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Explanatory Report to the Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons

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I. The Additional Protocol to the Convention on the Transfer of Sentenced Persons, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), was opened to signature by the member States of the Council of Europe on 18 December 1997.

II. In 2015, the PC-OC developed, under the authority of the CDPC, a Protocol amending the Additional Protocol. This amending Protocol was opened for signature by the Parties to the Additional Protocol on 22 November 2017.

III. The text of the explanatory report, prepared on the basis of that Committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of the Additional Protocol although it may facilitate the understanding of the Additional Protocol's provisions.

Introduction

1. Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) is entrusted inter alia with examining the functioning and implementation of Council of Europe Conventions and Agreements in the field of criminal law, with a view to adapting them and improving their practical application where necessary.

2. Within the framework of its tasks, the PC-OC identified certain difficulties that States met when operating the Convention on the Transfer of Sentenced Persons (ETS 112). It also identified situations bordering the area covered by ETS No. 112, yet not included within the scope of that Convention.

3. Having studied various options, the PC-OC agreed that an additional protocol to the Convention was the most appropriate and pragmatic response under the circumstances. It therefore approved a draft Additional Protocol, at its 34th meeting (February 1997).

4. The draft Additional Protocol was examined and approved by the CDPC at its 46th plenary session (June 1997) and submitted to the Committee of Ministers.

5. At the 601st meeting of their Deputies in September 1997, the Committee of Ministers adopted the text of the Additional Protocol and decided to open it for signature on 18 December 1997.

6. In 2013, the PC-OC conducted an inquiry on the implementation of the Convention on the Transfer of Sentenced Persons and its Additional Protocol (Docs PC-OC (2013) 10 rev 2 and PC-OC (2013) 10 ADD rev 2). The replies received by the Parties mentioned difficulties encountered in the implementation of the Additional Protocol and contained proposals for amendments which were discussed during a special session organised during the 65th plenary meeting of the PC-OC (26-28 November 2013). As a result, the PC-OC made a proposal to the CDPC that the Additional Protocol should be amended so as to address certain difficulties identified by its Parties. In December 2014, during its 67th plenary meeting, the CDPC instructed the PC-OC to prepare a draft protocol to amend the Additional Protocol to the Convention on the Transfer of Sentenced Persons.

7. The PC-OC agreed to introduce the following changes to the Additional Protocol:

– extension of the scope of Article 2 to situations where the person, subject to a final sentence, did not flee but moved freely to the country of his or her nationality;

– deletion of the consequential link between the expulsion or deportation order and the sentence imposed in Article 3, paragraph 1 of the Additional Protocol;

– extension of the scope of Article 3, paragraph 3a to cases where the person concerned refuses to give an opinion on the transfer. It was felt that transfer should also be possible in those cases;

– introduction of a time-limit (90 days) as regards the decision making related to the application of the rule of speciality in the Additional Protocol. (Article 3, paragraph 4a);

– reduction of the time limit of immunity against prosecution, due to the speciality principle, from 45 to 30 days of final discharge, where the person, having had the opportunity to leave legally the territory of the administering State, has not done so. (Article 3, paragraph 4b).

8. The draft amending Protocol was examined and approved by the CDPC on 30 June 2016 and submitted to the Committee of Ministers.

9. The text of the amending Protocol was adopted by the Committee of Ministers at its 1291st meeting on 5 July 2017. It was opened for signature on 22 November 2017.

General considerations

10. The purpose of the Additional Protocol, as amended by Protocol CETS N° 222, is to provide rules applicable to the transfer of the execution of sentences in two different cases, namely:

a. where a sentenced person has left the sentencing State and is in the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed; and

b. where the sentenced person is subject to expulsion or deportation after having served the sentence.

11. These situations are dealt with in Articles 2 and 3 respectively.

12. As with the mother Convention, neither Article 2 nor Article 3 imposes any obligation on the sentencing State or the administering State to agree to transfer. They set the framework within which States involved may co-operate, if they so wish, and provide a procedure for this purpose.

Commentaries on the articles of the Protocol

Article 1 – General provisions

13. By providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention, this Article ensures uniform interpretation of both.

