two Protocols articulate procedures and standards for extradition requests. All member states have ratified the Convention, but not all have ratified the Protocols. No observers have ratified either the Convention or Protocols. The Convention’s general rule of compulsory extradition is subject to significant exceptions and conditions as well as numerous declarations and reservations lodged by member states. Of relevance to the present report, a Council of Europe expert body is currently working on modernizing the Convention.

Information provided by the concerned states suggests that extradition requests for war crimes suspects have been addressed not only to other concerned states but also to other member states of the Council of Europe, observers and other third countries. The most frequent reason for rejection was the suspect’s citizenship. Publicly available information indicates that the most common reasons for denial also include fair trial concerns, diplomatic immunity, refugee status, concerns about discriminatory punishment and prosecution, and lapse of time.

It appears likely that the number of extradition requests for war crimes suspects from the concerned states to Council of Europe member states and observers will increase in the future raising additional questions about implementation of the Convention and its Protocols. This situation suggests that continued attention to this issue by the Parliamentary Assembly would be useful. Follow-up actions by the Assembly could include recommendations to the Committee of Ministers in regard to coordination with Council of Europe organs engaged in revision of the Convention, highlighting concerns related to co-operation with third countries and collaboration with other international organizations.

In this context it should by mentioned that the General Assembly of the United Nations proclaimed the years 2001-2010 as the “International Decade for a Culture of Peace and Non-Violence” and adopted several resolutions on the “Culture of Peace”. Since the history of mankind has for thousands of years been the history of the “Culture of War” we should, at the end of this decade, ask ourselves what have we truly achieved and in what way have we contributed to the goals of the above-mentioned resolutions.

1. Introduction

1. As noted by the motion for recommendation, the Parliamentary Assembly unambiguously declared in 2007 that individual accountability for war crimes committed during the conflicts on the territory of the former Yugoslavia “is an indispensable ingredient in the process of reconciliation for the victims, communities and countries concerned.” In order for justice to be done, the Assembly concluded, impunity must be fought “resolutely.” As part of its Completion Strategy, the International Criminal Tribunal for the former Yugoslavia (ICTY) set a cap on the persons and crimes it would prosecute. Hence, as of 2005 the concerned states in

---

4 Resolution 1564 (2007), Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), paragraph 2.
5 In 2003, the United Nations Security Council (UNSC) endorsed the following timetable for the ICTY Completion Strategy: 2004 (complete investigations); 2008 (complete trials); 2010 (complete all work). United Nations Security Council Resolution (UNSCR) 1503 (2003). In 2004, the UNSC obliged the ICTY to report every six months on its progress in implementation of the Completion Strategy as well as address this issue in its Annual Report to the General Assembly. UNSCR 1534 (2004). As of late 2009, the Completion Strategy timetable has been extended as follows: 2010 (trials completed but 4); 2011 (trials completed but 1); 2012 (trials completed); 2013 (appeals completed but 1); 2014 (appeals completed). Statement by Judge Patrick Robinson, President of the ICTY to UNSC on 3 December 2009 presenting 12th Completion Strategy report; see also Assessment and report of Judge Patrick Robinson, President of the ICTY, S/2009/589, 13 November 2009, paragraphs 4 and 5.
6 The ICTY indicted a total of 161 persons. Proceedings have concluded against 121 persons, including 11 acquittals, 61 convictions and sentences, 13 transferred to national courts, and 36 cases terminated. Proceedings against 40 persons are ongoing, including 13 on appeal, 24 on trial, 1 in pre-trial, and two fugitives. ICTY Digest 22 December 2009, No. 70.
the region bear the primary responsibility for ensuring accountability for both individuals and crimes not addressed by ICTY proceedings.\footnote{The question of state responsibility (as distinguished from individual criminal responsibility) for crimes during the armed conflicts on the territory of the former Yugoslavia has been the subject of inter-state litigation before the International Court of Justice (ICJ) under the Convention on the Prevention and Punishment of Genocide. Bosnia and Herzegovina v. Serbia, judgment on the merits 26 February 2007; Croatia v. Serbia, judgment finding jurisdiction to review on the merits, 18.11.2008. According to media reports, Serbia initiated a counter complaint against Croatia. See Serbia Hits Back with Genocide Suit against Croatia, www.balkaninsight.com, 6 January 2010.}

2. The motion repeated the Assembly’s observation that effective prosecution required co-operation between the concerned states, reiterating its call that these states remove legal obstacles that impede justice. In particular, Resolution 1564 (2007) cited the ban on extradition of nationals,\footnote{The Parliamentary Assembly concluded that “non-extradition of nationals should not extend to persons charged with war crimes, once there are guarantees that the accused will receive a fair trial” and called on the concerned states to “immediately lift the ban on the extradition of nationals charged with committing war crimes.” Resolution 1564 (2007), paragraphs 19.1 and 21.1.1.} including the “misuse of the acquisition of multiple nationality,”\footnote{Noting that some persons obtained citizenship in one concerned state for the purpose of avoiding extradition on war crimes charges to another, the Parliamentary Assembly urged these states to “carefully examine applications for nationality and not grant it to anyone indicted for a war crime in another country.” Resolution 1564 (2007), Paragraphs 19.2 and 21.1.2.} and transfer of serious criminal proceedings\footnote{Resolution 1564 (2007), paragraph 21.1.4.} as legal obstacles that should be lifted. As noted by the ICTY Prosecutor\footnote{“Legal obstacles to cooperation continue to exist. Each State bars extradition based on nationality and has other legal barriers preventing the transfer of war crimes cases from one State to another.” Report of Serge Brammertz Prosecutor of the ICTY to the UNSC S/2009/589, 13 November 2009, paragraph 48. “[N]ational prosecution services and judiciaries continue to face significant legal obstacles and challenges with regard to the prosecution of war crimes.” Address of Serge Brammertz Prosecutor of the ICTY to the UNSC on 3 December 2009.} and the European Commission,\footnote{“Obstacles to the extradition of suspects in cases of war crimes and crimes against humanity between the countries of the region continue to exist.” Croatia 2009 Progress Report, SEC (2009) 1333, 14 October 2009, pages 16-17; Serbia 2009 Progress Report SEC (2009) 1339/2, 14 October 2009, page 20; Bosnia and Herzegovina 2009 Progress Report SEC (2009) 1338, 14 October 2009, page 22. “This exacerbates the problem of impunity.... [Croatia, Serbia, and Bosnia and Herzegovina] together with its neighbours should address the regional impunity gap, including by taking steps toward extradition agreements covering war crimes cases.” Croatia 2009 Progress Report, SEC (2009) 1333, 14 October 2009, page 17; Serbia 2009 Progress Report, SEC (2009) 1339/2, 14 October 2009, page 20; Bosnia and Herzegovina 2009 Progress Report SEC (2009) 1338, 14 October 2009, page 22. See also Croatia 2009 Progress Report, SEC (2009) 1333, 14 October 2009, page 11 (“Convicted persons are on occasion able to escape and shelter within the region due to dual citizenship and a lack of extradition agreements.”).} impediments to co-operation continue to exist\footnote{“Cooperation in judicial matters among the States of the former Yugoslavia is critical to the fulfilment of the International Tribunal’s mandate. Cooperation is necessary to successfully prosecute cases using investigative material transferred by the Office of the Prosecutor to State Prosecutors. [Due to legal obstacles to cooperation] [p]rosecutors from different States are initiating parallel war crimes investigations for the same crimes. This situation threatens the successful investigation and prosecution of war crimes cases and exacerbates the problem of impunity.” Report of Serge Brammertz Prosecutor of the ICTY to the UNSC 13 November 2009, S/2009/589, paragraph 48. “The prohibition on extraditing nationals to other states threatens successful investigations and prosecutions as do legal barriers to the transfer of war crimes cases between states.” Address of Serge Brammertz, Prosecutor of the ICTY to the UNSC on 3 December 2009.} jeopardizing the effectiveness of the ICTY’s Completion Strategy.\footnote{Report of Serge Brammertz the Prosecutor of the ICTY to the UNSC, 13 November 2009, S/2009/589, paragraph 48.} The ICTY Prosecutor called on the concerned states to “urgently address these important issues”\footnote{Report of Serge Brammertz the Prosecutor of the ICTY to the UNSC, 13 November 2009, S/2009/589, paragraph 48.} while the European Commission recommended that steps be taken toward extradition agreements covering war crimes cases.\footnote{See footnote 13.}
3. Following the above-mentioned recommendations, co-operation between the prosecutors of several states concerned has contributed to the prosecution of persons in a state refusing to extradite its citizen, primarily through the transfer of information and evidence as well as by overcoming impunity by recognising foreign judgments.

