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

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Miljenko DORIĆ, Croatia, Alliance of Liberals and Democrats for Europe

Summary

Justice and accountability for war crimes committed in the conflicts that occurred on the territory of the states of the former Yugoslavia are essential to regional reconciliation. In light of the Completion Strategy of the International Criminal Tribunal for the former Yugoslavia (ICTY), the states concerned have, since 2005, borne the primary obligation to ensure accountability for both persons and crimes not addressed by the ICTY. Co-operation between the states concerned is essential to combat impunity.

Co-operation of third states is also needed, in particular when war crime suspects are found on their territory. The European Convention on Extradition and its three Protocols articulate procedures and standards for extradition requests. All member states have ratified the Convention, but not all have ratified the Protocols. No observer states have ratified either the Convention or its 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 states.

The most frequent reason for rejection of extradition requests for war crime suspects is the suspect's citizenship. Reasons for denial also include fair trial concerns, diplomatic immunity, refugee status, concerns about discriminatory punishment and prosecution, and lapse of time.

The number of extradition requests for war crime suspects from the states of the former Yugoslavia will increase in the future, raising additional questions about implementation of the Convention and its Protocols. The Committee of Ministers should therefore ensure that the above concerns be taken into account by Council of Europe bodies engaged in revision of the Convention, especially with regard to co-operation with third countries and other international organisations.

¹ Reference to committee: Doc. 11602, Reference 3494 of 3 October 2008.

A. Draft resolution²

1. The Parliamentary Assembly recalls, as emphasised in its Resolution 1564 (2007) on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), that individual justice and accountability for war crimes committed in the conflicts that occurred on the territory of the states of the former Yugoslavia are essential components in the framework of regional reconciliation for the victims, communities and states concerned. Hence, impunity must be fought resolutely.
2. In line with the Completion Strategy of the ICTY, Resolution 1564 (2007) underlined that the main responsibility to ensure accountability of the perpetrators lies with the states concerned. In this context, while reiterating the obligation to fully and effectively co-operate with the ICTY, the Assembly underlined the importance of effective domestic war crime trials as well as co-operation between the countries concerned in ensuring the effective conduct of justice in the region.
3. The Assembly welcomes, in this context, progress made by the states of the former Yugoslavia, narrowing the impunity gap through increased co-operation, including the conclusion of agreements on bilateral extradition and recognition of foreign judgments. The Assembly welcomes, in particular, the co-operation between national prosecutors who have concluded special bilateral agreements which have facilitated the transfer of information and evidence and have proven to be effective.
4. However, it is clear that the states concerned cannot fully succeed in combating impunity when the alleged perpetrators of war crimes are out of their reach in third countries. Therefore, other member and observer states must likewise fight impunity when persons suspected of war crimes are found on their territories. These persons must be either extradited or prosecuted in their countries of residence.
5. Consequently, co-operation between all states is essential, as already underlined in United Nation Security Council Resolution 827 (1993) establishing the ICTY. It is crucial to avoid the regional "impunity gap" being replaced by an "impunity gap" elsewhere in Europe or in the world.
6. In respect to extradition, the Assembly has clearly stated that the ban on extradition of nationals constitutes a serious obstacle to the course of justice. The Assembly welcomes the fact that one of the states concerned, namely Croatia, has lifted the constitutional ban on extradition of its nationals. That said, restrictions on the extradition of nationals are common in member states of the Council of Europe.
7. Council of Europe treaty law, in particular the European Convention on Extradition (ETS No. 24) and its three Protocols (ETS No. 86, ETS No. 98 and CETS No. 209) set out the norms applicable to extradition requests. However, these Protocols have not yet been ratified by all member states and no observer state has ratified either the Convention or its Protocols. The general rule of compulsory extradition is subject to significant exceptions and conditions already specified in the Convention itself and in its Protocols. In addition, these instruments are subject to different interpretations by member states and declarations and reservations further narrow the scope of their application.
8. Furthermore, it is disappointing that other Council of Europe and international standards relevant for filling the impunity gap have not been widely accepted. Very few member states have ratified the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 1974 (ETS No. 82). Less than half of the member states have ratified the United Nations Convention on the same issue. Seven member states and two observer states have not yet ratified the Rome Statute of the International Criminal Court. Less than half of the member states have ratified the European Convention on the International Validity of Criminal Judgments (ETS No. 70). Even when ratified, these instruments are often subject to various reservations and restrictive declarations.
9. The Assembly also reiterates its Recommendation 1427 (1999) on respect for international humanitarian law in Europe, inviting member states to introduce the principle of *aut dedere aut iudicare* (either extradite or prosecute) in their national criminal law, thus enabling all perpetrators of war crimes to be tried in the country of their present residence, when there are obstacles for their extradition to the states where the crimes were committed.

² Draft resolution adopted unanimously by the committee on 16 September 2010.

10. The Assembly urges all member and observer states to:
 - 10.1. take all necessary measures to combat impunity for war crimes, in accordance with the initiatives of the Assembly and of the United Nations;
 - 10.2. sign and ratify the Conventions and Protocols mentioned in paragraphs 7 and 8 and in its Recommendation 1803 (2007) on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), and withdraw, where relevant, declarations and reservations thereto that contravene the object and purpose of those instruments;
 - 10.3. refrain from granting nationality to a person charged for war crimes in another state;
 - 10.4. examine requests for extradition speedily;
 - 10.5. process requests for extradition for war crimes in good faith;
 - 10.6. introduce – in particular in respect of war crime trials – the principle of *aut dedere aut iudicare* (either extradite or prosecute) in their national criminal law.
11. In addition, the Assembly encourages the states concerned in the region to:
 - 11.1. continue to reform their national legislation with the view to further facilitating war crime trials, including the transfer of war trial proceedings;
 - 11.2. pursue effective mutual co-operation in the prosecution of war crimes, in particular through co-operation of national prosecutors' offices regarding the transfer of information and legal evidence;
 - 11.3. improve data collection specifically for extradition requests for war crimes or war-related crimes, as well as for information on international arrest warrants already issued, in order to correctly assess the scope of the problem and its possible systematic solution;
 - 11.4. follow the best practices in the region in respect of lifting the ban on extradition of nationals and recognition of foreign judgments;
 - 11.5. remove all remaining legal hindrances to the prosecution of war crimes as specified in its Resolution 1564 (2007).
12. The Assembly encourages the ICTY and the United Nations Security Council to integrate, in the light of the Completion Strategy, the role performed by states other than those directly concerned, in the prosecution of war crimes committed in the former Yugoslavia.
13. It also encourages the European Union – as the states concerned wish to commence or have commenced the European Union accession process – to explore possibilities for enhanced co-operation between European Union member states and the states concerned in the prosecution of war crimes.

