

Corker

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EXTRADITION TREATY BETWEEN THE GOVERNMENT OF
THE UNITED STATES OF AMERICA AND THE GOVERN-
MENT OF THE REPUBLIC OF KOSOVO

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Mr. CORKER, from the Committee on Foreign Relations,
submitted the following

REPORT

[To accompany Treaty Doc. 115-2]

The Committee on Foreign Relations, to which was referred the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Kosovo, signed at Pristina on March 29, 2016 (Treaty Doc. 115-2), having considered the same, reports favorably thereon with one declaration and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of advice and consent to ratification.

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I. PURPOSE

The purpose of the Extradition Treaty with the Republic of Kosovo (hereafter "the Treaty") is to impose mutual obligations to extradite fugitives at the request of a party subject to conditions set forth in the Treaty.

II. SUMMARY AND DISCUSSION OF KEY PROVISIONS

The United States is currently a party to over 100 bilateral extradition treaties, including a treaty with the Kingdom of Serbia which was signed on October 25, 1901, and entered into force on June 12, 1902 (hereafter the "1901 treaty"). The 1901 treaty ap-

plies to the Republic of Kosovo as a successor state to the former Socialist Federal Republic of Yugoslavia.

The treaty before the Senate is designed to replace, and thereby modernize, the century-old extradition treaty with the Kingdom of Serbia. It was signed in March 2016 and submitted to the Senate on January 17, 2017. In general, the Treaty follows a form used in several other bilateral extradition treaties approved by the Senate in recent years. It contains two important features which are not in the 1901 treaty. First, the Treaty contains a “dual criminality” provision, which requires a party to extradite a fugitive whenever the offense is punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year. This provision replaces the list of offenses specifically identified in the 1901 treaty. This more flexible provision ensures that newly-enacted criminal offenses are covered by the Treaty, thereby obviating the need to amend it as offenses are criminalized by the Parties.

Second, the Treaty provides for the extradition of nationals. Specifically, Article 1 states that the extradition obligations under the treaty “shall apply regardless of nationality, including with respect to the extradition of nationals of the Requested State.” This contrasts with Article V of the 1901 treaty, which does not obligate a party to extradite its own citizens or subjects. Many countries have, historically, refused to extradite nationals.

The Treaty contains another provision worth noting. Consistent with U.S. policy and practice in recent years, the Treaty narrows the political offense exception. The political offense exception (a long-standing exception in U.S. extradition practice) bars extradition of an individual for offenses of a “political” nature. The Treaty with Kosovo retains the political offense exception in Article 3, but provides that certain crimes shall not be considered political offenses, including murder, serious sexual assault, kidnapping, and offenses for which both parties have an obligation to extradite under a multilateral agreement.

The Treaty contains a provision related to the death penalty. Under Article 6, when extradition is sought for an offense punishable by death in the Requesting State and is not punishable by death in the Requested State, the Requested State may refuse extradition unless the Requesting State provides an assurance that the person sought for extradition will not be executed. This provision is found in many U.S. extradition treaties, as many treaty partners do not impose the death penalty under their laws, and object to its application to fugitives whom they extradite to the United States.

Finally, the terms of Article 15 Rule of Specialty clearly bar onward extradition unless the Requested State consents to the onward extradition or surrender.

III. ENTRY INTO FORCE AND TERMINATION

Under Article 21, the Treaty enters into force upon the exchange of the instruments of ratification. Under Article 22, either party may terminate the treaty on written notice; termination will be effective six months after the date of such notice.

IV. COMMITTEE ACTION

The committee reviewed the Treaty at a hearing on December 13, 2017, at which representatives of the Departments of State and Justice testified. The committee considered the Treaty on March 20, 2018, and ordered it favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the Treaty subject to the declaration set forth in the resolution of advice and consent to ratification.

V. COMMITTEE COMMENTS

The committee recommends favorably the Treaty with the Republic of Kosovo. It modernizes a treaty that is over a century old, and provides a more flexible “dual criminality” provision which will incorporate a broader range of criminal offenses than is covered under the current treaty in place with the Republic of Kosovo.

VI. EXPLANATION OF EXTRADITION TREATY WITH KOSOVO

What follows is a technical analysis of the Treaty prepared by the Departments of State and Justice.

TECHNICAL ANALYSIS OF THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF KOSOVO

The Extradition Treaty between the Government of the United States and the Government of the Republic of Kosovo (“Treaty”) replaces an outdated extradition treaty between the United States of America and the Kingdom of Serbia signed in 1901.

The following is an article-by-article description of the provisions of the Treaty:

Article 1—Obligation To Extradite

Article 1 obligates each State to extradite to the other State persons sought by the Requesting State for prosecution or for imposition or service of a sentence for an extraditable offense. Article 1(2) establishes that extradition shall not be refused based on the nationality of the person sought.