4. Notwithstanding the primary responsibility of the concerned states, the motion highlighted that member states and observers of the Council of Europe also have an obligation to assist in ending impunity because persons suspected of war crimes have left the territory of the former Yugoslavia. It observed that in several cases where a concerned state requested extradition of a person suspected of war crimes, third countries neither extradited nor prosecuted the sought person found on their territory.

5. This report examines several aspects of the nature and extent of the obligation of member states and observers to aid the concerned states in ensuring accountability for war crimes.

6. First, it presents data provided by several of the concerned states related to their war crimes extradition requests. In order to provide an expanded discussion, this report also relies on information about decisions on extradition requests obtained from public sources. Member states have been presented with extradition requests from the concerned states for persons residing in, transiting through, and visiting their countries, including those on official business or diplomatic mission as a representative of one of the other concerned states.

7. Second, the report reviews the norms applicable to extradition requests as set out in Council of Europe treaty law, i.e., the European Convention on Extradition (Convention) and its two Protocols as well as the reservations thereto lodged by member states. All member states of the Council of Europe as well as two non-members\(^\text{17}\) have ratified the Convention. Thirty-seven (37) members\(^\text{18}\) and one non-member\(^\text{19}\) have ratified the Additional Protocol while forty (40) members\(^\text{20}\) and one non-member\(^\text{21}\) have ratified the Second Additional Protocol. None of the five observer states of the Council of Europe\(^\text{22}\) have ratified either the Convention or its Protocols. Of note, a Council of Europe expert body\(^\text{23}\) is currently working on modernizing the Convention, building on the 2002 “New Start” report addressing developments in international co-operation in criminal matters\(^\text{24}\) and consistent with recommendations of an expert report adopted by the European Committee on Crime Problems in 2006.\(^\text{25}\)

---

\(^{17}\) Israel and South Africa.

\(^{18}\) Member states that have not ratified the Additional Protocol are: Austria, Finland, France, Germany, Greece (signed but not ratified), Ireland, Italy, San Marino, Turkey, and the United Kingdom.

\(^{19}\) South Africa.

\(^{20}\) Member states that have not ratified the Second Additional Protocol are: Andorra, France, Greece (signed but not ratified), Ireland, Liechtenstein, Luxembourg, and San Marino.

\(^{21}\) South Africa.

\(^{22}\) Canada, Holy See, Japan, Mexico, and the United States of America.

\(^{23}\) Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters (PC-OC).


8. The Convention’s general rule of compulsory extradition is subject to significant exceptions and conditions as specified in the Convention and Protocols. In addition, member states have lodged numerous reservations, which further define how they will evaluate extradition requests, including the application of other standards or obligations in particular humanitarian and human rights concerns. Taken together, these documents reveal a tension between different approaches by member states to the principles applicable to extradition and the weight given to various factors. Namely, while an approach that values ending impunity above all else would tend to favour extradition regardless of other factors, an approach that additionally emphasizes humanitarian and human rights concerns related to the accused person would tend to limit extradition. Hence, the Convention and its Protocols are subject to different interpretations by member states. Assessment of a decision rendered on a specific extradition request could require a country-specific inquiry into ratification status vis-à-vis the Protocols, reservations lodged, and national law. For requests to non-parties to the Convention, assessment could require examination of national law as well as any bilateral treaty related to extradition.

9. Both Protocols provide for the engagement of the European Committee on Crime Problems (CDPC) in the settlement of Protocol-related disputes between member states. However, the Convention has no such provision since the CDPC did not exist when the Convention was being prepared.

10. Third, the report examines the impact on extradition of international treaty law related to the personal immunity from foreign jurisdiction of diplomats and other state officials. It also notes the related recommendations by the Secretary General for standard-setting by the Council of Europe in order to establish exceptions to State immunity in cases of serious human rights violations focusing on the possibility of waiver.

11. Fourth, it considers the issue of prosecution by third states including through the Convention mechanism, which must be triggered by the requesting state, when extradition is refused due to citizenship. However, the concerned states provided no information as to whether or how often they requested prosecution by a third country rejecting extradition. This section further discusses subsequent support by Council of Europe expert bodies for full use of the principle of *aut dedere aut judicare*.

12. The report also stresses the fact that, besides the above-mentioned Convention and protocols, there is insufficient respect and implementation of many other existing Conventions and International Agreements in this field. Although the Parliamentary Assembly has on several occasions recommended that member states ratify the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, only five members have done so. Somewhat less than half of the Council of Europe member states (including all of the states concerned) have ratified the United Nations convention on the same issue. Equally important is co-operation with the International Criminal Court (ICC). Since its adoption in 1998, the Rome Statute of the ICC has been ratified by only 108 states. Regrettably, eight Council of Europe member states and two observer states have not yet ratified the Rome Statute.

---

26 During the development of the Convention, two different attitudes, which [proved] irreconcilable, were taken to certain principles which should govern extradition. Namely, one attitude follows the traditional views that the chief aim is to repress crime and that therefore extradition should be facilitated; the other introduces humanitarian considerations and so tends to restrict the application of extradition laws.” Explanatory Report, Convention, General Considerations.

27 Article 7, Additional Protocol; Article 10, Second Additional Protocol.


29 Parliamentary Assembly Recommendation 1427 (1999), paragraph 8.ii.b; Parliamentary Assembly Recommendation 1803 (2007), paragraph 1.1.2.

30 Belgium; Bosnia and Herzegovina; Netherlands; Romania; Ukraine. France signed but did not ratify.

31 Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, “the former Yugoslav Republic of Macedonia”, Ukraine.
13. Finally, the report provides recommendations for possible follow-up action given the likelihood that the number of extradition requests by the concerned states to each other as well as third countries for war crimes suspects will increase in coming years.

2. Data on war crimes extradition requests

14. Information was provided by the concerned states related to their extradition requests for persons suspected of war crimes. Bosnia and Herzegovina, “the former Yugoslav Republic of Macedonia” and Serbia provided numerical as well as other information about extradition requests. Croatia provided numerical information about suspects located in third countries, persons under investigation, charged, and convicted, and discussed four specific extradition requests, three of which were cited in the motion. The information provided by the concerned states omits extradition requests cited in public sources including media and reports of international organizations. The concerned states did not provide information about the number of pending international arrest warrants for war crimes suspects, making it difficult to predict the continuing impact of this issue in third countries. However, based on information provided by Croatia, it is foreseeable that large numbers of suspects would be sought in third countries.