B. Draft recommendation³

1. The Parliamentary Assembly, referring to its Resolution ... on the obligation of member states of the Council of Europe to co-operate in the prosecution of war crimes, recommends that the Committee of Ministers:

1.1. urge member and observer states to sign and ratify the conventions mentioned in paragraphs 7 and 8 of the Resolution and review declarations and reservations limiting their applicability;

1.2. instruct the European Committee on Crime Problems and the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters to make an assessment of the application of the *aut dedere aut iudicare* principle (either extradite or prosecute) and of arrangements to transpose into domestic law the principle of universal jurisdiction over war crimes and crimes against humanity;

1.3. inform the group of experts in charge of revising and modernising the European Convention on Extradition (ETS No. 24) of the Assembly's concerns with respect to co-operation of the member states in the prosecution of war crimes and invite it to take proper account of them in its work;

1.4. invite the Committee of Experts on Impunity of the Steering Committee for Human Rights to take this subject into account in its Draft Guidelines on Eradicating Impunity for Serious Human Rights Violations.

³ Draft recommendation adopted unanimously by the committee on 16 September 2010.

C. Explanatory memorandum by Mr Dorić, rapporteur⁴

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1. Introduction

1. As noted by the motion for a recommendation,⁵ 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”.⁶ In order for justice to be done, the Assembly concluded, impunity must be fought “resolutely”. As part of its Completion Strategy,⁷ the International Criminal Tribunal for the former Yugoslavia (ICTY) set a cap on the persons and crimes it would prosecute and transferred the other cases before the competent national jurisdictions.⁸ Hence, since 2005, the states on the territory of the former Yugoslavia (“the states concerned”) bear the primary responsibility for ensuring accountability for both individuals and crimes not addressed by ICTY proceedings.⁹

⁴ The rapporteur wishes to express his appreciation for help he obtained from Mrs Mary Wyckoff, former Head of the Rule of Law Unit, OSCE Mission to Croatia. A background paper prepared by Mrs Wyckoff served as the principal source of this explanatory memorandum. He also wishes to thank the Heads of the delegations to the Parliamentary Assembly from Bosnia and Herzegovina, Croatia, “the former Yugoslav Republic of Macedonia” and Serbia for assisting him in collecting data on war crime suspects presented in his report.

⁵ [Doc. 11602](#).

⁶ Resolution 1564 (2007) on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), paragraph 2. The present report focuses on war crimes committed in the Balkan region. That said, the rapporteur is fully aware that war crimes are also a concern with regard to other member states: see, for example, Resolution 1683 (2009) on the war between Georgia and Russia: one year after”, and [Doc. 12010](#), report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).

⁷ 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). UNSC Resolution 503 (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 to address this issue in its Annual Report to the General Assembly. UNSC Resolution 1534 (2004). As of late 2009, the Completion Strategy timetable has been extended as follows: 2010 (trials completed but 4); 2011 (trials completed, except four); 2012 (trials completed); 2013 (appeals completed, except one); 2014 (appeals completed). Statement by Judge Patrick Robinson, President of the ICTY, to UNSC on 3 December 2009 presenting the 12th Completion Strategy report; see also assessment and report of Judge Patrick Robinson, S/2009/589, 13 November 2009, paragraphs 4 and 5.

⁸ 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, one in pre-trial, and two fugitives. ICTY Digest, 22 December 2009, No. 70.

⁹ 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

2. The motion repeated the Assembly's observation that effective prosecution required co-operation between the states concerned, reiterating its call that these states remove legal obstacles that impede justice. In particular, Resolution 1564 (2007) cited the ban on extradition of nationals,¹⁰ including the "misuse of the acquisition of multiple nationality"¹¹ and transfer of serious criminal proceedings,¹² as legal obstacles that should be lifted. As noted by the ICTY Prosecutor¹³ and the European Commission,¹⁴ impediments to co-operation continue to exist,¹⁵ jeopardising the effectiveness of the ICTY's Completion Strategy.¹⁶ The ICTY Prosecutor called on the states concerned to "urgently address these important issues"¹⁷ while the European Commission recommended that steps be taken towards extradition agreements covering war crime cases.¹⁸

3. Following the above-mentioned recommendations, co-operation between the prosecutors of several of the states concerned has contributed to the prosecution of persons accused of war crimes in a state refusing to extradite its citizens, 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 states concerned, 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 and have found refuge elsewhere in the world. It observed that, in several cases where a state concerned 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 states concerned in ensuring accountability for war crimes.

6. First, it presents data provided by several of the states concerned relating to their war crime 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

merits, 18 November 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.

¹⁰ The 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 states concerned 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.

¹¹ Noting that some persons obtained citizenship in one state concerned for the purpose of avoiding extradition on war crime charges to another, the 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.

¹² Resolution 1564 (2007), paragraph 21.1.4.

¹³ "[L]egal obstacles to co-operation 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 Prosecutor Serge Brammertz to the UNSC on 3 December 2009.

¹⁴ "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, pp. 16-17; Serbia 2009 Progress Report SEC (2009) 1339/2, 14 October 2009, p. 20; Bosnia and Herzegovina 2009 Progress Report SEC (2009) 1338, 14 October 2009, p. 22.

¹⁵ "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, p. 17; Serbia 2009 Progress Report, SEC (2009) 1339/2, 14 October 2009, p. 20; Bosnia and Herzegovina 2009 Progress Report SEC (2009) 1338, 14 October 2009, p. 22. See also Croatia 2009 Progress Report, SEC (2009) 1333, 14 October 2009, p. 11 ("Convicted persons are on occasion able to escape and shelter within the region due to dual citizenship and a lack of extradition agreements.")