Paragraph 2 clarifies the relationship between the provisions of the Convention and those of the Protocol, i.e. the provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Protocol. This means that, with respect to the application of both this Protocol and the Convention, the rule applies according to which "*lex specialis derogat generalis*".

It also follows from paragraph 2 that the Protocol, like the Convention, does not apply to conditionally sentenced or conditionally released offenders.

Article 2 – Persons having left the sentencing State before having completed the execution of their sentence

14. This article envisages a situation where a national of State A is sentenced in State B and subsequently leaves State B before or while serving the sentence and voluntarily enters State A. It would apply most commonly to cases where the sentenced person escapes from legal custody in the territory of the sentencing State and flees to the territory of the State of his or her nationality, seeking thereby to avoid the execution, or full execution, of the sentence. When amending the Protocol, the Committee decided to extend the scope of this provision to situations where the person was free to move to the country of his or her nationality and made use of this freedom. Article 2, paragraph 1, as amended, foresees two situations; either the person concerned left the sentencing country while criminal procedures were still pending or after the final sentence had been passed, and is now in his or her country of origin. In both circumstances, the provision will only apply if the person was aware of the proceedings pending or the judgement issued against him or her. The sentence has to be final at the moment when the request for transfer is introduced.

15. This article does not cover the situations where a national of State A is tried and sentenced *in absentia* in State B, In those cases, the solution could be to introduce a request for extradition or, where this is not possible, for a transfer of proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73). Although the definition of "*in absentia*" varies from State to State **(*)**, it usually excludes situations where the person was represented by a defence lawyer of his or her choice.

16. The provision, as redrafted by the amending Protocol, may however cover a situation where a national of State A is sentenced in State B, the execution of the sentence being suspended, and subsequently the suspension is revoked after the person has voluntarily moved to State A.

(*) Reference is made to the Questionnaire concerning judgments *in absentia* and the possibility of retrial: Summary and Compilation of Replies [PC-OC (2013) 01 rev.3].

17. The revocation of a suspended sentence may occur (a) when the sentenced person does not comply with the conditions attached to the sentence rendered by State B or (b) when he or she commits an additional crime in this State. In the first case (a), the sentence was conditional. It follows from Article 1, paragraph 2 that the Protocol, like the Convention, does not apply to conditionally sentenced or conditionally released offenders. In the latter case (b), the sentencing State may ask State A to execute both the sentence for which the suspension was revoked and the sentence for this additional crime. However, since the Protocol does not apply to *in absentia* judgments, the sentence for the additional crime also needs to have been rendered in the person's presence or the presence of a defence lawyer of the person's choice and he or she needs to have voluntarily moved to State A before this additional sentence was executed.

18. The mother Convention is of no use in the situation described in paragraph 14 above because the sentenced person is not present in the sentencing State and is thus unavailable for transfer. Nor can the problem in practice be dealt with under existing forms of international co-operation. For example, the normal method of returning a fugitive from justice – extradition – is generally not available because most countries do not extradite their own nationals. Apart from this, the only other option which may be available at present is for the person to be prosecuted and sentenced afresh in State A for the same facts – a process which is both expensive and cumbersome, even though permitted by the internationally-recognised *ne bis in idem* principle. If neither option is available, the consequence is that the person goes unpunished and thus the ends of justice are frustrated. The Committee considered that this was not acceptable.

19. The Committee also considered whether the European Convention on the International Validity of Criminal Judgments (ETS No. 70) might provide a solution to the problem by allowing for the transfer of the sentence from State B to State A for execution. However, only a few States have ratified that Convention and this situation is not likely to change in the foreseeable future. Because of the difficulties with that Convention, the Committee doubted whether the elaboration of a new instrument on the enforcement of foreign judgments would meet with any greater success.

20. The Committee recognised that Convention ETS No. 112 is to a great extent founded on humanitarian principles and that, for this reason, the consent of the person is an integral element in it. However it concluded that where the person has chosen to return to the country of his or her origin before having completed the execution of a foreign sentence, the need for his or her consent was no longer appropriate. The Committee therefore concluded that it would be acceptable to devise a solution not based on the consent of the person.