Article 2—Extraditable Offenses

Article 2 defines extraditable offenses. Under Article 2(1), an offense is extraditable if it is punishable under the laws of both States by deprivation of liberty for a period of more than one year or by a more severe penalty. This formulation is consistent with the modern “dual criminality” approach. The new Treaty eliminates the requirement of the 1901 Treaty that the offense be among those listed in the Treaty. The dual criminality formulation also obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws of both States. It ensures comprehensive coverage of criminal conduct for which extradition may be sought.

Article 2(2) is designed to include within the realm of extraditable offenses an attempt or conspiracy to commit, or participation in the commission of, offenses described in Article 2(1). By using the broad term “participation,” the Treaty covers such of-

fenses as aiding, abetting, counseling, or procuring the commission of an offense, as well as being an accessory to an offense, at whatever stage of development of the criminal conduct and regardless of the alleged offender's degree of involvement.

Additionally, Article 2(3) identifies a number of situations in which an offense will be extraditable despite potential differences in the criminal laws of both States. For instance, an offense shall be extraditable whether or not the laws of the Requesting and Requested States place the acts constituting the offense within the same category of offenses or describe the offense by the same terminology. This provision also makes explicit that an offense is extraditable even where the evidence provided does not support the existence of certain facts that are merely necessary to establish U.S. federal jurisdiction, such as evidence of interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce. This clarifies an important issue for the United States in requesting extradition for certain federal crimes. In addition, an offense involving tax fraud or tax evasion, customs duties, or import/export controls shall be extraditable regardless of whether the Requested State provides for the same sort of taxes, duties, or controls.

Article 2(4) addresses issues of territorial jurisdiction. It specifies that where the Requesting State seeks extradition for an offense that occurred outside its territory, the Requested State shall grant extradition if the laws of the Requested State would provide for punishment of the extraterritorial offense in similar circumstances. If the Requested State's laws would not provide for punishment of the extraterritorial offense in similar circumstances, the Requested State nonetheless retains discretion to grant extradition provided the other requirements of the Treaty are met.

Article 2(5) prohibits the Requested State from refusing extradition for the sole reason that the offense was committed on its own territory. The U.S. negotiating team proposed this provision in order to satisfy a provision of Kosovo's domestic law that permits extradition for offenses committed on Kosovo's territory only when expressly required by an extradition treaty or other binding international agreement. Kosovo has previously refused to grant extradition to the United States on this basis under the existing treaty.

Article 2(6) prescribes that if extradition is granted for an extraditable offense, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by a maximum of one year's deprivation of liberty or less, provided that all other requirements for extradition are met.

Article 2(7) provides that where the extradition request is for service of a sentence of imprisonment for an extraditable offense, the Requested State may only grant extradition if at least four months imprisonment remains to be served.

Article 3—Political and Military Offenses

Article 3 establishes an exception for political and military offenses. Article 3(1) states generally that extradition shall not be granted if the offense for which extradition is requested is a political offense.

Article 3(2), however, describes five categories of offenses that shall not be considered political offenses. A near identical list of

these limitations was included in the extradition treaties between the United States and Chile (signed 2013) and the United States and the Dominican Republic (signed 2015). The list of limitations in each of these most recent treaties is slightly broader than similar lists that appear in other modern treaties, including those with Hungary (signed 1994), Poland (signed 1997), the United Kingdom (signed 2003), Bulgaria (signed 2007) and Romania (signed 2007). In addition to offenses that involve the possession, placement, use or threatened use of an explosive, incendiary, or destructive device when such device is capable of endangering life or causing substantial bodily harm or substantial property damage, Article 3(2)(d) now also establishes that political offenses cannot include offenses involving similarly serious biological, chemical or radiological agents. Further, Article 3(2)(e) makes clear that conspiracy or attempt to commit non-political offenses, or aiding or abetting another person who commits or attempts to commit such offenses, also shall not be considered political offenses. This slight narrowing of extraditable offenses to exclude political offenses aligns with a major priority of the United States to ensure that an overbroad definition of "political offense" does not impede the extradition of terrorists.

Notwithstanding Article 3(2), Article 3(3) provides that extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated.

Under Article 3(4), the executive authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. Desertion would be an example of such an offense.

Article 4—Prior Prosecution

Article 4(1) prohibits extradition in instances where a person sought has been previously convicted or acquitted by the Requested State for the offense for which extradition is requested. Under Article 4(2), however, a person shall not be considered to have been convicted or acquitted in the Requested State when the authorities of the Requested State: (a) have decided not to proceed against the person sought for the acts for which extradition is requested; (b) have decided to discontinue any criminal proceedings against the person for those acts; or (c) are still investigating or proceeding against the person sought for those acts.

