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The obligation of member and observer States of the Council of Europe to co-operate in the prosecution of war crimes

Reply to Recommendation¹: Recommendation 1953 (2011)
Committee of Ministers

1. The Committee of Ministers has carefully studied Parliamentary Assembly Recommendation 1953 (2011) on “The obligation of member and observer States of the Council of Europe to co-operate in the prosecution of war crimes” (hereinafter referred to as Assembly recommendation), and has transmitted it to the European Committee on Crime Problems (CDPC) and the Steering Committee for Human Rights (CDDH), for information and possible comments. It shares the Assembly’s opinion that member and observer States of the Council of Europe must co-operate to counter impunity and to ensure that those accused of war crimes are brought to justice.

2. The Committee of Ministers notes that all Council of Europe member States have ratified the European Convention on Extradition. It invites the member States which have not yet done so to sign and ratify the other relevant Council of Europe treaties, and in particular the three Additional Protocols to the European Convention on Extradition (ETS No. 86, ETS No. 98 and CETS No. 209), without declarations and reservations limiting their applicability. It also encourages observer States to take the necessary steps with a view to their accession to the above-mentioned instruments.

3. The Committee recalls that Article 1 of the Additional Protocol to the European Convention on Extradition (ETS No. 86), provides that war crimes and crimes against humanity cannot be qualified as political offences and, consequently, that war crimes constitute extraditable offences. In view of the fact that to date, 37 member States of the Council of Europe have ratified the Protocol, and given the pertinence of Article 1 regarding the subject matter of Recommendation 1953 (2011), it is not only important that all member States ratify this Protocol, but also that they withdraw any reservations with respect to Article 1.

4. In October 2011, the Committee of Ministers transmitted a draft Fourth Additional Protocol to the European Convention on Extradition, to the Parliamentary Assembly for an opinion. It has taken note of the Assembly’s positive opinion and has adopted the instrument which modernises a number of the Convention’s provisions. When elaborating the draft protocol, the CDPC was fully aware of the Assembly’s concerns on this subject (paragraph 1.3 of the Assembly recommendation).

5. With respect to the Assembly’s recommendation that the Committee of Ministers 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 assess – in transparent consultation with civil society – the application of the *aut dedere aut iudicare* principle (extradite or prosecute) and arrangements to transpose into domestic law the principle of universal jurisdiction over war crimes and crimes against humanity, the Committee of Ministers recalls that the principle “extradite or prosecute” is already enshrined in the European Convention on Extradition. According to Article 6 paragraph 2 of the Convention, a requested Party that refuses to extradite a national, shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken.

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6. The Committee of Ministers furthermore notes that several member States of the Council of Europe have acknowledged the principle of universal jurisdiction. However, there is no international consensus on the definition and scope of this principle, as the exercise of universal jurisdiction is in practice often subject to legal limitations defined in national legislation. Considerable challenges therefore remain for domestic legal systems to ensure the exercise of universal jurisdiction efficiently and effectively.

7. The Committee of Ministers therefore considers that the Council of Europe could reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction cannot be exercised. It also encourages enhancing co-operation between the member and observer States. The Committee considers that the standard-setting work in progress on the subject is already addressing the criminal law and criminal procedural law questions which arise in relation to the prosecution of war crimes.

8. With regard to paragraph 1.4 of the Assembly recommendation, the Committee of Ministers draws the attention of the Assembly to the fact that the terms of reference of the Committee of Experts on Impunity (DH-I) of the Steering Committee for Human Rights expired on 31 December 2010 and that the Guidelines on eradicating impunity for serious human rights violations were adopted by the Committee of Ministers on 30 March 2011. The subject of Recommendation 1953 (2011) is taken into account in Guideline XII, which states that “International co-operation plays a significant role in combating impunity. In order to prevent and eradicate impunity, States must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights, including the principle of “non-refoulement”, and in good faith. To that end, States are encouraged to intensify their cooperation beyond their existing obligations.” The Committee of Ministers observes that even in those exceptional circumstances when the “non-refoulement” principle may not be claimed, the asylum seeker cannot be expelled, when such expulsion would put him or her at risk of death penalty, or torture or inhuman or degrading treatment, or other serious violations of human rights in accordance with the case law of the European Court of Human Rights.

9. The Committee of Ministers observes that even though these Guidelines do not replace other international standards relating to impunity, such as international criminal law standards, the text also makes reference to issues such as “Accountability of subordinates” (Guideline XIII) and “Restrictions and limitations” (Guideline XIV). Moreover, the reference texts used for the preparation of the guidelines make reference, with respect to Guideline XII, to States’ obligations under the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters, as well as to the United Nations General Assembly Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

10. The Committee of Ministers notes that effective prosecution of war crimes must be based on lessons of the past, and is a condition for the tragedy of totalitarian regimes, in any of their forms and ideologies, never to be repeated. The Committee of Ministers notes the unacceptability of all attempts aiming at denial of totalitarian regimes, their crimes or glorification of their perpetrators and collaborators and attempts to review history. In this context the Committee of Ministers would like to welcome all initiatives aiming at enhancing awareness of totalitarian crimes and protecting the memory of their victims.