1. Total number of extradition requests or number of persons located in different states on the basis of international warrants is as follows:
   - Bosnia and Herzegovina (BiH) – 23 extradition requests
   - Serbia – 4 extradition requests
   - Croatia – 70 persons “located”
   - “The former Yugoslav Republic of Macedonia” – 1 extradition request

2. Extradition requests to other states of former Yugoslavia (FY):
   - BiH - 13: Serbia (6); Croatia (5); Montenegro (1); Slovenia (1)
   - Serbia - 1: “the former Yugoslav Republic of Macedonia” (1)
   - Croatia - 29 “located” - Serbia (15); BiH (13); Montenegro (1)

3. Extradition requests to third states (among the mentioned states only Australia is not a member/observer to the Council of Europe):
   - BiH - 10: Netherlands (2); Germany (1); Norway (1); Italy (1); USA (4); Australia (1)
   - Serbia - 3: Norway (1); Austria (1); Italy (1)
   - Croatia - 41 “located”: United Kingdom (4); Russian Federation (3); Austria (1); Greece (1); Netherlands (1); Norway (1); USA (12); Canada (4); Australia (14)
   - “The former Yugoslav Republic of Macedonia”: Germany (1)

---

32 In June 2009, the Rapporteur requested the following information related to extradition requests for war crimes suspects from the Parliamentary Assembly delegations of Bosnia and Herzegovina (BiH), Croatia, “the former Yugoslav Republic of Macedonia”, Montenegro and Serbia.
1) How many extradition requests have been made by your country? Please indicate - to the extent possible – to which countries. 2) Among those, how many have been granted and how many have been rejected? 3) For those granted, what was the outcome of the judicial proceedings in your country after the extradition? 4) For those rejected – to the extent possible – could you indicate the reasons given for the refusal? 5) Which extradition requests are still pending? Please also indicate whether and how often extradition requests had to be renewed before the extradition was carried out. I would be grateful if you could provide me with any other relevant information concerning this issue.” No response provided by Montenegro.
33 BiH: Information provided by State Prosecutor dated 16 September 2009 and information from the Ministry of Justice, dated 25 September 2009; “the former Yugoslav Republic of Macedonia”: Information provided by the Head of the delegation to PACE, dated 18 March 2010; Serbia: Information provided by the Ministry of Justice, dated 7 October 2009.
35 As of 1 October 2009, Croatia had initiated the following number of proceedings related to war crimes: 306 persons under investigation, 1 784 charged, and 602 convicted and sentenced. State Attorney’s Office of the Republic of Croatia, 2 December 2009.
15. The rapporteur has unfortunately not yet received data from all the states of former Yugoslavia.

16. To date only five persons have been extradited to BiH from Serbia and three from the USA, while one person was extradited to Serbia from Norway and one person to “the former Yugoslav Republic of Macedonia” from Germany.

17. Public information indicates that at least forty to fifty persons have been arrested in third countries between 2002 and 2009 on the basis of extradition requests by Croatia for war crimes suspects. At least 22 extraditions were granted and suspects surrendered including Greece (2), Italy (1), United Kingdom (2), Serbia (2), Germany (4), United States (1), Bulgaria (1), Austria (2), BiH (2), Switzerland (2), Slovenia (1), and Hungary (1). Norway granted extradition of one suspect, but surrendered this individual to Serbia, concluding that the concurrent charges in Serbia were for more serious crimes. Australia and the Netherlands each extradited one person accused for war related murders, one with consent.

18. Only BiH provided information about outcomes after extradition. BiH also pointed to several extraditions, which were denied for procedural reasons. For example, Australia did not consider BiH an “extradition country” for purposes of national law, which designation was subsequently changed. Similarly, the USA did not extradite a person considered by BiH as a “suspect,” rather than an “accused.” In both cases, it seems likely that BiH could renew the request.

19. Citizenship of the suspect was the most frequently cited reason for denial of extradition. For example, citizenship was cited as the basis for denial of extradition in forty (40) per cent (4 of 10) of BiH’s denied extradition requests. BiH did not provide any information about when the citizenship of the other state had been acquired in relation to its extradition request. BiH did not indicate whether it utilized its option under the Convention to request that the state refusing to extradite its citizen conduct its own prosecution.

20. At least fourteen (14) extraditions requested by Croatia were denied. Five were denied by Bosnia and Herzegovina, four (4) due to the suspect’s citizenship and one (1) due to an ongoing proceeding, which concluded that charges were unfounded. Several countries denied extradition due to fair trial concerns including Italy (1) and Austria (1). It appears that three other extraditions may also have been denied on this basis including Austria (2) and Norway (1). Canada rejected an extradition request after its immigration service denied the Government’s request to vacate refugee status. The United States denied a request due to the expiration of the statute of limitations under applicable law and bilateral treaty. Bulgaria denied a request based on diplomatic immunity and the Russian Federation denied a request based on the Convention bar against extradition where discriminatory prosecution is a concern. In addition, Croatia withdrew one international warrant on which a suspect had been arrested in BiH due to the expiration of the statute of limitations on the execution of sentence.

36 Deported for immigration fraud.
38 Croatia cited two extraditions granted by the United Kingdom as “very positive and important examples of cooperation representing a result of long-term procedures with a political implication.” Republic of Croatia Ministry of Justice dated 23 December 2009.
39 Of 8 persons extradited, the outcomes reported were as follows: charges dropped (1); investigation ongoing (1); indictment issued (1); trial ongoing (2); “agreement” reached, presumably guilty plea agreement (1); appeal ongoing (2) (unspecified whether conviction or acquittal at trial).
41 Croatia cited this case as an example in which the final extradition decision was “a political one”. Republic of Croatia Ministry of Justice dated 23 December 2009.
43 See footnote 37.
21. Finally, it should be emphasized that even when extraditions were granted, in some cases, the extradition process lasted five to ten or even more years. This of course is of great importance concerning the needs of organizing a trial after so many years.

3. Convention exceptions to and conditions on extradition

22. While the Convention articulates the principle of compulsory extradition, it in combination with its two Protocols specifies exceptions to this general rule as well as conditions that must be met if extradition is to be granted. Some Convention exceptions are mandatory upon the requisite finding, such as non-extradition for political offenses, discriminatory prosecution or punishment, certain prior final judgments (ne bis in idem), and immunity due to lapse of time. The Second Additional Protocol establishes conditions that must be satisfied by the requesting party before extradition on the basis of judgments in absentia.

23. Other Convention exceptions are optional at the discretion of the requested state such as non-extradition of citizens, for offenses committed on its territory, where it is conducting a proceeding for the same offense, or it decided either not to institute or to terminate proceedings for the same offense.

24. As a general rule when extradition is granted, proceedings in the requesting state are limited to those offenses for which the person was extradited under the rule of speciality.

3.1. Extradition prohibited for political offenses, but international humanitarian law obligation unaltered

25. The Convention prohibits extradition for an offense determined by the requested state to be a political offense or an offense connected with a political offense. Acknowledging that the prohibition on extradition for political offenses does not affect the obligation of states under other international conventions, the Convention supports extradition where offenses involve violations of the Geneva Conventions and the Genocide Convention. One member explicitly declared political offenses do not include crimes against humanity, violations of the Geneva Conventions and other international crimes.

26. The Convention explicitly excluded the “taking or attempted taking of the life of a Head of State or a member of his family” from the definition of political offense. Ten members reserved the option to determine in light of the circumstances of an individual case whether such crimes against a Head of State constituted a political offence, while one member reserved the option to extradite for such offenses only to state parties to another Council of Europe convention. One member declared additional crimes it considered as excluded from the definition of political offense.

---

44 Article 1, Convention.
45 Article 14.
46 E.g., The Croatian Ministry of Justice advised a local court of the need to release Jovan Petkovic who had been acquitted of the charges for which he had been extradited from Switzerland and that detention could not continue while additional charges were investigated. OSCE Mission to Croatia, Background Report: Domestic War Crimes Trials 2005, 22 September 2006, SEC.FR/444/06, page 39. Similarly, the Croatian Supreme Court held that conviction of Nenad Tepavac under a different legal qualification, i.e., murder instead of war crimes, although based on the same facts was consistent with the rule of speciality, while conviction of offenses beyond the scope of the request for which he had been extradited from Serbia violated that rule. I Kz 1265/07-7, 1 October 2008.
47 Article 3, paragraph 1, Convention.
48 Article 3, paragraph 4, Convention.
49 Explanatory Report, Convention, page 7 (“The reference here is in particular to the four Red Cross Conventions signed at Geneva in 1949, and to the Convention on the Suppression of Genocide.”)
50 Russian Federation.
51 Article 3, paragraph 3, Convention.
52 Denmark, Finland (if the offence was committed in “open fight”), France, Iceland, Lithuania, Malta, Moldova, Norway, Sweden, Switzerland.
53 United Kingdom reserved the right to apply the provisions of Article 3 paragraph 3 only in respect of States Parties to the European Convention on the Suppression of Terrorism.
54 Spain declared that in addition acts of terrorism would not be considered political offenses.
27. The Additional Protocol explicitly excluded crimes against humanity, violations of the Geneva Conventions, and other violations of the laws of war from the definition of political offence. During preparation of the Additional Protocol, some States objected that it was inappropriate to conclude in advance that certain offences could never be considered "political offences" and that this question should be left to the requested state in the light of the facts of each individual case. Hence, the Additional Protocol permits members to opt out of this provision as part of ratification. Forty percent of the member states have either not ratified the Additional Protocol or while ratifying took advantage of the option to reject this specific provision.

