



## **Explanatory Report to the Convention on the Transfer of Sentenced Persons**

Strasbourg, 21.III.1983

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1. The Convention of the Transfer of Sentenced Persons, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 21 March 1983.
2. 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 Convention although it may facilitate the understanding of the Convention's provisions.

### **Introduction**

1. At their 11th Conference (Copenhagen, 21 and 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of Resolution No. 1, by which the Committee of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problems (CDPC), *inter alia*, "to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member States or by member States in their relations with non-member States".
2. Following this initiative, the creation of a Select Committee of Experts on Foreign Nationals in Prison was proposed by the CDPC at its 28th Plenary Session in March 1979 and authorised by the Committee of Ministers at the 306th meeting of their Deputies in June 1979.
3. The committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, the CDPC (at its 29th Plenary Session in March 1980) authorised the Select Committee, at its own request, to prepare a multilateral convention rather than a model agreement, provided it would not conflict with the provisions of existing European conventions.
4. The Select Committee was composed of experts from fifteen Council of Europe member States (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers. Mr. J. J. Tulkens (the Netherlands) was elected Chairman of the Select Committee. The secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. The draft for a Convention on the Transfer of Sentenced Persons was prepared during the Select Committee's first five meetings, held from 3 to 5 October 1979, 4 to 6 March 1980, 7 to 10 October 1980, 1 to 4 June 1981 and 1 to 4 December 1981 (enlarged meeting to which experts from all member States were invited). In addition, a drafting group met from 7 to 9 October 1980 (during the Select Committee's 3rd meeting) and from 24 to 26 November 1980.

6. The draft convention was finalised by the CDPC at its 31st Plenary Session in May 1982 and forwarded to the Committee of Ministers.

7. At the 350th meeting of their Deputies in September 1982, the Committee of Ministers approved the text of the convention. At their 354th meeting in December 1982, the Ministers' Deputies decided to open it for signature on 21 March 1983.

### General considerations

8. The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1970 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has, so far, been ratified by only a small number of member States, and the procedure it provides is not conducive to being applied in such a way as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitable administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

9. In facilitating the transfer of foreign prisoners, the convention takes account of modern trends in crime and penal policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation of offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interests of the prisoners as well as of the governments concerned.

10. The convention distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects:

- With a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.
- A transfer may be requested not only by the State in which the sentence was imposed ("sentencing State"), but also by the State of which the sentenced person is a national ("administering State"), thus enabling the latter to seek the repatriation of its own nationals.
- The transfer is subject to the sentenced person's consent.

– The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

11. Unlike the other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open also to like-minded democratic States outside Europe. Two such States – Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

## Commentaries on the articles of the Convention

### Article 1 – Definitions

12. Article 1 defines four terms which are basic to the transfer mechanism which the Convention provides.

13. The definition of "sentence" *a* makes clear that the Convention applies only to a punishment or measure which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

14. It follows from the definition of "judgment" *b* that the Convention applies only to sentences imposed by a court of law.

15. The two States involved in the transfer of a sentenced person are defined as "sentencing State" and "administering State" *c* and *d*.

### Article 2 – General principles

16. Paragraph 1 contains the general principle which governs the application of the Convention. Its wording is inspired by Article 1.1 of the European Convention on Mutual Assistance in Criminal Matters. The reference to "the widest measure of co-operation in respect of the transfer of sentenced persons" is intended to emphasise the convention's underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned.

17. Paragraph 2 refers the sentencing State to the possibility, afforded by the Convention, of having the sentenced person transferred to another Contracting State for the purpose of enforcing the sentence. That other State, that is the "administering State", is – by virtue of Article 3.1.a – the State of which the sentenced person is a national.

Although the sentenced person may not formally apply for his transfer (see paragraph 3), he may express his interest in being transferred under the Convention, and he may do so by addressing himself to either the sentencing State or the administering State.