¹⁶ "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 by 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 to the UNSC on 3 December 2009.

¹⁷ Report of Serge Brammertz, Prosecutor of the ICTY, to the UNSC, 13 November 2009, S/2009/589, paragraph 48.

¹⁸ See footnote 15.

requests from the states concerned 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 states concerned.

7. Second, the report reviews the norms applicable to extradition requests as set out in Council of Europe treaty law, namely the European Convention on Extradition (ETS No. 24) ("the Convention") and its three Protocols (ETS No. 86, ETS No. 98 and CETS No. 209), as well as the reservations lodged thereto by member states. All member states of the Council of Europe as well as two non-members¹⁹ have ratified the Convention. Thirty-seven member states²⁰ and one non-member state²¹ have ratified the Additional Protocol while forty member states²² and one non-member state²³ have ratified the Second Additional Protocol. None of the five observer states of the Council of Europe²⁴ have ratified either the Convention or its Protocols. Of note, a Council of Europe expert body²⁵ is currently working on modernising the Convention, building on the 2002 "New Start" report addressing developments in international co-operation in criminal matters²⁶ and consistent with recommendations of an expert report adopted by the European Committee on Crime Problems (CDPC) in 2006.²⁷

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 emphasises humanitarian and human rights concerns related to the accused person would tend to limit extradition.²⁸ 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 in the settlement of Protocol-related disputes between member states.²⁹ However, the Convention has no such provision since the CDPC did not exist when the Convention was being prepared.³⁰

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 states concerned provided no information as to whether or how often they requested

¹⁹ Israel and South Africa.

²⁰ 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.

²¹ South Africa.

²² Member states that have not ratified the Second Additional Protocol are: Andorra, France, Greece (signed but not ratified), Ireland, Liechtenstein, Luxembourg, and San Marino.

²³ South Africa.

²⁴ Canada, Holy See, Japan, Mexico, and the United States of America.

²⁵ Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters.

²⁶ New Start: a report, Reflection Group on developments in international co-operation in criminal matters, PC-S-NS (2002)7, 18 September 2002, approved by the CDPC in June 2002.

²⁷ Final Activity Report prepared by the Committee of Experts on Transnational Criminal Justice, PC-TJ(2005)10, 20 December 2005, submitted to CDPC in April 2006, p. 3.

²⁸ "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.

²⁹ Additional Protocol, Article 7; Second Additional Protocol, Article 10.

³⁰ Explanatory Report, Additional Protocol, Chapter III – Final Clauses, General Remarks.

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 are insufficient respect and implementation of many other existing conventions and international agreements in this field. 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 (ETS No. 82),³¹ only five members have done so.³² 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.³³ 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 it.

13. Finally, the report provides recommendations for possible follow-up action, given the likelihood that the number of requests by the states concerned for extradition of war crime suspects, to each other as well as third countries, will increase in coming years.

2. Data on war crime extradition requests

14. Information has been provided by the states concerned relating to their extradition requests for persons suspected of war crimes.³⁴ Bosnia and Herzegovina, “the former Yugoslav Republic of Macedonia” and Serbia provided numerical as well as other information about extradition requests.³⁵ 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.³⁶ The information provided by the states concerned omits extradition requests cited in public sources, including media and reports by international organisations. The states concerned did not provide information about the number of pending international arrest warrants for war crime 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 will be sought in third countries.³⁷

1. Total number of extradition requests or international arrest warrants concerning persons located in various states:
 - Bosnia and Herzegovina: 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:
 - Bosnia and Herzegovina → 13: Serbia (6); Croatia (5); Montenegro (1); Slovenia (1);
 - Serbia → 1: “the former Yugoslav Republic of Macedonia” (1);

³¹ Assembly Recommendation 1427 (1999), paragraph 8.ii.b; Assembly Recommendation 1803 (2007), paragraph 1.1.2.

³² Belgium, Bosnia and Herzegovina, Netherlands, Romania and Ukraine. France has signed but not ratified.

³³ 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” and Ukraine.

³⁴ In June 2009, the rapporteur requested the following information relating to extradition requests for war crime suspects from the Assembly delegations of Bosnia and Herzegovina, 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 reply was provided by Montenegro.

³⁵ Bosnia and Herzegovina: Information provided by State Prosecutor on 16 September 2009 and information from the Ministry of Justice on 25 September 2009; “the former Yugoslav Republic of Macedonia”: Information provided by the chairperson of the parliamentary delegation on 18 March 2010; Serbia: Information provided by the Ministry of Justice on 7 October 2009.

³⁶ Information from the Ministry of the Interior on 26 October 2009; information from the State Attorney on 2 December 2009; information from the Ministry of Justice on 23 December 2009.

³⁷ As of 1 October 2009, Croatia 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.

- Croatia → 29 persons “located” – Serbia (15); Bosnia and Herzegovina (13); Montenegro (1).
- 3. Extradition requests to third states (among the states mentioned only Australia is not a member/observer to the Council of Europe):
 - Bosnia and Herzegovina → 10: Netherlands (2); Germany (1); Norway (1); Italy (1); United States (4); Australia (1);
 - Serbia → 3: Norway (1); Austria (1); Italy (1);
 - Croatia → 41 persons “located”: United Kingdom (4); Russian Federation (3); Austria (1); Greece (1); Netherlands (1); Norway (1); United States (12); Canada (4); Australia (14);
 - “The former Yugoslav Republic of Macedonia” → Germany (1).

15. The rapporteur has unfortunately not yet received data from all the states of the former Yugoslavia.

16. To date, only five persons have been extradited to Bosnia and Herzegovina from Serbia and three from the United States,³⁸ 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 40 to 50 persons were arrested in third countries between 2002 and 2009 on the basis of extradition requests by Croatia for war crime suspects.³⁹ At least 22 extraditions were granted and suspects surrendered including by Greece (2), Italy (1), United Kingdom (2),⁴⁰ Serbia (2), Germany (4), United States (1), Bulgaria (1), Austria (2), Bosnia and Herzegovina (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 of war related murders, one with consent.