28. None of the concerned states indicated that extradition requests had been denied on the grounds that the war crimes charges for which a person was sought were considered political offences by the requested state. However, Croatia cited two examples in which it identified the decision denying extradition as “a political one.”

3.2. Extradition prohibited for discriminatory prosecution or punishment

29. The Convention prohibits extradition if the requested State “has substantial grounds for believing that a request for extradition for an ordinary offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.” The Convention specifies only two categories of criminal offenses – political offenses and ordinary offenses. While war crimes and crimes against humanity are not “ordinary” in a common-sense meaning of that word, for purposes of the Convention as made explicit by the Additional Protocol, they would in general be considered ordinary offenses, subject to the prohibition against extradition, which would lead to discriminatory treatment by the requesting State. Reportedly, the Russian Federation cited this provision as the basis for denying at least one extradition request by Croatia, which decision Croatia described as “a political one.”

30. Application of a related standard by Australia – a non-member, non-observer - to deny a request for the extradition of an Australian citizen of Serb national origin for war crimes sheds light on the types of factors considered by states concerned about possible discriminatory treatment by the requesting state after extradition.

55 Article 1, Additional Protocol. This list of offenses was drawn in large part from the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes. See Explanatory Report, Additional Protocol, Chapter I - Political Offence, General Remarks.


57 See footnote 18.

58 Denmark, Georgia, Hungary, Iceland, Malta, Netherlands, Norway, Sweden, and Ukraine used the option permitted by Article 6 of the Additional Protocol to declare that they do not accept Chapter I, which contains the revised definition of Article 3 of the Convention. Several of these states further indicated that they reserved the right to decide on a case-by-case basis whether to grant extradition, while one reserved the right to “refuse extradition in cases of violations of laws and customs of war which have been committed during a non-international armed conflict.”


60 Article 3.2, Convention.


63 Snedden v. Republic of Croatia, Federal Court of Australia, FCAFC111 (2 September 2009). Article 7 of the Australian Extradition Act of 1988 provides that there is an extradition objection if: (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions.”
3.3. Prior final judgment for same offences – ne bis in idem

31. The Convention read together with the Additional Protocol differentiates between final judgments issued by the requested state and those issued by a third state for purposes of determining the impact of the principle of *ne bis in idem* (“not twice for the same”).

32. The Convention prohibits extradition if the requested state has previously passed a final judgment (i.e., acquittal, pardon, or conviction) against the same person in respect of the same offences. For purposes of the Convention, a “final judgment” indicates that all means of appeal have been exhausted. A judgment *in absentia* is not considered to be a final judgment. [See also Section 3.5. below.] In contrast, extradition is discretionary if the requested state has decided either not to institute criminal proceedings or terminated such proceedings. However, if relevant new facts subsequently become known, extradition is required unless the requested state initiates its own proceeding.

33. As a general rule, the Additional Protocol prohibits extradition if a third State Contracting Party to the Convention previously issued a final judgment for the same offences, where that judgment satisfied certain additional conditions. Even where a third state contracting party has issued a final judgment that meets the additional conditions, extradition is optional if the offences were committed on the territory of the requesting state. Further, under the Additional Protocol, decisions by third state contracting parties which preclude or terminate proceedings do not limit extradition. However, the Additional Protocol’s “minimum rules” on the impact of third state judgments can be superseded where national law gives broader effect of *ne bis in idem* to foreign judgments. To similar effect, several members reserved the option under the Convention to prohibit or retain discretion to refuse extradition where final judgments had been issued as to the same offences by a third state, some states further qualifying this by adding that in the event of a conviction, the sentence had also been served or suspended. More than 20% of the members have not ratified the Additional Protocol.

---

65 Several states clarified what constituted acquittal or conviction for purposes of the *ne bis in idem* prohibition. E.g., Austria (does not apply when acquittal or decision not to pursue or terminate criminal proceedings resulted due to the lack of Austrian jurisdiction); Malta (where in a trial, judgment is given acquitting the person charged or accused, it shall not be lawful to subject such person to another trial for the same fact); United Kingdom (reserves the right to refuse to grant extradition, if it appears that that person would if charged with that offence in the United Kingdom be entitled to be discharged under any rule of law relating to previous acquittal or conviction.)
66 Article 9, Convention.
67 Explanatory Report, Convention. At least one state clarified, e.g., Spain (final judgment shall be deemed to have been passed on a person when the judicial decision is no longer subject to any ordinary appeal either because all remedies have been exhausted, or because the decision has been accepted, or on account of its specific nature).
69 Explanatory Report, Convention. Several states reserved the right to grant extradition even if it had issued a final judgment upon a showing by the requesting state that new facts and evidence justify re-opening the case. E.g., Moldova; Switzerland (if extradition granted for other offences and the requesting state has shown that new facts or evidence justify review of the decision on which the refusal to extradite is based, or if the person sought has not served all or part of the punishment imposed on him by that decision).
70 Article 2.2, Additional Protocol. For final judgments of acquittal, extradition remains possible if the acquittal was for formal reasons such as lack of jurisdiction or new facts, which are sufficient grounds for retrial, become known to the requesting state after the final judgment. The final judgment would thus not have been rendered for the “same offences.”
71 Explanatory Report, Additional Protocol, Article 2, paragraph 2, sub-paragraph a. For final judgments of conviction, extradition remains possible unless a) the sentence has been completely enforced, b) subject to pardon or amnesty (either wholly or to extent not enforced), or c) no sanction imposed.) Article 2, paragraph 2, sub-paragraphs b and c.
72 Article 2.3, Additional Protocol. Extradition is also discretionary if offences committed against a person or institution with “public status” or by a person having “public status.”
73 Explanatory Report, Additional Protocol, Article 2, paragraph 2. But see in contrast e.g., Denmark reserved the discretion under the Convention to refuse extradition where third states waived or discontinued proceedings against the same person related to the same offence.
75 Denmark; Ireland; Moldova; Switzerland (right to refuse extradition if decision rendered in a third State in whose territory the offence was committed).
76 Luxembourg; The Netherlands.
77 See footnote 18.
3.4. **Extradition prohibited where immunity due to lapse of time**

34. War crimes on the territory of the former Yugoslavia occurred at a minimum ten years ago and at a maximum nearly twenty years ago. The ICTY concluded its investigations five years ago. The Convention prohibits extradition where under the law of either the requesting or requested state, the sought person has become immune due to the passage of time from either prosecution or punishment.\(^ {77} \) One state reserved the option to refuse if, given the nature of the offence, extradition after the passage of time from either the crime or when the person became at large would be “unjust or oppressive.”\(^ {78} \)

35. Although the Parliamentary Assembly has several times recommended that member states (and specifically the states concerned) ratify the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes,\(^ {79} \) only five members have so ratified.\(^ {80} \) Somewhat less than half of the Council of Europe member states (including all of the concerned states) have ratified the United Nations convention on the same issue.\(^ {81} \)

36. Information available from public sources indicates some charges and verdicts have apparently lapsed due to the passage of time.\(^ {82} \) Unfortunately, these examples suggest that as the years pass there could be some circumstances under which additional extradition requests could be denied on similar grounds.

3.5. **Extradition based on in absentia judgments requires effective re-trial remedy**

37. Multiple member states have been presented with requests from Croatia to extradite on the basis of a conviction *in absentia*. The Second Additional Protocol permits the requested state to condition extradition based on a judgment *in absentia* upon the receipt of assurances from the requesting state “considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence.”\(^ {83} \) The requesting state must ensure “not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy.”\(^ {84} \) Approximately twenty per cent of the member states have either not ratified the Second Additional Protocol\(^ {85} \) or rejected this provision.\(^ {86} \) In addition, several member states lodged reservations specific to judgments *in absentia*.\(^ {87} \) [See Section 4.2. below.]

