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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

**Preliminary draft protocol amending the Additional Protocol to the
Convention on the Transfer of sentenced Persons (ETS N°167)**

Preamble

The member States of the Council of Europe, and the other States signatory to this Protocol

Desirous of facilitating the application of the Additional Protocol to the Convention on the Transfer of Sentenced Persons opened for signature at Strasbourg on 18 December 1997 (hereinafter referred to as "the Additional Protocol") in particular pursuing its acknowledged aims of furthering the ends of justice and the social rehabilitation of sentenced persons;

Considering it desirable to modernise and improve the Additional Protocol taking into account the evolution in international co-operation as regards transfer of sentenced persons since its entry into force;

Have agreed to amend the Additional Protocol as follows:

Article 1

Article 2 of the Additional Protocol shall be replaced by the following provisions:

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

1 ~~Where a national of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence~~

Where a national of a Party is the subject of a final sentence, the sentencing State may request the State of nationality to take over the execution under the following circumstances:

- when the national has fled to or otherwise returned to the state of his or her nationality being aware of the criminal proceedings pending against him or her in the sentencing State, or,
- when the national has fled to or otherwise returned to the state of his or her nationality being aware that a judgement has been issued against him or her.

2 At the request of the sentencing State, the administering State may, prior to the arrival of the documents supporting the request, or prior to the decision on that request, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory, pending a decision on the request. Requests for provisional measures shall include the information mentioned in paragraph 3 of Article 4 of the Convention. The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reason of this paragraph.

3 The consent of the sentenced person shall not be required to the transfer of the execution of the sentence."

Article 2

Article 3 of the Additional Protocol shall be replaced by the following provisions:

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

1 Upon being requested by the sentencing State, the administering State may, subject to the provisions of this Article, agree to the transfer of a sentenced person without the consent of that person, where the sentence passed on the latter, or an administrative decision ~~consequential to that sentence~~, includes an expulsion or deportation order or any other measure as the result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

2 The administering State shall not give its agreement for the purposes of paragraph 1 before having taken into consideration the opinion of the sentenced person.

3 For the purposes of the application of this Article, the sentencing State shall furnish the administering State with:

a a declaration containing the opinion of the sentenced person as to his or her proposed transfer, ~~or a statement that the sentenced person refuses to provide an opinion in this regard~~ and

b a copy of the expulsion or deportation order or any other order having the effect that the sentenced person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

4 Any person transferred under the provisions of this Article shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, for any offence committed prior to his or her transfer other than that for which the sentence to be enforced was imposed, nor shall he or she for any other reason be restricted in his or her personal freedom, except in the following cases:

a when the sentencing State so authorises: a request for authorisation shall be submitted, accompanied by all relevant documents and a legal record of any statement made by the convicted person; authorisation shall be given when the offence for which it is requested would itself be subject to extradition under the law of the sentencing State or when extradition would be excluded only by reason of the amount of punishment. ~~The decision shall be taken as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the sentencing State to comply with the period provided for in this paragraph, it shall inform the administering State, providing the reasons for the delay and the estimated time needed for the decision to be taken.~~

b when the sentenced person, having had an opportunity to leave the territory of the administering State, has not done so within /30 days of his or her final discharge, or if he or she has returned to that territory after leaving it.

5 Notwithstanding the provisions of paragraph 4, the administering State may take any measures necessary under its law, including proceedings in absentia, to prevent any legal effects of lapse of time.

6 Any contracting State may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate that it will not take over the execution of sentences under the circumstances described in this Article.”

Final and transitional provisions

Article 3 Signature and ratification

This Protocol shall be open for signature by the Parties to the Additional Protocol. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

After the opening for signature of this Protocol and before its entry into force, a Party to the Convention may not ratify, accept, approve or accede to the Additional Protocol unless it has simultaneously ratified, accepted or approved the present Protocol.

Article 4 Entry into force

This Protocol shall enter into force on the first day of the month following the expiration of a period of [three] months after the date on which all Parties to the Additional Protocol have expressed their consent to be bound by the Protocol in accordance with the provisions of article 3.

Article 5 Provisional application

Alternative 1

Pending the entry into force of this Protocol according to the conditions set under Article 4, a Party to the Additional Protocol having [signed or] ratified this Protocol may, at any moment, declare that the provisions of this Protocol shall apply to it on a provisional basis. Such a declaration shall take effect on the first day of the month following the date of its receipt by the Secretary General of the Council of Europe.

Alternative 2

Pending the entry into force of this Protocol according to the conditions set under Article 4, a Party to the Additional Protocol may at the time of ratification, acceptance or approval of the present Protocol, declare that the provisions of this Protocol shall apply to it on a provisional basis. Such a declaration shall take effect on the first day of the month following the date of its receipt by the Secretary General of the Council of Europe.

Alternative 3

Pending the entry into force of this Protocol according to the conditions set under Article 4, a Party to the Additional Protocol may at the time of ratification, acceptance or approval of the present Protocol or at any later moment, declare that it will apply the provisions of this Protocol on a provisional basis in the relation to the other Parties who have made a declaration to the same effect. Such a declaration shall take effect on the first day of the second month following the date of its receipt by the Secretary General of the Council of Europe.

Article 6

This Protocol shall cease to be applied on a provisional basis from the date of its entry into force.

Article 7 Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any Signatory, any Party and any other State which has been invited to accede to the Convention of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. the date of entry into force of this Protocol in accordance with Article 4;
- d. any declaration made under Article 5; and
- e. any other act, notification or communication relating to this Protocol.

Done at Strasbourg, the...., in English and French, and opened for signature the Both texts are equally authentic and shall be deposited in a single copy in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other Parties to the Convention