Article 4(3) applies to circumstances where the Requested State has not convicted or acquitted the person sought, but has an international agreement with a third state for reciprocal recognition and enforcement of criminal judgements. In such cases, the Requested State may deny an extradition request if the person sought has been convicted or acquitted in that third state for the same crime for which extradition was requested.

Article 5—Lapse of Time

Article 5 provides that only the laws of the Requesting State regarding lapse of time shall be considered for purposes of deciding whether or not to grant extradition. In this regard, the Requested State is bound by the statement of the Requesting State that the statute of limitations has not expired.

Article 6—Punishment

Article 6 addresses punishment. When an offense for which extradition is sought is punishable by death under the laws of the Requesting State but not under the laws of the Requested State, the Requested State may refuse extradition unless the Requesting State provides assurances that: (a) the death penalty shall not be imposed on the person sought, or (b) the death penalty, if imposed, shall not be carried out against the person sought. If either condition is satisfied, the Requested State must comply with the extradition request, and the Requesting State must abide by its assurances.

Article 7—Extradition Procedures and Required Documents

Article 7 specifies the procedures and documents required to support a request for extradition. Article 7(1) requires all extradition requests to be submitted through the diplomatic channel. Among several other requirements, Article 7(3)(c) establishes that extradition requests must be supported by such information as would provide a reasonable basis to believe that the person sought committed the offense(s) for which extradition is requested. Notably, this language is understood as equivalent to the probable cause standard applied in U.S. criminal law and applied by U.S. courts in determining whether to certify to the Secretary of State that a fugitive's extradition would be lawful under the applicable treaty and U.S. law. Article 7(6) permits the submission of additional information to enable the Requested State to decide on the extradition request. Article 7(7) deals with circumstances where the Requesting State is considering submitting particularly sensitive information to support its request for extradition. In such a case, if the Requesting State is not satisfied that the Requested State can adequately protect the sensitive information, the Requesting State must determine whether the sensitive information should be submitted nonetheless.

Article 8—Admissibility of Documents

Article 8 sets out the procedures for the certification and admissibility of documents in extradition proceedings.

Article 9—Translation

Article 9 requires all documents submitted by the Requesting State under the Treaty to be accompanied by an official translation into a language of the Requested State, unless otherwise agreed.

Article 10—Provisional Arrest

Article 10 provides that, in cases of urgency, the Requesting State may request the provisional arrest of fugitives and sets forth the procedures for making such a request pending presentation of the formal extradition request. Article 10(2) specifies the information that must accompany a provisional arrest request. Article 10(3) provides that the Requesting State shall be notified without delay of the date of a provisional arrest or the reasons why the Requested State cannot proceed with the request. Article 10(4) permits the release of the person provisionally arrested if the executive authority of the Requested State does not receive the formal extradition request and supporting documents within 60 days of

the date on which the person was provisionally arrested. Article 10(5) specifies that for the purposes of applying the 60-day time limitation in Article 10(4), receipt of the formal extradition request and supporting documents by the embassy of the Requested State located in the Requesting State constitutes receipt by the executive authority of the Requested State. Article 10(6) makes clear that the release of a person pursuant to Article 10(4) does not prevent the person's re-arrest and extradition if the Requested State receives the formal extradition request and supporting documents at a later date.

Article 11—Decision and Surrender

Article 11 requires the Requested State to promptly notify the Requesting State of its decision regarding an extradition request. If the Requested State denies extradition, Article 11(2) requires the Requested State to explain the reasons for denial. If the Requested State agrees to grant extradition, Article 11(3) requires the Requested and Requesting States to coordinate the date and place for surrendering the person sought. Article 11(4) provides that if the person to be surrendered is not removed from the territory of the Requested State within the time prescribed by the Requested State's laws, the Requested State may discharge the person sought from custody and subsequently refuse extradition for the same offense.

Article 12—Deferral of Extradition Proceedings and Deferred or Temporary Surrender

Article 12 addresses deferred extradition proceedings as well as deferred and temporary surrender of the person sought. Under Article 12(1), if the person sought is being proceeded against in the Requested State, the Requested State may defer the extradition proceedings until its own proceedings have been concluded. Article 12(2) addresses circumstances where extradition proceedings have concluded and extradition has been authorized, but the person sought is being proceeded against or is serving a sentence in the Requested State. In such cases, the Requested State may either defer the surrender of the person sought or temporarily surrender the person to the Requesting State for the purpose of prosecution. Article 12(3) explains that if the Requested State elects to defer surrender, it may detain the person sought until surrender. Under Article 12(4), however, if the Requested State elects to temporarily surrender the person to the Requesting State, the Requesting State must detain the temporarily surrendered person during proceedings and return the person when proceedings conclude. The person's return to the Requested State shall not require any further extradition request or proceedings. Moreover, upon return to the Requested State, the time a person served in the temporary custody of the Requesting State may be deducted from the remaining time to be served in the Requested State, according to the laws of the Requested State.