---

\(^ {77} \) Article 10, Convention. Spain lodged a reservation re-iterating this position.

\(^ {78} \) United Kingdom. See also Malta.

\(^ {79} \) PACE Recommendation 1427 (1999), paragraph 8.i.b; PACE Recommendation 1803 (2007), paragraph 1.1.2.

\(^ {80} \) Belgium; Bosnia and Herzegovina; Netherlands; Romania; Ukraine. France signed but did not ratify.

\(^ {81} \) Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Ukraine.


\(^ {83} \) Article 3, Second Additional Protocol.

\(^ {84} \) Explanatory Report, Second Additional Protocol, Chapter III, paragraph 28.

\(^ {85} \) See footnote 19.

\(^ {86} \) Malta and United Kingdom utilized the option under Article 9 to reject Chapter 3 related to judgments *in absentia*.

\(^ {87} \) Luxembourg, Netherlands, United Kingdom.
38. Decisions by member states in several cases were based on judgments in absentia.\textsuperscript{98, 89, 90}

3.6. Non-extradition of citizens permitted

39. The Convention allows member states to refuse extradition of their citizens even where national law permits such extradition.\textsuperscript{91} Extradition can be denied on the basis of nationality without a specific reservation or declaration to the Convention.\textsuperscript{92} Nonetheless, numerous members have lodged declarations or reservations underscoring their refusal to extradite nationals, retaining discretion to refuse extradition or otherwise conditioning extradition.\textsuperscript{93} Several states indicate more openness to extradition of a national who is also a national of the requesting state where s/he permanently resides\textsuperscript{94} or on the basis of reciprocity, including when additional conditions are satisfied.\textsuperscript{95} Several states while refusing extradition of nationals for enforcement of criminal penalties permit extradition upon the condition inter alia that once criminal proceedings conclude, the citizen is transferred back in the event a criminal sanction involving deprivation of liberty is ordered.\textsuperscript{96}

40. As noted above, Parliamentary Assembly Resolution 1534 called on the concerned states to “immediately lift the ban on the extradition of nationals charged with committing war crimes.”

41. A Council of Europe expert body has acknowledged that the extradition of nationals “requires both a higher degree of confidence among the States concerned and the streamlining of the relevant procedures with a view to guarantee security and foreseeability.”\textsuperscript{97} It notes, however, that the failure to do so presents “the danger to create impunity where none is intended.” [See Section 6 below.]

42. “National” defined. Utilizing the option provided by the Convention,\textsuperscript{98} most members lodged declarations specifying their definition of “national.” Some states include only those persons who have (or would be entitled to) citizenship as defined by national law,\textsuperscript{99} a few included those with multiple or dual citizenship.\textsuperscript{100} Other members define “nationals” more broadly to also include citizens of specified third countries in particular if extradition is sought by a country other than those named, non-citizens with permanent domicile, foreigners sufficiently integrated to be subject to in-state prosecution including without loss of residence privileges upon conviction, specified non-citizens who are not citizens of another state, and persons granted political asylum.\textsuperscript{101}

\begin{itemize}
  \item \textsuperscript{98} \url{www.nezavisne.com}, Released Captain Ilija Brocic, 24 July 2008.
  \item \textsuperscript{89} Milan Spanovic v. Government of Croatia and Secretary of State for Home Department, Case No. CO/7230/2008, 15 May 2009, High Court of Justice, Queen’s Bench Division, Administrative Court, paragraph 5.
  \item \textsuperscript{90} In the re-trial of Mitar Arambasic, deported from the USA, the trial court determines whether the facts as established in the trial in absentia have changed. Depending upon this determination, the trial court confirms the first verdict, invalidates it in part, or invalidates it in entirety.
  \item \textsuperscript{91} Article 6, paragraph 1, Convention. See Explanatory Report, Convention, page 7.
  \item \textsuperscript{92} E.g., Bosnia and Herzegovina.
  \item \textsuperscript{93} Albania ("unless otherwise provided in international agreements"); Andorra; Armenia; Azerbaijan; Bulgaria; Croatia; Cyprus; Estonia (reserves the right to refuse if national does not consent); France; Georgia (reserves the right to refuse on the grounds of public morality, public policy and State security); Germany; Greece; Hungary; Liechtenstein; Lithuania; Luxembourg; Moldova; Montenegro; Netherlands; Poland; Portugal; Romania; Russian Federation; Serbia; “the former Yugoslav Republic of Macedonia”; Ukraine. See also European Committee on Crime Problems, Committee of Experts on Transnational Criminal Justice, Final Activity Report, PC-TJ (2005) 10, 20 December 2005, paragraph 48, page 12 ("The Committee notes that a large number of member States to the Council of Europe do not allow for the extradition of their nationals as an expression of their sovereignty. Others may allow transfer of their nationals for adjudication purposes provided that the sentence is carried out in the state of origin.")
  \item \textsuperscript{94} Hungary (will not grant extradition of national except where person is also national of requesting state and has permanent residence there); Romania (will extradite nationals on the basis of international conventions on the basis of reciprocity if one of the following are fulfilled: “satisfactory” assurance that if custodial sentence imposed, person would be returned to Romania to serve punishment, national has permanent residence in requesting state; national has citizenship of requesting state; crime on the territory or against citizen of EU state).
  \item \textsuperscript{95} Georgia, Romania.
  \item \textsuperscript{96} Netherlands; Romania
  \item \textsuperscript{98} Article 6.1.b., Convention.
  \item \textsuperscript{99} Andorra; Cyprus; Estonia; Georgia; Germany; Ireland; Liechtenstein; Lithuania; Moldova; Monaco; Portugal; Spain; Ukraine.
  \item \textsuperscript{100} Albania; South Africa.
  \item \textsuperscript{101} Denmark (national of Denmark, Finland, Iceland, Norway or Sweden, or a person domiciled in one of those countries); Finland (nationals of Finland, Denmark, Iceland, Norway and Sweden as well as aliens domiciled in these states); Hungary (persons settled definitively in Hungary); Iceland (national of Iceland, Denmark, Finland, Norway or Sweden or a person domiciled in these countries); Latvia (citizens of Latvia and non-citizens who are subjects of the Law on the
43. **Time of citizenship determination.** The Convention provides that as a general rule citizenship “shall be determined as at the time of the decision concerning extradition.” However, the Convention also foresees that the requested state could “first recognize” the person in question as a citizen after its decision to extradite but prior to surrender, in which case it would also be entitled to refuse to extradite on the basis of nationality. The Convention thus permits the acquisition of citizenship during an extradition proceeding for the purpose and/or with the effect of avoiding extradition. Despite the explicit language of the Convention, some states specify the relevant time period for purposes of determining citizenship, including the time of the crime, receiving the request for extradition, the decision on extradition, or surrender. One state indicated that the time of the crime would not be taken into account in the determination of citizenship.

44. Noting examples of persons obtaining citizenship in one state of the former Yugoslavia for the purpose of avoiding extradition on war crimes charges to another of these states, the Parliamentary Assembly previously urged the concerned states to “carefully examine applications for nationality and not grant it to anyone indicted for a war crime in another country.” Newly acquired citizenship of other member states has also reportedly been the basis for the denial of extradition including a case cited in the motion. The Convention provides a mechanism for seeking prosecution by the state denying extradition on the basis of citizenship. [See Section 6 below.]

Status of Former USSR Citizens who are not citizens of Latvia or any other state); Luxembourg (persons of Luxembourg nationality as well as foreigners integrated into the Luxembourg community in so far as they can be prosecuted within Luxembourg for the act in respect of which extradition is requested); Netherlands (persons of Netherlands nationality as well as foreigners integrated into the Netherlands community insofar as they can be prosecuted within the Netherlands for the act in respect of which extradition is requested and insofar as such foreigners are not expected to lose their right of residence in the Kingdom as a result of the imposition of a penalty or measure subsequent to their extradition); Norway (nationals and residents of Norway, Denmark, Finland, Iceland or Sweden, if extradition is requested by states other than those mentioned); Poland (persons granted asylum); Romania (person for whom asylum was granted); Sweden (Swedish nationals, aliens domiciled in Sweden, nationals in Denmark, Finland, Iceland and Norway, as well as aliens domiciled in these states).