18. According to paragraph 3, transfers may be requested by either the sentencing State or the administering State. This provision signifies an important departure from the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home country may have in his repatriation for reasons of cultural, religious, family and other social ties.

### Article 3 – Conditions for transfer

19. The first paragraph of Article 3 enumerates six conditions which must be fulfilled if a transfer is to be effected under the terms of the Convention.

20. The first condition *a* is that the person to be transferred is a national of the administering State. In an effort to render the application of the convention as easy as possible, the reference to the sentenced person's nationality was preferred to including in the convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other State" and "the State of origin" used in Article 5 of the European Convention on the International Validity of Criminal Judgments.

It is not necessary for the person concerned to be a national of only the administering State. Contracting States may decide to apply the convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals.

Paragraph 1.*a* is to be read in conjunction with paragraph 4 which grants Contracting States the possibility to define, by means of a declaration, the term "national".

This possibility, corresponding with that provided in Article 6.1.*b* of the European Convention on Extradition, is to be interpreted in a wide sense: the provision is intended to enable Contracting States to extend the application of the convention to persons other than "nationals" within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.

21. The second condition *b* is that the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

22. The third condition *c* concerns the length of the sentence still to be served. For the convention to be applicable, the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

Two considerations have led to the inclusion of this condition: the first is that the convention is conceived as an instrument to further the offender's social rehabilitation, an objective which can usefully be pursued only where the length of the sentence still to be served is sufficiently long. The second reason is that of the system's cost-effectiveness; the transfer of a prisoner is costly, and the considerable expenses incurred by the States concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned has only a short sentence to serve.

In exceptional cases, however, Contracting States may – in application of paragraph 2 – agree to a transfer even though the time to be served is less than that specified, as the general rule, in paragraph 1.*c*. The introduction of this element of flexibility was deemed useful to cover cases where the aforementioned two considerations do not fully apply, for instance where the prospects of rehabilitation are favourable despite a sentence of less than six months or where the transfer can be effected expeditiously and at low cost, for example between neighbouring States.

23. The fourth condition *d* is that the transfer must be consented to by the person concerned. This requirement which is not contained in the European Convention on the International Validity of Criminal Judgments constitutes one of the basic elements of the transfer mechanism set up by the convention. It is rooted in the convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.

This provision is to be read in conjunction with Article 7 which contains rules on the way in which consent is to be given and on the possibility for the administering State to verify that consent has been given in accordance with the conditions laid down in that article.

Consent is to be given by the sentenced person's legal representative in cases where one of the two States considers it necessary in view of the age or of the physical or mental condition of the sentenced person. The reference to the sentenced person's "legal representative" is not meant to imply that the representative must be legally qualified; it includes any person duly authorised by law to represent the sentenced person, for example a parent or someone specially authorised by the competent authority.

24. The fifth condition *e* is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him.

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

25. The sixth condition *f* confirms the convention's basic principle that a transfer requires the agreement of the two States concerned.

26. Paragraph 3 is to be seen in connection with Article 9 which grants the administering State a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing State as to which of these two procedures it will follow (Article 9, paragraph 2). The general rule is, therefore, that the administering State may choose between the two enforcement procedures in each individual case.

If, however, a Contracting State wishes to exclude, in a general way, the application of one of the two procedures, it can do so under the provisions of paragraph 3: by way of a declaration, it may indicate that it intends to exclude the application of either the "continued enforcement procedure" or the "conversion procedure" in its relations with other Contracting States. As the declaration made under paragraph 3 applies to the "relations with other parties" it enables the State making such a declaration to exclude one of the two enforcement procedures not only where it is in the position of the administering State but also where it is the sentencing State; in the latter case the declaration would have the effect of making that State's agreement to a requested transfer dependent on the administering State not applying the excluded procedure.