Article 13—Requests for Extradition or Surrender Made by Several States

Pursuant to Article 13, if the Requested State receives extradition requests for the same person from the Requesting State and

from any other State or States, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State, if any, it will surrender that person. Article 13 requires the Requested State to consider a list of non-exclusive factors when making its decision.

Article 14—Seizure and Surrender of Items

Article 14 provides that, subject to certain conditions, the Requested State may seize and surrender to the Requesting State all items that are connected with the offense for which extradition is sought or that may be required as evidence in the Requesting State.

Article 15—Rule of Specialty

Article 15(1) sets forth the rule of specialty, which prohibits a person extradited under the Treaty from being detained, tried, or punished in the Requesting State, except where the detention, trial, or punishment: (a) is for an offense for which extradition was granted, or for a differently denominated offense carrying the same or lesser penalty that is based on the same facts as the offense for which extradition was granted, provided such offense is extraditable or is a lesser included offense; (b) is for an offense committed after that person's extradition to the Requesting State; or (c) occurs with the consent of the competent authority of the Requested State. If the Requested State consents to the person's detention, trial or punishment for a different offense, the Requested State may require the Requesting State to submit the documentation required under Article 7.

Similarly, Article 15(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition, unless the Requested State consents. This provision would preclude the Republic of Kosovo from transferring to a third State or an international tribunal a fugitive that the United States surrendered to the Republic of Kosovo, unless the United States consents. Article 15(3), however, permits the Requesting State to detain, try, punish, extradite, or surrender the same person if that person: (a) leaves and voluntarily returns to the Requesting State, or (b) chooses not to leave the Requesting State within 20 days of the day that person is free to leave. Article 15(4) provides that the rule of specialty provisions in this Article do not apply if the person sought waives extradition under Article 16(a).

Article 16—Waiver and Simplified Extradition

Article 16 allows the Requested State to expedite the transfer of the person whose extradition is sought to the Requesting State. If the person waives extradition, a judicial officer may direct the person's transfer to the Requesting State without further proceedings. If the person consents to extradition or to a simplified extradition proceeding, the Requested State may surrender the person as expeditiously as possible.

Article 17—Transit

Article 17 allows either State to authorize transportation through its territory of a person being extradited or otherwise transferred

to the other State by a third State or from the other State to a third State for the purposes of prosecution, imposition of a sentence, or service of a sentence. It also specifies the procedures for requesting such transit and makes clear that a person who is being transported pursuant to this Article shall be detained during the period of transit. Under Article 17(2), authorization is not required when the other State only uses air transportation and no landing is scheduled on the State's territory. Should an unscheduled landing occur, however, the State may require submission of a formal transit request within 96 hours; during that time, the State must take all measures necessary to prevent the person being transferred from absconding.

Article 18—Representation and Expenses

Article 18 requires the Requested State to advise, assist, appear in court on behalf of, and represent the interests of, the Requesting State in any proceedings arising out of an extradition request. Additionally, the Requested State must bear all expenses incurred in that State in connection with the extradition proceedings, except for expenses related to translation of documents and transportation of the person surrendered.

Article 19—Consultation

Article 19 provides that the U.S. Department of Justice and the Ministry of Justice of the Republic of Kosovo may consult with each other directly in connection with individual cases and in furtherance of efficient implementation of the Treaty.

Article 20—Application

Article 20 establishes that the Treaty applies to offenses committed both before and after the date it enters into force.

Article 21—Ratification and Entry into Force

Article 21 notes that the Treaty is subject to ratification and shall enter into force upon the exchange of the instruments of ratification. Article 21(3) provides that, upon entry into force, the Treaty will supersede the 1901 Treaty with respect to all requests submitted on or after the date of ratification. With respect to all pending requests made under the 1901 Treaty, subparagraphs (3) and (4) provide that the Treaty shall supersede the 1901 Treaty, except that the provisions of the 1901 Treaty relating to required documents and the admissibility and translation of documents shall apply if the extradition request and supporting documents have already been submitted to the Requested State at the time the Treaty enters into force.

Article 22—Termination

Under Article 22, either State may terminate the Treaty by giving written notice to the other State through the diplomatic channel. The termination shall be effective six months after the date of such notice.

VII. TEXT OF RESOLUTION OF ADVICE AND
CONSENT TO RATIFICATION

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION.

The Senate advises and consents to the ratification of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Kosovo, signed at Pristina on March 29, 2016 (Treaty Doc. 115-2), subject to the declaration of section 2.

SEC. 2. DECLARATION.

The Senate's advice and consent under section 1 is subject to the following declaration: The Treaty is self-executing.