18. Only Bosnia and Herzegovina provided information about outcomes after extradition.⁴¹ It also mentioned several extraditions which were denied for procedural reasons. For example, Australia did not consider Bosnia and Herzegovina an “extradition country” for purposes of national law, which designation was subsequently changed.⁴² Similarly, the United States did not extradite a person considered by Bosnia and Herzegovina as a “suspect,” rather than an “accused”. In both cases, it would appear that Bosnia and Herzegovina was able to renew the request.

19. Citizenship of the suspect was the most frequently cited reason for denial of extradition. [See Section 3.6.] For example, citizenship was cited as the basis for denial of extradition in 40% of Bosnia and Herzegovina’s denied extradition requests. Bosnia and Herzegovina did not provide any information about when the citizenship of the other state had been acquired in relation to its extradition request. Neither did it indicate whether it utilised its option under the Convention to request that the state refusing to extradite its citizen conduct its own prosecution. [See Section 6.]

20. At least 14 extraditions requested by Croatia were denied. Five were denied by Bosnia and Herzegovina, four due to the suspect’s citizenship and one due to an ongoing proceeding, which concluded that charges were unfounded. Several countries denied extradition due to fair trial concerns, including Italy (1)⁴³ and Austria (1). It appears that three other extraditions may also have been denied on this basis, including Austria (2) and Norway (1). [See Section 4.2.] Canada rejected an extradition request after its immigration service denied the Government’s request to vacate refugee status.⁴⁴ The United States denied a request due to the expiration of the statute of limitations under applicable law and bilateral treaty. [See

³⁸ Deported for immigration fraud.

³⁹ Information was gleaned from public sources, including judicial and administrative decisions, media, and reports of the Organization for Security and Cooperation in Europe (OSCE) Mission to Croatia, including Background Report: Domestic War Crimes Proceedings 2006, 3 August 2007, p. 17; Background Report: Domestic War Crimes Trials 2005, 22 September 2006, SEC.FR/444/06, p. 39; Background Report: Domestic War Crimes Trials 2004, 26 April 2005, p. 12; Background Report: Domestic War Crimes Trials 2003, 22 June 2004, p. 9.

⁴⁰ Croatia cited two extraditions granted by the United Kingdom as “very positive and important examples of co-operation representing a result of long-term procedures with a political implication.” Republic of Croatia Ministry of Justice, dated 23 December 2009.

⁴¹ Of eight 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).

⁴² In October 2009, Australia designated Bosnia and Herzegovina as an “extradition country.” See Extradition (Bosnia and Herzegovina) Regulations 2009 SLI 2009 No. 256, Legislative Instrument F2009 LO 3623, 12 October 2009.

⁴³ Croatia cited this case as an example in which the final extradition decision was “a political one”. Republic of Croatia Ministry of Justice, 23 December 2009.

⁴⁴ Immigration and Refugee Review Board of Canada, VA7-00522, 19 November 2008.

Section 3.4.] Bulgaria denied a request based on diplomatic immunity [See Section 4.] and the Russian Federation denied a request based on the Convention bar against extradition where discriminatory prosecution is a concern.⁴⁵ [See Section 3.2.] 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. [See Section 3.4.]

21. Finally, it should be emphasised that, even when extraditions were granted, in some cases, the extradition process lasted five to ten years, or more. This of, course is, of great importance concerning the needs of organising a trial after so many years.

3. Exceptions to and conditions on extradition foreseen in the Convention

22. While the Convention articulates the principle of compulsory extradition,⁴⁶ in combination with its three Protocols, it 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 offences, discriminatory prosecution or punishment, certain prior final judgments (*ne bis in idem*), and immunity due to lapse of time. In addition, 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 offences committed on its territory, where it is conducting proceedings for the same offence, or if it decided either not to institute or to terminate proceedings for the same offence.

24. As a general rule, when extradition is granted, proceedings in the requesting state are limited to those offences for which the person was extradited under the rule of speciality.^{47 48}

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

25. The Convention prohibits extradition for an offence determined by the requested state to be a political offence or an offence connected with a political offence.⁴⁹ Acknowledging that the prohibition on extradition for political offences does not affect the obligation of states under other international conventions,⁵⁰ the Convention supports extradition where offences involve violations of the Geneva Conventions and the Genocide Convention.⁵¹ One member explicitly declared that political offences do not include crimes against humanity, violations of the Geneva Conventions and other international crimes.⁵²

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 offence.⁵³ Ten members reserved the option to determine in the light of the circumstances of an individual case whether such crimes against a Head of State constituted a political offence,⁵⁴ while one member state reserved the option to extradite for such offences only to state parties to another Council of Europe convention.⁵⁵ One member state declared additional crimes it considered as excluded from the definition of political offence.⁵⁶

⁴⁵ See footnote 39.

⁴⁶ Article 1 of the Convention.

⁴⁷ Article 14.

⁴⁸ For example, 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, p. 39. Similarly, the Croatian Supreme Court held that the conviction of Nenad Tepavac under a different legal qualification, namely murder instead of war crimes, although based on the same facts, was consistent with the rule of speciality, while conviction of offences 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.

⁴⁹ Article 3, paragraph 1, of the Convention.

⁵⁰ Article 3, paragraph 4, of the Convention.

⁵¹ Explanatory Report, Convention, p. 7 (“The reference here is in particular to the four Red Cross Conventions signed in Geneva in 1949, and to the Convention on the Suppression of Genocide”).

⁵² Russian Federation.

⁵³ Article 3, paragraph 3, of the Convention.

⁵⁴ Denmark, Finland (if the offence was committed in “open fight”), France, Iceland, Lithuania, Malta, Moldova, Norway, Sweden and Switzerland.

⁵⁵ 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 (ETS No. 90).

⁵⁶ Spain declared that, in addition, acts of terrorism would not be considered political offences.