#### **Article 4 – Obligation to furnish information**

27. Article 4 concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, the administering State, and the sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by the sentencing State to the sentenced person on the substance of the convention; paragraphs 2 to 4 refer to information between the two States concerned after the sentenced person has expressed an interest in being transferred; paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer.

28. According to paragraph 1, any sentenced person who may be eligible for transfer under the convention shall be informed, by the sentencing State, of the convention's substance. This is to make the sentenced person aware of the possibilities for transfer offered by the convention and the legal consequences which a transfer to his home country would have. The information will enable him to decide whether he wishes to express an interest in being transferred. It is to be noted, however, that the sentenced person cannot himself make the formal request for transfer; it follows from Article 2.3 that transfer may be requested only by the sentencing or the administering State.

The information to be given to the sentenced person must be in a language he understands.

29. Paragraphs 2 and 3 apply where the sentenced person has expressed an interest to the sentencing State in being transferred under the convention. In that event, the sentencing State informs the State of which the sentenced person is a national that he has expressed an interest in being transferred. This information has to be provided as soon as practicable after the judgment becomes final and enforceable, and it must include the elements enumerated in paragraph 3.

30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that State to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.

31. If the sentenced person has expressed his interest in a transfer not to the sentencing State, but to the State of which he is a national, paragraph 4 applies: in that case, the sentencing State provides the information referred to in paragraph 3 only upon the express request of the State of which the person is a national.

32. By virtue of paragraph 5, the sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

#### **Article 5 – Requests and replies**

33. This article specifies the form and the channels of transmission to be used for requests for transfer and replies thereto.

34. Requests and replies must be made in writing (paragraph 1). They must, in principle, be transmitted between the respective Ministries of Justice (paragraph 2), but Contracting States may declare that they will use other ways of transmission as, for instance, the diplomatic channel (paragraph 3).

35. In line with the convention's aim to provide a procedure for the speedy transfer of sentenced persons, paragraph 4 requires the requested State promptly to inform the requesting State whether it agrees to the requested transfer.

#### **Article 6 – Supporting documents**

36. Article 6 States which supporting documents must be provided, on request, by the administering State to the sentencing State (paragraph 1), and by the sentencing State to the administering State (paragraph 2). These documents must be provided before the transfer is effected. As regards the documents to be provided by the sentencing State, they may be sent to the administering State either together with the request for transfer or afterwards; they need not be sent if either State has already indicated that it will not agree to the transfer.

37. In addition, paragraph 3 provides that either of the two States may request any of the documents or statements referred to in paragraph 1 or 2 before making a request for transfer or taking a decision on whether or not to agree to the requested transfer. This provision is intended to avoid setting the transfer procedure in motion when there are doubts as to whether all the conditions for transfer are satisfied. The sentencing State may, for instance, wish to ascertain beforehand – that is before making a request for transfer or before agreeing to a requested transfer – whether the sentenced person is a national of the administering State, or the administering State may wish to ascertain beforehand that the sentenced person consented to his transfer.

#### **Article 7 – Consent and its verification**

38. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the convention. It was therefore deemed necessary to impose an obligation on the sentencing State to ensure that the consent is given voluntarily and with full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering State an opportunity to verify that consent has been given in accordance with these conditions.

39. Under paragraph 2, the administering State is entitled to that verification either through a Consul or through another official on which the two States agree.

40. As the convention is based on the principle that enforcement in the administering State requires the sentenced person's prior consent, it was not considered necessary to lay down a rule of speciality to the effect that the person transferred under the convention with a view to the enforcement of a sentence may not be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. Other conventions which provide for this rule of speciality, as, for instance, the European Convention on Extradition in its Article 14 or the European Convention on the International Validity of Criminal Judgments in its Article 9, do not require the consent of the person concerned, so that in those cases the rule of speciality is a necessary safeguard for him.

The absence of a speciality rule should be included in the information on the substance of the convention which is to be given to sentenced persons under Article 4.1.