21. To "take over the execution" of a sentence, pursuant to a request under Article 2, means that the provisions of the Convention – save paragraph 1.(d) of Article 3 – shall apply. In particular Articles 8 to 11 of the Convention shall apply.

22. Paragraph 2 deals with provisional measures which might be taken by the administering State, at the request of the sentencing State and prior to the arrival of the documents supporting the request, or prior to the decision on that request, arresting the sentenced person or adopting any other measures to ensure that the sentenced person remains in its territory pending a decision on the request.

23. Moreover, this paragraph specifies that for the purpose of adopting a provisional measure, the sentencing State should include in the request the information mentioned in paragraph 3 of Article 4 of the Convention, i.e. the name, date and place of birth of the sentenced person, his or her address, if any, in the administering State, a statement of the facts upon which the sentence was based and, finally, the nature, duration and date of commencement of the sentence. This information should be transmitted by the sentencing State as soon as practicable.

24. The last phrase in Paragraph 2 means that, where a person is arrested under the provisions of this paragraph, the time thus spent in custody must be deducted in the administering State, in the case of continued enforcement as well as in the case of conversion of sentence. This obligation also applies to the sentencing State, should it come to enforce, or resume enforcement, of the sentence.

25. Paragraph 3 provides that the transfer of the execution shall not require the consent of the sentenced person.

26. Because Article 2 was drafted under the assumption of an implied consent of the sentenced person to remain on the territory of State A, the drafters did not consider it necessary to provide for the application of the principle of speciality.

Article 3 – Sentenced persons subject to an expulsion or deportation order

27. The Committee considered that it does not serve the objective of rehabilitation of the sentenced person to keep such a person in the sentencing State when it is likely that, once he or she has completed the sentence to be served, he or she will no longer be permitted to remain in that State.When amending the Protocol, the Committee decided that this should apply in all cases where a sentenced person will have to leave the sentencing state, irrespective of the existence of a consequential link between the expulsion or deportation order and the sentence.

28. The situation described in this Article is one where the sentenced person is subject to deportation or expulsion. The verbs "to expel" and "to deport" are both used in order to accommodate varying terminologies of member States. The meaning given to both in this Protocol is such as to include any measure as a result of which the person is subject to removal from the territory of the sentencing State at some point in time. It includes expulsion orders given by administrative authorities.

29. It is envisaged that a transfer under this Article will only take place after all rights of appeal against the expulsion or deportation order or other measure referred to in paragraph 1 have been exhausted.

30. Acknowledging that the Convention operates on the basis of a three-fold consent, i.e. the sentencing State, the administering State and the sentenced person, the Committee considered that provision could be made for the Convention to operate on the basis of a two-fold consent, namely the consent of both the sentencing State and the administering State, where the person concerned is subject to deportation or expulsion from the sentencing State.

31. Because transfer under the provisions of this Article neither requires nor assumes the sentenced person's consent, the Committee considered that the rights and interests of the person should be otherwise protected. Hence the provisions extending to such persons the benefit of the principle of speciality, as well as the requirement for the person's opinion to be examined and taken into account prior to any decision being taken.

32. Indeed, paragraphs 2 and 3 require respectively that the opinion of the sentenced person as to his proposed transfer be taken into consideration and, for that purpose, that it is included in a formal declaration addressed by the sentencing to the administering State. It follows that the provisions of the Convention on the verification of the consent (Article 7) should apply, *mutatis mutandis*, when taking the person's opinion.

33. The Committee considered that the person's opinion must be examined and taken into account prior to any decision being taken by the sentencing or the administering States. However, this requirement is written *expressis verbis* into the Protocol only with respect to the administering State. The Committee felt that one could safely presume that States governed by the rule of law duly respect the person's right to be heard before a decision on that person's transfer is taken.

34. The sentenced person's opinion may be of particular relevance *inter alia* where that person has more than one nationality, or otherwise may take advantage of the possibility of being deported to a country other than the country of his or her nationality.