---

102 Article 6.1.c., Convention.
103 Andorra; Croatia; France.
104 Bulgaria.
105 Armenia; Ukraine.
106 Austria.
107 Greece.
110 Reportedly, the Russian Federation rejected Croatia’s request to extradite Veljko Kadijevic who was granted Russian citizenship in 2008. See [www.b92.net](http://www.b92.net), Russian won’t extradite ex-Yugoslav defence minister, 1 October 2008.
3.7. **Non-extradition permitted where pending proceeding for same offense or competing requests**

45. The Convention allows a requested state to deny extradition where it has an ongoing proceeding for the same offense as for which extradition is sought.\(^{111}\)

46. The Convention also addresses the related issue of how a requested state should resolve concurrent requests from more than one state for the same person.\(^{112}\) Such decisions should be made in light of all the circumstances, in particular the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person sought, and the possibility of subsequent extradition to another state. Examples of concurrent requests based on proceedings in more than one of the concerned states were reported by the delegation from Serbia. Namely, the two denied extraditions reported were in cases in which another unspecified state requested extradition, which requests were granted. An extradition request granted by Norway, which involved concurrent competing requests from Croatia and Serbia, resulted in both requests being granted while the sought person was surrendered to Serbia.\(^{113}\)

47. As noted above, the ICTY Prosecutor recently observed that “parallel investigations remain a problem where, due to the absence of a legal basis for cooperation, evidence is held by one country, but the suspect resides in another country.”\(^{114}\) This situation makes it more likely that Council of Europe member states will be presented with an increasing number of concurrent and competing requests for extradition from the concerned states.

4. **Reservations impose additional exceptions and conditions**

48. As permitted by the Convention\(^{115}\) member states have lodged a significant number of reservations, which further define how they will evaluate extradition requests. These reservations are primarily lodged either to the Article 1 obligation to extradite or to the entire Convention, although some are also lodged to other specific provisions. The most common reservations address humanitarian concerns related to the status of the sought person and human rights concerns related to the institutions and proceedings in the requesting state. One state reserves the option to refuse if extradition would be adverse to its national security/sovereignty.\(^{116}\)

4.1. **Humanitarian bars to extradition**

49. A considerable number of members have reserved the right to deny extradition where it would be likely to have exceptionally grave/serious consequences (cause particular hardship) for the person sought.\(^{117}\) Factors considered include age (both youth and advanced age), state of health, personal motivation, or other conditions or circumstances (personal and otherwise), including those which would make extradition unreasonable or otherwise incompatible with humanitarian obligations. Several states indicated that this humanitarian interest would nonetheless be considered in light of the nature of the offense and interests of the requesting state. During the development of the Convention, a suggestion to include a provision explicitly foreseeing refusal of extradition for humanitarian reasons was rejected in favour of allowing states to lodge a reservation.\(^{118}\) Reservations lodged by member states largely reflect the language of the rejected proposal. At least one state reserved the right to deny extradition sought for persons granted political asylum,\(^{119}\) whereas as discussed above another member accomplished this same goal by defining political asylees as nationals.\(^{120}\)

---

\(^{111}\) Article 8, Convention.

\(^{112}\) Article 17, Convention.

\(^{113}\) Damir Sireta. See jurist.law.pitt.edu, January 17, 2008, Norway extraditing Vukovar war crime suspect Sireta to the wrong country.


\(^{115}\) Article 26, Convention.

\(^{116}\) Azerbaijan.

\(^{117}\) Andorra; Armenia; Azerbaijan; Belgium; Denmark; Finland; France; Georgia; Hungary; Iceland; Lithuania; Luxembourg; Netherlands; Norway; Russian Federation; Sweden; Ukraine.

\(^{118}\) Explanatory Report, Convention, page 8.

\(^{119}\) Armenia.

\(^{120}\) Poland.
4.2. Human rights bars to extradition

50. As part of their review of extradition requests, a number of states reserve the discretion to assess in light of basic human rights guarantees not only the structures and proceedings of the judiciary in the requesting state but also the quality of the evidence or charges against the individual suspect. One state indicated that its Council of Europe human rights obligations would serve as the prism through which it would give effect to the Convention.

51. **Type of tribunal.** Nearly half of the members explicitly limit extradition to decisions issued and proceedings conducted by an “ordinary” criminal court. These states prohibit or reserve the right to refuse extradition for trial by a “special,” “extraordinary,” or “provisional” court ( provisionally or exceptionally empowered to deal with such offenses) or *ad hoc* tribunal, including one created for that person’s particular case, or summary proceedings, or for purposes of enforcement of either a detention order or sentence of such a court. Some states reserve the right to condition extradition upon receiving adequate assurances from the requesting state that the person will only be tried in an “ordinary” court. One state while countenancing extradition to such a court or for such proceedings would nonetheless refuse if there were grounds for supposing that the proceedings failed to provide minimum fair trial guarantees to the accused. All war crimes proceedings in the concerned states are conducted by courts authorized by law to preside over criminal cases, although the type and specific jurisdiction of the courts varies. As a result, this common reservation should not represent an obstacle to extradition.

52. **Treatment of the accused, including death penalty, life sentences, and prison conditions.** A few members reserve the right to refuse extradition if there are sufficient “grounds for supposing” that the person sought already was or would be, if extradited, subject to torture, cruel, inhuman, or degrading treatment or punishment, or persecution on specified impermissible grounds akin to those cited in the exception to extradition articulated in Article 3.2 of the Convention. At least one state reserves the right to refuse extradition if upon conviction and imposition of a sentence involving deprivation of liberty, the sought person would serve his/her sentence in inhuman conditions. This is also in line with the Case Law of the European Court of Human Rights, which prohibits someone’s extradition in a country where he/she faces a real risk of being subjected to treatment contrary to article 3 ECHR.

---


122 United Kingdom (in giving effect to the Convention will have regard to its human rights obligations under the European Convention on Human Rights).

123 The Russian Federation clarified that *ad hoc* tribunal or summary proceedings did not refer to any international criminal court it recognized.

124 Andorra; Armenia; Austria; Belgium; Bulgaria; Denmark; Finland; France; Georgia; Hungary; Iceland; Liechtenstein; Lithuania; Malta; Moldova; Portugal; Russian Federation; Spain; Sweden Switzerland; “the former Yugoslav Republic of Macedonia”.

125 E.g., Liechtenstein, Switzerland.

126 Russian Federation.

127 Azerbaijan; Russian Federation. See also Final Activity Report prepared by the Committee of Experts on Transnational Criminal Justice, PC-TJ (2005) 10, 20 December 2005, submitted to CDPC April 2006, page 7 (“the Committee underlined the absolute prohibition to extradite persons to a country where they risk being executed or where they may be subjected to torture or to inhuman or degrading treatment or punishment.”)

128 Azerbaijan.

129 Portugal.

53. A few states specify that extradition will be refused where upon conviction either a life sentence or the death penalty could be imposed as punishment. However, none of the concerned states use either of these punishments for war crimes convictions.

54. **Evidence supporting extradition request.** The Convention specifies the procedure for and content of extradition requests. If the information is insufficient to render a decision, the requested state must request additional information and can set a time limit within which it must be provided. The importance of adequate information for purposes of identifying the sought person is underscored by the Netherlands denial of extradition to BiH due to mistaken identity.

55. A number of member states lodged reservations to the provisions setting out these procedures and further specified the quality of evidence they require prior to granting an extradition request such as evidence (prima facie or otherwise) establishing that the person sought has committed the offence (or a sufficient presumption thereof), or where indicated by special circumstances, evidence establishing a sufficient presumption of guilt. Several members reserved the option to assess whether the sentence or arrest warrant was “manifestly ill-founded.” Other states lodged similar reservations to the general obligation to extradite indicating that extradition would be granted only if its court concluded that the evidence was sufficient to warrant trial in the requested state.

56. **Quality of the charges or conduct of the requesting state.** Several states reserve the right to refuse extradition as “unjust or oppressive” due to the “trivial” nature of the offense or because the accusations against the sought person were not made in “good faith in the interests of justice.”