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.⁵⁷ 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.⁵⁸ Hence, the Additional Protocol permits members to opt out of this provision as part of ratification. 40% of the member states have either not ratified the Additional Protocol⁵⁹ or, while ratifying, took advantage of the option to reject this specific provision.⁶⁰

28. None of the states concerned indicated that extradition requests had been denied on the grounds that the war crime 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".⁶¹

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 offence 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".⁶² The Convention specifies only two categories of criminal offences – political offences and ordinary offences. While war crimes and crimes against humanity are not "ordinary" in a common-sense meaning of that word, for the purposes of the Convention, as made explicit by the Additional Protocol, they would in general be considered ordinary offences, 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,⁶³ which decision Croatia described as "a political one".⁶⁴

30. The application of a related standard by Australia – a non-member, non-observer state – 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.⁶⁵

3.3. Prior final judgment for same offences – *ne bis in idem*⁶⁶

31. The Convention, read together with the Additional Protocol, differentiates between final judgments issued by the requesting state and those issued by a third state for the 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 (namely acquittal, pardon, or conviction)⁶⁷ against the same person in respect of the same offences.⁶⁸ For

⁵⁷ Article 1, Additional Protocol. This list of offences 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.

⁵⁸ Explanatory Report, Additional Protocol, General Observations.

⁵⁹ See footnote 20.

⁶⁰ 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".

⁶¹ Republic of Croatia Ministry of Justice dated 23 December 2009.

⁶² Article 3.2 of the Convention.

⁶³ For example, Dragan Arnaut (convicted of war crimes by group judgment *in absentia*). See also Milan Mandić. OSCE Mission to Croatia News in Brief, 14-27 November 2007.

⁶⁴ Republic of Croatia Ministry of Justice, 23 December 2009.

⁶⁵ *Snedden v. Republic of Croatia*, Federal Court of Australia, FCAFC111 (2 September 2009). Article 7.c of the Australian Extradition Act of 1988 provides that there is an extradition objection if: "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."

⁶⁶ See also discussion in Final Activity Report prepared by the Committee of Experts on Transnational Criminal Justice, PC-TJ(2005)10, 20 December 2005, submitted to the CDPC, April 2006, pp. 11-12.

⁶⁷ Several states clarified what constituted acquittal or conviction for purposes of the *ne bis in idem* prohibition. For example, Austria (does not apply when there was an acquittal or decision not to pursue or terminate criminal proceedings due to a shortcoming in Austrian legislation); 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

the purposes of the Convention, a “final judgment” indicates that all means of appeal have been exhausted.⁶⁹ A judgment *in absentia* is not considered to be a final judgment.⁷⁰ [See also Section 3.5.] 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 proceedings.⁷¹

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.⁷² 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.⁷³ In addition, under the Additional Protocol, decisions by third state contracting parties which preclude or terminate proceedings do not limit extradition.⁷⁴ 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.⁷⁵ Similarly, several members reserved the option under the Convention to prohibit or retain discretion to refuse extradition where final judgments had been issued regarding same offences by a third state,⁷⁶ some states further qualifying this by adding that, in the event of a conviction, the sentence had also to have been served or suspended.⁷⁷ More than 20% of the member states have not ratified the Additional Protocol.⁷⁸

3.4. Extradition prohibited where immunity due to lapse of time

34. War crimes on the territory of the former Yugoslavia occurred between ten and 20 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 from either prosecution or punishment due to the passage of time.⁷⁹ 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”.⁸⁰

35. Although the Assembly has recommended several times 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 (ETS No. 82),⁸¹ only six members have done so.⁸² Less than half of 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).

⁶⁸ Article 9 of the Convention.

⁶⁹ Explanatory Report to the 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).

⁷⁰ Explanatory Report, Additional Protocol.

⁷¹ 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. For example, Moldova and 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).

⁷² Article 2.2 of the 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.” 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.

⁷³ Article 2.3, Additional Protocol. Extradition is also discretionary if the offences are committed against a person or institution with “public status” or by a person having “public status.”)

⁷⁴ Explanatory Report to the Additional Protocol, Article 2, paragraph 2. But, in contrast, Denmark, for example, 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 Article 2.4 of the Additional Protocol. Explanatory Report, Additional Protocol, Article 2, paragraph 4.

⁷⁶ Denmark, Ireland, Moldova and Switzerland (right to refuse extradition if decision rendered in a third State in whose territory the offence was committed).

⁷⁷ Luxembourg and the Netherlands.

⁷⁸ See footnote 20.

⁷⁹ Article 10 of the Convention. Spain lodged a reservation re-iterating this position.

⁸⁰ United Kingdom. See also Malta.

⁸¹ Recommendation 1427 (1999), paragraph 8.ii.b; Recommendation 1803 (2007), paragraph 1.1.2.

⁸² Belgium, Bosnia and Herzegovina, Montenegro, Netherlands, Romania, Ukraine. France has signed but ratified.

Council of Europe member states (including all of the states concerned) have ratified the United Nations convention on the same issue.⁸³

36. Information available from public sources indicates that some charges and verdicts have apparently lapsed due to the passage of time.⁸⁴ 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. Several 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 make extradition based on a judgment *in absentia* conditional 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”.⁸⁵ The requesting state must ensure “not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy”.⁸⁶ Approximately 20% of the member states have either not ratified the Second Additional Protocol⁸⁷ or rejected this provision.⁸⁸ In addition, several member states lodged reservations specific to judgments *in absentia*.⁸⁹ [See Section 4.2.]

38. Decisions by member states in several cases were based on judgments *in absentia*.^{90, 91, 92}

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.⁹³ Extradition can be denied on the basis of nationality without a specific reservation or declaration to the Convention.⁹⁴ Nonetheless, many members have lodged declarations or reservations underscoring their refusal to extradite nationals, retaining discretion to refuse extradition or otherwise making extradition subject to certain conditions.⁹⁵ Several states indicate more openness to extradition of a national who is also a national of the requesting state where he or she permanently resides⁹⁶ or on the basis of reciprocity, including when additional conditions are satisfied.⁹⁷ 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 if a criminal sanction involving deprivation of

⁸³ 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.

⁸⁴ See “Federal Prosecutor Drops Charges Against AzulySeiden Law Group Client Goran Pavic”, 21 December 2007, www.allbusiness.com.

⁸⁵ Article 3 of the Second Additional Protocol.

⁸⁶ Explanatory Report to the Second Additional Protocol, Chapter III, paragraph 28.

⁸⁷ See footnote 22.