#### **Article 8 – Effects of transfer for sentencing State**

41. This article safeguards the application of the principle of *ne bis in idem* in respect of the enforcement of the sentence after a transfer has been effected.

42. To avoid the sentenced person's serving a sentence for the same acts or omissions more than once, Article 8 provides that enforcement in the sentencing State is suspended at the moment when the authorities of the administering State take the sentenced person into charge (paragraph 1), and that the sentencing State may no longer enforce the sentence once the administering State considers enforcement to have been completed (paragraph 2).

#### **Article 9 – Effect of transfer for administering State**

43. This article concerns the enforcement of the sentence in the administering State. It states the general principles which govern enforcement; the details of the different enforcement procedures are regulated in Articles 10 and 11.

44. According to paragraph 1, the administering State may choose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order (Article 10), or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing State (Article 11). It is to be noted, however, that in accordance with Article 3.3, Contracting States have the possibility to exclude, in a general way, the application of one of these two procedures.

45. If requested, the administering State must inform the sentencing State as to which of these two procedures it intends to apply (paragraph 2). This obligation has been imposed on the administering State because the information may have a bearing on the sentencing State's decision on whether or not to agree to a requested transfer.

46. The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 – commonly called "exequatur" – is that, in the first case, the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas, in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.

47. In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.

48. Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.

#### **Article 10 – Continued enforcement**

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11, under which the administering State *substitutes* a sanction for that imposed in the sentencing State, the procedure under Article 10.2 enables the administering State merely to *adapt* the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

#### **Article 11 – Conversion of sentence**

51. Article 11 concerns the conversion of the sentence to be enforced, that is the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "*exequatur*". The provision should be read in conjunction with Article 9.1. *b*. It is essential for the smooth and efficient functioning of the convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

53. However, as regards the extent of the conversion and the criteria applicable to it, paragraph 1 states four conditions to be observed by the competent authority of the administering State.

54. Firstly, the authority is bound by the findings as to the facts insofar as they appear – explicitly or implicitly – from the judgment pronounced in the sentencing State *a*. It has, therefore, no freedom to evaluate differently the facts on which the judgment is based; this applies to "objective" facts relating to the commission of the act and its results, as well as to "subjective" facts relating, for instance, to premeditation and intent on the part of the convicted person. The reason for this condition is that the substitution by a sanction of a different nature or duration does not imply any modification of the judgment; it merely serves to obtain an enforceable sentence in the administering State.

55. Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction *b*. This provision reflects the fact that the Convention applies only to the transfer of sentenced persons, "sentence" being defined in Article 1. *a* as a punishment or measure involving deprivation of liberty. However, it does not prevent conversion to a non-custodial sanction other than a pecuniary one.

56. Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering State *c*. This provision applies to any part of the sentence already served in the sentencing State as well as any provisional detention served during remand in custody prior to conviction, or any detention served during transit.

57. Fourthly, the penal position of the sentenced person must not be aggravated *d*. This prohibition refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: it must not be harsher than that imposed in the sentencing State. If, for instance, under the law of the administering State the offence carries a more severe form of deprivation of liberty than that which the judgment imposed (e.g. penal servitude or forced labour instead of imprisonment), the administering State is precluded from enforcing this harsher kind of sanction. In addition, paragraph 1. *d* provides, in respect of the length of the sentence to be enforced, that the authority which converts that sentence is not bound by any minimum which its own law may provide for the same offence, that is, that it is allowed not to respect that minimum with the result that it can enforce the sanction imposed in the sentencing State even if it is less than the minimum laid down in its own law.

58. As the conversion procedure may take some time, paragraph 2 requires the administering State, if the procedure takes place after the transfer of the sentenced person, to keep that person in custody or otherwise ensure his presence in the administering State, pending the outcome of that procedure.

#### **Article 12 – Pardon, amnesty, commutation**

59. Whereas Article 9.3 makes the administering State solely responsible for the enforcement of the sentence, including any decisions related to it (e.g. the decision to suspend the sentence), pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering State, in accordance with its Constitution or other laws.