57. **Fair trial standards.** Some states reserve the right to refuse extradition if they deem that minimum fair trials standards would either not be satisfied in a prospective proceeding or had not been provided in a prior proceeding. Hence, these states may refuse if the tribunal/proceedings would not assure fundamental guarantees in particular the rights of the defence and conditions “internationally recognized as essential to the protection of human rights,” including those that must be afforded to criminal defendants by parties to the European Convention on Human Rights (ECHR) and its protocols as well as the International Covenant on Civil and Political Rights. At least one state reserves the right to refuse extradition when a sentence is deemed to be based on “manifest error,” while several indicate specific concern about extraditions for purposes of enforcement of a conviction rendered in absentia, in particular when no remedy remains available and the extradition could subject the person to a penalty without having been able to exercise specific rights of defence provided by the ECHR. [See Section 3.5. above.] Public information indicates that several extradition requests, including one cited in the motion, were rejected due to fair trial concerns. [Sections 2 and 3.5. above.]

131 Georgia (death penalty); Portugal (life sentence).
132 Requests must be supported by a copy of the conviction and sentence, detention order, or arrest warrant, a statement of the offences for which extradition is sought, including the time and place of commission, legal description of the charged crimes and legal citations and/or copy of relevant law together with “as accurate a description as possible” of the person claimed along with any other information to establish identity and citizenship. Article 12, Convention.
133 Article 13, Convention.
134 Andorra; Iceland; Norway.
135 Denmark.
136 Sweden; “the former Yugoslav Republic of Macedonia”.
137 Malta; Israel.
138 Malta; United Kingdom.
139 Malta; United Kingdom.
140 Andorra; France; Portugal; Russian Federation (specifying the rights set forth in Article 14 of the International Covenant on Civil and Political Rights and Articles 2, 3 and 4 of Protocol 7, ECHR).
141 Andorra.
142 United Kingdom.
143 Luxembourg and Netherlands (specifying the rights of defence prescribed by Article 6.3.c., ECHR); see in this context *Ismoilov v. Russia*, Application No. 2947/06, 24 April 2008 and *Kaboulov v. Ukraine*, application No. 41015/05, 19 November 2009.
5. **Personal immunity from foreign jurisdiction**

58. Diplomats, persons on special mission, and certain high-ranking government officials are shielded from the criminal jurisdiction of foreign states even when suspected of or charged with war crimes. Specified officials are provided immunity by international treaty law to which their states are party such as the Vienna Convention on Diplomatic Relations and the New York Convention on Special Missions. The immunity of officials from non-party states to the above treaties derives from customary international law. This type of personal immunity constitutes a complete procedural defence to the exercise of criminal jurisdiction, covers public or private acts committed by limited specified categories of officials while in office or prior to assuming office, ends with the termination of the official function, and applies only between sending and receiving states as well as third states through which the official transits.

59. As provided by the Vienna Convention on Diplomatic Relations, the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States," which immunity can be waived only by the sending state. The International Court of Justice (ICJ) has observed that the Vienna Convention on Diplomatic Relations "reflects customary international law" for purposes of which immunity is accorded to "ensure the effective performance of [an official’s] functions on behalf of their respective States." The ICJ concluded that for an official deemed to enjoy immunity, arrest in a third state on a criminal charge "clearly" prevents exercise of official functions. The ICJ considered the nature of the official’s function in order to determine the extent of immunity when abroad.

60. Given the inviolability of personal immunity, third states have limited options in the absence of a waiver of immunity by the sending state. If allegations of war crimes are known in advance, the foreign state can request that the official not enter. If that person is already on its territory, a receiving state can declare her/him persona non grata and request that the individual leave the country immediately.

---

144 “Diplomatic agents” including the Head of Mission and members of the diplomatic staff of the mission enjoy immunity from the criminal jurisdiction of the receiving state. The person of a diplomatic agent shall be inviolable. S/he shall not be liable to any form of arrest or detention. Articles 1(e), 29, 31.1, Vienna Convention on Diplomatic Relations.

145 A “special mission” is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task. The Head of State, Head of Government, Minister of Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving state or in a third State, in additional to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law. The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State. Articles 1 (a), 21.2, 29, 31.1, New York Convention on Special Missions.


148 Article 32, Vienna Convention on Diplomatic Relations.


150 E.g., Article 9.1, Vienna Convention on Diplomatic Relations (The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving state); Article 12.1, New York Convention on Special Missions (The receiving state may, at any time and without having to explain its decision, notify the sending state that any representative of the sending state in the special mission or any member of its diplomatic staff is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving state). See also International Criminal Law, Antonio Cassese, Oxford University Press, 2003, page 272.
61. The ICJ emphasized however that “immunity from jurisdiction ... does not mean that [an official] enjoys impunity in respect of any crimes [s/he] might have committed,” highlighting that immunity from criminal jurisdiction and individual criminal responsibility are “quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility.” Accordingly, prosecution can proceed under certain circumstances. First, ensuring accountability for crimes committed by officials with personal immunity from foreign jurisdiction remains the responsibility of the home state where they enjoy no such immunity. Second, immunity from foreign jurisdiction ceases if waived by the sending state. Third, after the cessation of the function that provides immunity prosecution could be undertaken by third states that otherwise have jurisdiction for crimes “committed prior or subsequent to [an official’s] period in office as well as in respect of acts committed during that period of office in a private capacity.”

62. Seeking to build on the ICJ’s finding that “immunity does not equate with impunity,” the Secretary General of the Council of Europe issued recommendations for standard-setting by the Council of Europe for purposes of establishing “clear exceptions to State immunity in cases of serious human rights abuses.” The goal would be the adoption of a Council of Europe treaty on state immunity and serious human rights violations focusing on the possibility of waivers, including definition of a procedure for obtaining waivers in individual cases. For purposes of determining the type of cases in which waiver would be considered, the Secretary General noted that this could be done by reference to international crimes and/or human rights norms.

63. Extraditions requested by Serbia and Croatia from third countries where war crimes suspects were visiting have been denied on the basis of personal immunity. For example, Bulgaria in 2009 refused Serbia’s request to extradite Agim Ceku, a former prime minister of Kosovo, who had been invited to visit, following similar refusals by other countries over a period of years. Similarly Bulgaria in 2005 denied Croatia’s request to extradite Cedomir Brankovic who was visiting as part of a military delegation from Serbia. Information was not available as to whether any criminal proceedings were undertaken by the home state.

6. Prosecution by foreign state denying extradition

64. The motion reiterates Recommendation 1427 (1999), which in the specific context of respect for international humanitarian law recommended that Council of Europe member states introduce the aut dedere aut judicare (either extradite or try) principle into their national law. In its 2001 reply, the Committee of Ministers stated that introduction of this principle into national law was “a complex issue” being discussed by the European Committee on Crime Problems (CDPC) “within its present reflection on a new start in co-operation in criminal matters in Europe.” In 2002, the “New Start” report discussed the aut dedere aut judicare principle as a means of reconciling sovereignty with transnational justice, giving examples of how this balance had been met by several states. In late 2005, a Council of Europe expert body found that the
principle of *aut dedere aut judicare* “remains a valid alternative to extradition.”

Consequently, “both as an intermediate solution for facilitating an efficient transnational justice system and also as an effective tool against impunity, full use must be made of the principle of *aut dedere aut judicare*, taking at all times into consideration its character of complementarity to the initial forum.”

Neither report provided information as to the extent to which Council of Europe members and observers had incorporated the *aut dedere aut judicare* principle into national law.

65. When extradition is refused due to citizenship, the Convention provides a mechanism for avoiding impunity, which must be initiated by the state whose request has been rejected. Namely, the requesting state has the option to ask the requested state to undertake prosecution. If such a request is made, the requested state is obligated to “submit the case to its competent authorities” for purposes of determining whether proceedings are considered “appropriate.” During development of the Convention, a proposal, which would have mandated that a requested state initiate criminal proceedings upon denial of extradition due to citizenship, was rejected in favour of leaving this issue at the discretion of the requesting state. Several member states recognize in declarations the obligation (and intention) to prosecute nationals for whom extradition is denied for at least some offences committed abroad as long as specified conditions are satisfied. The concerned states did not provide information as to the extent to which they have exercised this option when confronted with denied extraditions.