⁸⁸ Malta and the United Kingdom utilised the option under Article 9 to reject Chapter 3 related to judgments *in absentia*.

⁸⁹ Luxembourg, the Netherlands and the United Kingdom.

⁹⁰ www.nezavisne.com, Released Captain Ilija Brcic, 24 July 2008.

⁹¹ 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.

⁹² In the re-trial of Mitar Arambasic, deported from the United States, 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.

⁹³ Article 6, paragraph 1, of the Convention. See Explanatory Report to the Convention.

⁹⁴ For example, Bosnia and Herzegovina.

⁹⁵ 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 CDPC, Committee of Experts on Transnational Criminal Justice, Final Activity Report, PC-TJ(2005)10, 20 December 2005, paragraph 48, p. 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”).

⁹⁶ 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 European Union state).

⁹⁷ Georgia and Romania.

liberty is ordered.⁹⁸ Croatia recently changed its Constitution to allow its citizens to be extradited to other states when this is specified in international agreements.

40. As noted above, Assembly Resolution 1564 (2007) called on the states concerned 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”.⁹⁹ It notes, however, that the failure to do so presents “the danger to create impunity where none is intended”. [See Section 6.]

– *“National” defined*

42. Utilising the option provided by the Convention,¹⁰⁰ most member states 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,¹⁰¹ a few included those with multiple or dual citizenship (including that of their own country).¹⁰² Other member states 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.¹⁰³

– *Time of citizenship determination*

43. The Convention provides that, as a general rule, citizenship “shall be determined as at the time of the decision concerning extradition”.¹⁰⁴ However, the Convention also foresees that the requested state could “first recognise” 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 extradition proceedings 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,¹⁰⁵ receiving the request for extradition,¹⁰⁶ the decision on extradition,¹⁰⁷ or surrender.¹⁰⁸ One state indicated that the time of the crime would not be taken into account in the determination of citizenship.¹⁰⁹

44. Noting examples of persons obtaining citizenship in one state of the former Yugoslavia for the purpose of avoiding extradition on war crime charges to another of these states, the Assembly previously urged the states concerned to “carefully examine applications for nationality and not grant it to anyone indicted for a

⁹⁸ The Netherlands and Romania.

⁹⁹ CDPC, Committee of Experts on Transnational Criminal Justice, Final Activity Report, PC-TJ(2005)10, 20 December 2005, paragraph 49, p. 12.

¹⁰⁰ Article 6.1.b of the Convention.

¹⁰¹ Andorra, Cyprus, Estonia, Georgia, Germany, Ireland, Liechtenstein, Lithuania, Moldova, Monaco, Portugal, Spain and Ukraine.

¹⁰² Albania and South Africa.

¹⁰³ 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 (nationals of Iceland, Denmark, Finland, Norway or Sweden or a person domiciled in these countries), Latvia (citizens of Latvia and non-citizens who are subject to the Law on the 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 of Denmark, Finland, Iceland and Norway, as well as aliens domiciled in these states).

¹⁰⁴ Article 6.1.c. of the Convention.

¹⁰⁵ Andorra, Croatia and France.

¹⁰⁶ Bulgaria.

¹⁰⁷ Armenia and Ukraine.

¹⁰⁸ Austria.

¹⁰⁹ Greece.

war crime in another country".^{110, 111} Newly acquired citizenship of other member states has also reportedly been the basis for denial of extradition, including a case cited in the motion.¹¹² The Convention provides a mechanism for seeking prosecution by the state denying extradition on the basis of citizenship. [See Section 6.]

3.7. *Non-extradition permitted where pending proceedings for same offence or competing requests*

45. The Convention allows a requested state to deny extradition where it has ongoing proceedings for the same offence as for which extradition is sought.¹¹³

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.¹¹⁴ Such decisions should be made in the 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 states concerned were reported by the Serbian delegation. The two denied extraditions reported were in cases in which another unspecified state also 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 accepted while the person sought was surrendered to Serbia.¹¹⁵

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 co-operation, evidence is held by one country, but the suspect resides in another country".¹¹⁶ 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 states concerned.

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

48. As permitted by the Convention,¹¹⁷ contracting parties 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 operation of the Convention, although some are also lodged to other specific provisions. The most common reservations address humanitarian concerns related to the status of the person sought 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.¹¹⁸

4.1. *Humanitarian bars to extradition*

49. A considerable number of states parties 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.¹¹⁹ 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 the light of the nature of the offence and interests of the requesting state. During the drafting 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.¹²⁰ Reservations lodged by member states largely reflect the language of the rejected proposal.

¹¹⁰ Resolution 1564 (2007), paragraph 21.1.2.

¹¹¹ In June 2009, Bosnia and Herzegovina rejected Croatia's request for extradition of Branimir Glavas who was convicted and sentenced to ten years for war crimes.

¹¹² Reportedly, the Russian Federation rejected Croatia's request to extradite Veljko Kadijevic who was granted Russian citizenship in 2008. See www.b92.net, Russian won't extradite ex-Yugoslav defence minister, 1 October 2008.

¹¹³ Article 8 of the Convention.

¹¹⁴ Article 17 of the Convention.

¹¹⁵ Damir Sireta. See jurist.law.pitt.edu, 17 January 2008, Norway extraditing Vukovar war crime suspect Sireta to the wrong country.

¹¹⁶ 2009 Annual Report to the United Nations General Assembly, A/64/205, S/2009/394, 31 July 2009, paragraph 77, presented on 8 October 2009.

¹¹⁷ Article 26 of the Convention.

¹¹⁸ Azerbaijan.

¹¹⁹ Andorra, Armenia, Azerbaijan, Belgium, Denmark, Finland, France, Georgia, Hungary, Iceland, Lithuania, Luxembourg, Netherlands, Norway, Russian Federation, Sweden and Ukraine.

¹²⁰ Explanatory Report to the Convention, p. 8.