#### **Article 13 – Review of judgment**

60. This article provides that the sentencing State alone has the right to take decisions on applications for review of the judgment. The exclusive competence of the sentencing State to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement so that Article 9.3 does not apply. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact. As the sentencing State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issue.

61. The term "review" within the meaning of Article 13 covers also proceedings which in some States may result in a new examination of the legal aspects of the case, after the judgment has become final.

62. The sentencing State's competence to decide on any application for review should not be interpreted as discharging the administering State from the duty to enable the sentenced person to seek a review of the judgment. Both States must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person's right to apply for a review.

#### **Article 14 – Termination of enforcement**

63. Article 14 concerns the termination of enforcement by the administering State in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing State (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering State must terminate enforcement as soon as it is informed by the sentencing State of any such decision or measure.

### **Article 15 – Information on enforcement**

64. This article provides for the administering State to inform the sentencing State on the state of enforcement: *a* when it considers enforcement of the sentence to have been completed (e.g. sentence served, remission, conditional release, pardon, amnesty, commutation); *b* if the sentenced person has escaped from custody before completion of the sentence; and *c* whenever the sentencing State requests a special report.

65. It is to be noted that the information to be supplied by virtue of Article 15. *a* may be provided either for each individual case or by means of periodical – for example annual – reports covering, for a given period, all cases in which completion of sentence has occurred.

### **Article 16 – Transit**

66. This article has been drafted on the lines of Article 21 of the European Convention on Extradition and Article 13 of the European Convention on the International Validity of Criminal Judgments. It lays down rules governing the transit of persons passing from the sentencing State to the administering State through the territory of another Contracting State.

67. Paragraph 1 imposes an obligation on Contracting States to grant requests for transit, in accordance with their national law, but this obligation is subject to a double condition: the request for transit must be made by another Contracting State, and that State must have agreed with another Contracting State or with a third State to the transfer of the sentenced person. The latter condition means that the obligation to grant transit becomes effective only when the sentencing and the administering State have agreed on the transfer of the sentenced person.

68. It is to be noted that the obligation to grant transit applies only where the request emanates from a Contracting State. If it is made by a third State, paragraph 4 applies. It contains an option, not an obligation: a request for transit *may* be granted if the requesting third State has agreed with another Contracting State to the transfer of the sentenced person.

69. Paragraph 1 does not exclude the transit of a national of the State of transit, but paragraph 2. *a* entitles a Contracting State to refuse transit if the person concerned is one of its own nationals. This applies also where transit is to be effected by air and the State concerned has made the declaration under paragraph 7.

Paragraph 2. *b* entitles a Contracting State to refuse to grant transit if the offence for which the sentence was imposed is not an offence under its own law.

70. As regards the channels of communication for requests for transit and replies, paragraph 3 makes the provisions of Article 5, paragraphs 2 and 3, applicable: in principle, requests and replies must pass through the Ministries of Justice of the two States concerned, but Contracting States may declare that they will use other ways of transmission.

71. Paragraph 5 provides for the State of transit to hold the sentenced person in custody only for such time as transit through its territory requires.

72. Paragraph 6 concerns the sentenced person's immunity from arrest and prosecution in the State of transit. It provides that the State requested to grant transit may be asked to give an assurance to the effect that the sentenced person will enjoy immunity in respect of any offence committed or sentence imposed prior to his departure from the territory of the sentencing State, with the exception of custody which the transit State may impose in application of paragraph 5. There is, however, no obligation on the State of transit to give such an assurance.

73. Paragraph 7 deals with transit by air where no landing in the territory of the State of transit is scheduled. In such cases, no request for transit is required. Contrary to the provisions of Article 21.4. a of the European Convention on Extradition which require notification of the transit State in such cases, paragraph 6 of Article 16 leaves it to each Contracting State to decide, by means of a declaration, whether it wishes to require such notification.