35. Moreover, the procedure laid down is not one of automatic transfer upon the consent of both Parties involved. It requires, in addition to the States' consent to transfer, their agreement to dispense with the consent of the sentenced person. When amending the Protocol, the Committee took into account cases where the person concerned refuses to give an opinion on the transfer. It concluded that transfer should also be possible in those cases. When this occurs, the sentencing State shall provide the administering State with a statement in this regard.

36. It should be recalled that persons may be expelled only subject to the provisions laid down in Article 1 of Protocol No. 7 to the European Convention on Human Rights.

37. Paragraph 4 makes provision for the principle of speciality (cf. *inter alia* Article 14 of the European Convention on Extradition). The wording draws largely on the provisions of Article V.12 of the Draft European Comprehensive Convention on International Co-operation in Criminal Matters. In substance, it grants any sentenced person transferred under the provisions of Article 3 immunity against prosecution – and indeed against being sentenced or detained – for any offence committed prior to transfer, other than that for which the sentence to be enforced was imposed. Such immunity however ceases:

a. where the sentencing State so authorises;

When amending the Protocol, the drafters agreed that requests for authorisation related to the application of the rule of speciality should be answered as soon as possible and, unless the sentencing State provides a reasoned justification for the delay, no later than 90 days after the receipt of the request.

b. where the person, having had the opportunity to leave legally the territory of the administering State, has not done so within 30 days of final discharge;

When amending the Protocol, the drafters decided to accelerate procedures by reducing the time limit of immunity against prosecution, from 45 to 30 days of final discharge, where the person, having had the opportunity to leave legally the territory of the administering State, has not done so (in line with the equivalent provision in the Fourth Additional Protocol to the Convention on Extradition).

c. where the person has returned voluntarily to the territory of the administering State after having left it.

38. The expression "final discharge" (in French: "*élargissement définitif*") means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country.

39. Paragraph 5 makes it clear that the administering State may take such measures as may be necessary in order to prevent any legal effects of the lapse of time; it may take such measures as it would have been able to take had the person concerned not been transferred.

40. Under the Protocol, Parties are not under an obligation to take over the execution of foreign sentences. Therefore, there is no justification to provide for the possibility of States entering any unilateral statement by which they would exclude or modify the legal effect of any provisions of the Protocol, i.e. entering reservations.

41. Conversely, it follows from the principle of *bona fides*, that, unless otherwise stated, Parties to a treaty must be ready to apply it, regardless of any undertaking to do so.

42. The Committee thought that some States might be ready to become a Party to the Protocol in order to apply the provisions of Article 2, but not necessarily, or not necessarily at the same time, those of Article 3, which will often require major changes in domestic law. With a view to ensuring compliance with the *bona fides* principle, but also for practical purposes relating to the convenience of Parties in having a clear picture of other Parties' attitudes, paragraph 6 opens the way for States to make a declaration indicating that they will not take over the execution of sentences under the circumstances described in Article 3.

Articles 4 to 9 – Final clauses

43. Articles 4 to 9 are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Convention. These articles do not call for specific comments.

Amending Protocol: Final provisions

Articles 3 and 4

44. The amending protocol will only enter into force when all Parties to the Additional Protocol have deposited their instrument of ratification, acceptance or approval with the Secretary General of the Council of Europe. According to the Vienna Convention on the Law of Treaties (Art 2,1b), the terms "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international level its consent to be bound by a treaty.

Articles 5 and 6

45. Considering the high number of Parties to the Additional ¨Protocol, the drafters considered it important to shorten as much as possible the period between the adoption of the amending protocol and its possible application. Article 5 provides therefore for a provisional application of the amending protocol pending its entry into force.

46. To that effect, a Party to the Additional Protocol may declare, at the time of ratification acceptance or approval or at any later moment, that it will apply the amending protocol on a provisional basis. In such a case, the Party declares its willingness to comply immediately with the new standards, while the other Parties remain bound by the original ones. A Party which declares that it will apply the protocol on a provisional basis thereby makes clear its intention to assume immediately the obligations stemming from it. As long as the original protocol remains in force, provisional application can only be required on the basis of reciprocity. A Party may not claim provisional application by other Parties which have not made a declaration to this end.

Article 7

47. This provision is based on the model final clauses adopted by the Committee of Ministers for conventions and agreements prepared within the framework of the Council of Europe.