At least one state reserved the right to deny extradition sought for persons granted political asylum,¹²¹ whereas, as discussed above, another member accomplished this same goal by defining political refugees as nationals.¹²²

4.2. *Human rights bars to extradition*¹²³

50. As part of their review of extradition requests, a number of states reserve the discretion to assess in the 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.¹²⁴

– *Type of tribunal*

51. Nearly half of the states parties 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 offences) or *ad hoc* tribunal,¹²⁵ 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.¹²⁶ Some states reserve the right to make extradition conditional upon receiving adequate assurances from the requesting state that the person will only be tried in an “ordinary” court.¹²⁷ 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.¹²⁸ All war crime proceedings in the states concerned are conducted by courts authorised by law to preside over criminal cases, although the type and specific jurisdiction of the courts vary. As a result, this common reservation should not represent an obstacle to extradition.

– *Treatment of the accused, including death penalty, life sentences, and prison conditions*

52. A few states parties 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,¹²⁹ or persecution on specified impermissible grounds akin to those cited in the exception to extradition articulated in Article 3.2 of the Convention.¹³⁰ At least one state reserves the right to refuse extradition if, upon conviction and imposition of a sentence involving deprivation of liberty, the person sought would serve his or her sentence in inhuman conditions.¹³¹ This is also in line with the case law of the European Court of Human Rights, which prohibits someone’s extradition to a country where he or she faces a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights.¹³²

¹²¹ Armenia.

¹²² Poland.

¹²³ In 2005, a Council of Europe expert body addressed the related question of fundamental guarantees during extradition proceedings in requested states. See CDPC, Committee of Experts on Transnational Criminal Justice, Final Activity Report, PC-TJ(2005)10, 20 December 2005, paragraph 49, pp. 6-8.

¹²⁴ United Kingdom (in giving effect to the Convention will have regard to its human rights obligations under the European Convention on Human Rights).

¹²⁵ The Russian Federation clarified that *ad hoc* tribunal or summary proceedings did not refer to any international criminal court it recognised.

¹²⁶ 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”.

¹²⁷ For example, Liechtenstein and Switzerland.

¹²⁸ Russian Federation.

¹²⁹ Azerbaijan and the 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 in April 2006, p. 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”).

¹³⁰ Azerbaijan.

¹³¹ Portugal.

¹³² See, inter alia, *Soering v. the United Kingdom*, Application No. 14038/88, judgment of 19 January 1989 and *Ismoilov v. Russia*, Application No. 2947/06, judgment of 24 April 2008.

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.¹³³ However, none of the states concerned use either of these punishments for war crime convictions.

– *Evidence supporting the extradition request*

54. The Convention specifies the procedure for and content of extradition requests.¹³⁴ 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.¹³⁵ The importance of adequate information for the purposes of identifying the person sought is underscored by the Netherlands' refusal to extradite to Bosnia and Herzegovina due to mistaken identity.

55. A number of states parties 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),¹³⁶ or where indicated by special circumstances, evidence establishing a sufficient presumption of guilt.¹³⁷ Several states parties reserved the option to assess whether the sentence or arrest warrant was "manifestly ill-founded".¹³⁸ Other states lodged similar reservations to the general obligation to extradite indicating that extradition would be granted only if its courts concluded that the evidence was sufficient to warrant trial in the requested state.¹³⁹

– *Quality of the charges or conduct of the requesting state*

56. Several states reserve the right to refuse extradition as "unjust or oppressive" due to the "trivial" nature of the offence¹⁴⁰ or because the accusations against the sought person were not made in "good faith in the interests of justice".¹⁴¹

– *Fair trial standards*

57. Some states reserve the right to refuse extradition if they deem that minimum fair trials standards would either not be satisfied in prospective proceedings or had not been provided in prior proceedings. Hence, these states may refuse if the tribunal/proceedings would not ensure fundamental guarantees in particular the rights of the defence and conditions "internationally recognised 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.¹⁴² At least one state reserves the right to refuse extradition when a sentence is deemed to be based on "manifest error",¹⁴³ while several indicate specific concern about extraditions for the purposes of enforcement of a conviction rendered *in absentia*,¹⁴⁴ 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.¹⁴⁵ [See Section 3.5.] 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.]

¹³³ Georgia (death penalty) and Portugal (life sentence).

¹³⁴ 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 of the Convention.

¹³⁵ Article 13 of the Convention.

¹³⁶ Andorra, Iceland and Norway.

¹³⁷ Denmark.

¹³⁸ Sweden and "the former Yugoslav Republic of Macedonia".

¹³⁹ Malta and Israel.

¹⁴⁰ Malta and the United Kingdom.

¹⁴¹ Malta and the United Kingdom.

¹⁴² Andorra, Russian Federation (which both specify 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, of the ECHR), France and Portugal.

¹⁴³ Andorra.

¹⁴⁴ United Kingdom.

¹⁴⁵ Luxembourg and the Netherlands (which both specify the rights of defence prescribed by Article 6.3.c of the ECHR); see, in this context, *Ismoilov v. Russia*, Application No. 2947/06, judgment of 24 April 2008 and *Kaboulov v. Ukraine*, Application No. 41015/05, judgment of 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 Relations¹⁴⁶ and the New York Convention on Special Missions.¹⁴⁷ The immunity of officials from non-party states to the above treaties derives from customary international law.¹⁴⁸ 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 and third states through which the official transits.¹⁴⁹

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.¹⁵⁰ The International Court of Justice (ICJ) has observed that the Vienna Convention on Diplomatic Relations “reflects customary international law” for the purposes of which immunity is accorded to “ensure the effective performance of [an official’s] functions on behalf of their respective States”.¹⁵¹ The ICJ concluded that, for an official deemed to enjoy immunity, arrest in a third state on a criminal charge “clearly” prevents the 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 their territory. If that person is already on its territory, a receiving state can declare her or him *persona non grata* and request that the individual leave the country immediately.¹⁵²

61. The ICJ emphasised however that “immunity from jurisdiction ... does not mean that [an official] enjoys impunity in respect of any crimes [he or she] 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 offences; it cannot exonerate the person to whom it applies from all criminal responsibility”.¹⁵³ 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,

¹⁴⁶ “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. She or he shall not be liable to any form of arrest or detention. Articles 1(e), 29, 31.1, Vienna Convention on Diplomatic Relations.

¹⁴⁷ 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 addition 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 International Criminal Law, Antonio Cassese, Oxford University Press, 2003, p. 264.