66. Between the concerned states, pragmatic co-operation between national prosecutors in terms of the transfer of information and evidence has overcome impunity in some cases.

67. Briefly, besides the earlier signed agreements on co-operation between the national/public prosecutors of the states of the former Yugoslavia, recently the Supreme National Prosecutor’s Office of Montenegro, the Croatian National Prosecutor’s Office and the Serbian Special Prosecutor’s Office for War Crimes have signed special bilateral agreements on co-operation in prosecution of war crimes. Croatia has also offered to sign such an agreement with Bosnia and Herzegovina.

68. As a result of this co-operation the Croatian Prosecutor stated that his Office had prepared and transferred information and evidence concerning 24 war crimes to the Serbian Special Prosecutor’s Office for War Crimes and in the case of one war crime to the Supreme National Prosecutor’s Office of Montenegro. A total number of 49 persons were suspected of the above-mentioned war crimes but could not be extradited to Croatia due to citizenship. However, on the basis of the exchanged evidence and undertaken investigations, five persons are now awaiting trial in Montenegro and 13 in Serbia. One person has already been sentenced in Serbia and other cases are being investigated.

---

163 Article 6.2, Convention.
165 Cyprus; Liechtenstein; Switzerland.
69. The issue of recognition of foreign judgments has also been re-visited by some of the states concerned. In February, 2010 the Ministers of Justice of Bosnia and Herzegovina and Croatia, signed in Sarajevo, a bilateral agreement recognizing foreign judgments and thus preventing the misuse of multiple nationality in evading punishment for crimes (including war crimes). In addition the Croatian Minister stated that Croatia is in the process of amending its Constitution (planned for April, 2010) and will soon after be willing to sign a new agreement with Bosnia and Herzegovina enabling the extradition of nationals between the two states.

70. When extradition is denied for reasons other than citizenship or territoriality, prosecution by a foreign state would depend upon the exercise of universal jurisdiction over persons and crimes, which have little or no connection to the state other than presence.

7. Recommendations

71. Parliamentary Assembly Resolution 1564 (2007) has accentuated that impunity for war crimes is not acceptable, and that all measures should be undertaken to ensure that war criminals still at large do not escape justice. The main responsibility in this respect lies with the states concerned. However, it is clear that the states concerned cannot fully succeed in combating impunity when the perpetrators of war crimes are out of their reach in third countries. The cooperation of all states in combating impunity for war crimes is therefore crucial.

72. This was also underlined in the Security Council Resolution (1993) establishing the ICTY that states (paragraph 4): "The Security Council decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under domestic law to implement the provision of the present resolution and the Statute, including the obligation of States to comply with request for assistance and orders issued by a Trial Chamber under Article 29 of Statute."

73. If the efficient prosecution of war crimes is to be ensured, the same should hold true for co-operation with the states concerned when the trials take place before their national courts, in particular in the light of Parliamentary Assembly Resolution 1564 (paragraph 15) which expressly confirms the responsibility of the national courts to take over from the ICTY and prosecute those responsible for war crimes who have not yet been brought to justice.

74. The Council of Europe Convention on Extradition, while allowing the extradition in cases of breach of the Geneva Conventions and international humanitarian law, does not specifically address the issue of the extradition requirements when war crimes are concerned. In this respect, given ongoing discussions pertaining to modernizing of the Convention, it would be useful for the Parliamentary Assembly to obtain information as to the status and content of those discussions as related to the subject of the report. The Assembly should also recommend that the Committee of Ministers advise the appropriate Council of Europe organs including the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) of specific concerns about extradition related to war crimes suspects. In particular, the Assembly could recommend to the Council of Ministers that it request that the appropriate Council of Europe organs obtain and provide information as to the extent to which member states have enacted the aut dedere aut judicare principle and codified universal jurisdiction over war crimes and crimes against humanity into national law.

75. It would also be of interest to analyse the reasons why Council of Europe member and observer states have not signed and ratified the Conventions mentioned in the introduction to this report. Although the Assembly has on several occasions recommended that member states ratify the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, only several member states have done so. Likewise with the ratification of the United Nations convention on the same issue and also concerning the ratification of the Rome Statute of the ICC.
76. The Assembly clearly stated, in respect of the states concerned, that the bar to extradition of nationals constitutes a serious obstacle to the course of justice. This report has however confirmed that this restriction is common in the member states of the Council of Europe.

77. Since citizenship of the suspect is the most frequent cited reason for denial of extradition, all Council of Europe member states should be urged to carefully examine applications for nationality and not grant it to anyone indicted for a war crime in another country. Furthermore, even when extradition is granted the process itself is sometimes extremely long (in some cases more than ten years), making it more and more difficult to organise a trial after so many years.

78. For purposes of the follow-up to Resolution 1564, it would be helpful to obtain information about the status of the reform of national law in regard to the ban on extradition of nationals between the concerned states, including the “misuse of the acquisition of multiple nationality,” and transfer of serious criminal proceedings, which were identified as legal obstacles that should be lifted.

79. In their discussions of the ICTY Completion Strategy, the UNSC and ICTY have not taken note of the direct role third countries have had in the prosecution of war crimes committed in the former Yugoslavia. The Rapporteur believes that the Assembly could highlight this concern in its resolution and bring it to the attention of the appropriate representatives of the ICTY and UNSC for possible reflection in future reports and statements by those bodies.

80. Council of Europe treaty law on mutual co-operation in criminal matters, including the Convention and its Protocols, forms part of the acquis of the European Union. The Rapporteur suggests that, where appropriate, the Assembly explore possible joint initiatives with the European Parliament related to enhancing co-operation between European Union member states and the states concerned. This is a question of growing importance since the states concerned are no longer a safe haven for war criminals [See Section 6]; the regional “impunity gap” must not be replaced by an “impunity gap” anywhere else in the world.

81. To date, the information provided by the concerned states related to their extradition requests has been limited, especially concerning war crimes committed in Kosovo during the 1990s. However, it is likely that the current scope of requested co-operation is more extensive than reflected in this report and the future scope and need for co-operation from Council of Europe members and observers will likely increase. In order to gain a better understanding, further information would be needed as well as continued attention to this issue over time.

82. The Rapporteur is of the opinion that this issue is meritorious of further in-depth study by the concerned states and the Assembly:

83. He therefore proposes that the Assembly remains seized of this issue (and intends to draft a new motion for a resolution to this end) and undertakes further study, including obtaining more extensive information, especially concerning the issues related to the Council of Europe and United Nations standards raised above, from all the member/observer states by the end of 2010 and 2011, in regard to the following:

84. It would be fruitful to fill in gaps in the information currently available about extradition requests for war crimes suspects lodged by the concerned states. Data collection would be facilitated if the concerned states maintained information specific to extradition requests for war crimes or war-related crimes separate from other types of extradition requests as well as harmonized information on this issue between and among different bodies in the concerned states.

85. Further, in order to have a more complete picture of the possible future scope of extradition requests, it would be helpful to obtain information as to the number of international arrest warrants already issued by each of the concerned states for persons suspected or convicted of war crimes or the number of warrants that would be anticipated in the future. It seems likely that the number of such pending and future warrants is likely in the thousands.
86. It would be also useful to obtain information from all Council of Europe member/observer states that have received an international arrest warrant for a war crime case concerning the extent to which it was dealt with bearing in mind the Parliamentary Assembly requirements on the particular care that should be given to combating impunity for war crimes.

87. In addition, it would be productive to obtain information from the concerned states as to the extent to which they have used the option available to them under the Convention to request that states that refuse to extradite due to citizenship conduct the prosecution or have used the dispute resolution mechanisms provided by the Protocols.

88. Finally, non-member/observer states to the Council of Europe should also be invited to take all necessary measures in combating impunity for war crimes in accordance with the initiatives of the Assembly as well as those of the United Nations, especially in implementing the provisions of Security Council Resolution (1993) on establishing the ICTY and in accordance with the Statute of the International Tribunal.