#### **Article 17 – Languages and costs**

74. This article deals with the questions of language (paragraphs 1 to 3), certification (paragraph 4), and costs (paragraph 5).

75. With regard to the languages to be used for the purposes of applying the Convention, Article 17 distinguishes between the information exchanged between the two States concerned in accordance with Article 4, paragraphs 2 to 4, which must be furnished in the language of the recipient State or in one of the official languages of the Council of Europe (paragraph 1), and requests for transfer and supporting documents for which it is stated that no translation is required (paragraph 2), unless the State concerned has declared that it requires requests for transfer and supporting documents to be accompanied by a translation (paragraph 3).

76. Paragraph 4 provides that with the exception of the copy of the judgment imposing the sentence – referred to in Article 6.2. a – supporting documents transmitted in application of the convention need not be certified.

77. As concerns costs, paragraph 5 provides that they shall be borne by the administering State, with the exception of those costs which are incurred exclusively in the territory of the sentencing State. By precluding Contracting States from claiming refund from each other of any expenses incurred during the transfer procedure, the provision intends to facilitate the practical application of the Convention.

The administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person.

#### **Articles 18 to 25 – Final clauses**

78. With the exception of Articles 18 and 19, the provisions contained in Articles 18 to 25 are, for the most part, based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these articles do not therefore call for specific comments, but the following points, relating to Articles 18,19,21,22 and 23, require some explanation.

79. Articles 18 and 19 have been drafted on the precedent established in Articles 19 and 20 of the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Contracting Parties as soon as possible. As similar considerations apply in the case of the convention on the Transfer of Sentenced Persons, Article 18 provides that it is open for signature by the member States of the Council of Europe as well as by non-member States which have participated in its elaboration. The provision is intended to apply to two non-member States, Canada and the United States of America, which were represented on the Select Committee by observers and actively associated with the elaboration of the Convention. They may sign the Convention, just as the member States of the Council of Europe, before its entry into force. According to Article 18.2, the Convention enters into force when three member States have expressed their consent to be bound by it. Non-member States other than those referred to in Article 18.1 may, by virtue of Article 19, be invited by the

Committee of Ministers to accede to the Convention, but only after its entry into force and after consultation of the Contracting States.

80. Article 21 ensures the convention's full temporal application. It enables Contracting States to avail themselves of the transfer mechanism with regard to any enforcement which falls within the convention's scope of application and which is to be effected after its entry into force, regardless of whether the sentence to be enforced has been imposed before or after that date.

81. Article 22 intends to ensure the smooth co-existence of the convention with other treaties – multilateral or bilateral – providing for the transfer of detained persons.

Paragraph 1 concerns extradition treaties and other treaties providing for the transfer of detained persons for purposes of confrontation or testimony. Paragraph 2 safeguards the continued application of agreements, treaties or relations relating to the transfer of sentenced persons, including uniform legislation as it exists, for instance, within the Nordic co-operation. Paragraph 3 concerns complementary agreements concluded in application of Article 64.2 of the European Convention on the International Validity of Criminal Judgments. Paragraph 4 applies where a request for transfer falls within the scope of both the present convention and the European Convention on the International Validity of Criminal Judgments or any other instrument on the transfer of sentenced persons. In such a case, the requesting State must indicate on the basis of which instrument it makes the request. Such indication is binding on the requested State.

82. Article 23 which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the convention follows the precedents established in other European conventions in the penal field, namely in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, in Article 7 of the Additional Protocol to the European Convention on Extradition, in Article 10 of the Second Additional Protocol to the European Convention on Extradition, in Article 10 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and in Article 9 of the European Convention on the Suppression of Terrorism. The reporting requirement which Article 23 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the convention so that it may contribute to facilitating friendly settlements and proposing amendments to the convention which might prove necessary.