¹⁴⁹ Ibid., p. 266.

¹⁵⁰ Article 32 of the Vienna Convention on Diplomatic Relations.

¹⁵¹ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, International Court of Justice, 14 February 2002, paragraph 52.

¹⁵² For example, Article 9.1 of the 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 of the 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, p. 272.

¹⁵³ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, International Court of Justice, 14 February 2002, paragraph 60.

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.”¹⁵⁴

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 the purposes of establishing “clear exceptions to state immunity in cases of serious human rights abuses”.¹⁵⁵ 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 the definition of a procedure for obtaining waivers in individual cases.¹⁵⁶ For the 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 crime suspects were visiting have been denied on the basis of personal immunity. For example, in 2009 Bulgaria refused Serbia’s request to extradite Agim Ceku, a former prime minister of Kosovo,¹⁵⁷ who had been invited to visit, following similar refusals by other countries over a period of years.¹⁵⁸ Similarly, in 2005, Bulgaria denied Croatia’s request to extradite Cedomir Brankovic who was visiting as part of a military delegation from Serbia.¹⁵⁹ Information was not available as to whether any criminal proceedings were undertaken by the home state.

6. Prosecution by a 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 legislation.¹⁶⁰ 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 CDPC “within its present reflection on a new start in co-operation in criminal matters in Europe”.¹⁶¹ 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.¹⁶² In late 2005, a Council of Europe expert body found that the principle of *aut dedere aut judicare* “remains a valid alternative to extradition”.¹⁶³ 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”.¹⁶⁴ Neither report provided information as to the extent to which Council of Europe member and observer states 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

¹⁵⁴ *Ibid.*, paragraph 61.

¹⁵⁵ Follow-up to the Secretary General’s reports under Article 52 of the ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies (SG/Inf(2006)5 and SG/Inf(2006)13), 30 June 2006, SG(2006)01, paragraph 16. The Secretary General noted that such exceptions would not necessitate amending existing treaty law on personal immunities given the availability of waiver. *Ibid.*, paragraph 17.b.

¹⁵⁶ *Ibid.*, paragraph 22.

¹⁵⁷ All references to Kosovo in this document, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

¹⁵⁸ According to media reports, Ceku was arrested in Bulgaria, released, asked to remain in country, but left after release. Similar outcomes occurred in Slovenia in 2003 and Hungary in 2004, and Columbia expelled Ceku in 2009. www.reuters.com, Bulgaria releases ex-Kosovo PM wanted in Serbia, 25 June 2009.

¹⁵⁹ Background Report: Domestic War Crimes Trials 2005, OSCE Mission to Croatia, 22 September 2006, p. 39.

¹⁶⁰ The Geneva Conventions explicitly incorporate the principles of *aut dedere aut judicare* and interstate co-operation in the matter of extradition. Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Article 88 of the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts.

¹⁶¹ Doc. 9174, Reply of the Committee of Ministers to Recommendation 1427 (1999) on respect for international humanitarian law in Europe.

¹⁶² New Start: a report, Reflection Group on developments in international co-operation in criminal matters, PC-S-NS(2002)7, 18 September 2002, approved by CDPC in June 2002, pp. 16 and 21.

¹⁶³ CDPC, Committee of Experts on Transnational Criminal Justice, Final Activity Report, PC-TJ(2005)10, 20 December 2005, paragraph 50, p. 12.

¹⁶⁴ *Ibid.*, paragraph 52, p. 13.

has the option to ask the requested state to undertake prosecution.¹⁶⁵ If such a request is made, the requested state is obliged to "submit the case to its competent authorities" for the purposes of determining whether proceedings are considered "appropriate".¹⁶⁶ During the drafting 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 states parties recognise 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.¹⁶⁷ The states concerned did not provide information as to the extent to which they have exercised this option when confronted with denials of extradition.

66. Between the states concerned, 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 recently signed special bilateral agreements on co-operation in the 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 investigations undertaken, 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.

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 recognising 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 and would soon thereafter be in a position to sign a new agreement with Bosnia and Herzegovina enabling the extradition of nationals between the two states. The constitution was amended in June 2010.

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. Assembly Resolution 1564 (2007) stressed 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 co-operation of all states in combating impunity for war crimes is therefore crucial.

72. This was also underlined in the United Nations Security Council Resolution 827 (1993) establishing the ICTY, which states (paragraph 4): "The Security Council decides that all States shall co-operate 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 Assembly Resolution 1564 (2007) (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.

¹⁶⁵ Article 6.2 of the Convention.

¹⁶⁶ Explanatory Report to the Convention, p. 7.

¹⁶⁷ Cyprus, Liechtenstein and Switzerland.

74. The European Convention on Extradition, while allowing extradition in cases of breach of the Geneva Conventions and international humanitarian law, does not specifically address the issue of the extradition requirements where war crimes are concerned. In this respect, given ongoing discussions pertaining to modernising the Convention, it would be useful for the Assembly to obtain information as to the status and content of those discussions as related to the subject of the present report. The Assembly should also recommend that the Committee of Ministers advise the appropriate Council of Europe bodies including the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters of specific concerns about extradition related to war crime suspects. In particular, the Assembly could recommend to the Committee of Ministers that it request that the appropriate Council of Europe bodies 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 a few 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 has 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 frequently 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 the purposes of the follow-up to Resolution 1564 (2007), 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 states concerned, 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 states concerned concerning 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 merits further in-depth study by the states concerned and the Assembly. 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 and observer states by the end of 2011, with regard to the following:

- It would be fruitful to fill in gaps in the information currently available about extradition requests for war crimes suspects lodged by the states concerned. Data collection would be facilitated if the states concerned maintained information specific to extradition requests for war crimes or war-related crimes separate from other types of extradition requests, as well as harmonised information on this issue between and among different bodies in the states concerned.
- 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 states concerned 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 to be in the thousands.
- It would also be useful to obtain information from all Council of Europe member and 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 Assembly requirements on the particular care that should be given to combating impunity for war crimes.
- It would be productive to obtain information from the states concerned 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.
- Council of Europe non-member and observer states 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 827 (1993) on establishing the ICTY and in accordance with the latter's Statute.