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Draft protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167)

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Philippe MAHOUX, Belgium, Socialist Group

Summary

The Convention on the Transfer of Sentenced Persons was adopted in 1983 to further the social rehabilitation of sentenced persons by facilitating their transfer to their countries of origin. The Additional Protocol to the convention, adopted in 1997, provides for exceptions to the rule according to which a transfer requires the consent of the sentenced person.

Due to some practical difficulties in the application of the convention, the Committee of Ministers has prepared a draft protocol amending the Additional Protocol. The proposed changes are aimed, in particular, at extending the scope of the application of the Additional Protocol to persons who moved freely to their country of origin and, in the case of transfer of sentenced persons subject to an expulsion measure, at deleting the consequential link between the expulsion measure and the sentence imposed.

The Committee on Legal Affairs and Human Rights fully supports the draft protocol amending the Additional Protocol and sees no need to propose any amendments. However, it is well aware of the sensitive nature of cases relating to the transfer of sentenced persons, which may raise a number of questions pertaining to human rights.

1. Reference to committee: [Doc. 14154](#), Reference 4245 of 14 October 2016.



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A. Draft opinion²

1. The Parliamentary Assembly fully supports the draft protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167) and sees no need to propose any amendments.

2. Draft opinion adopted unanimously by the committee on 7 March 2017.

B. Explanatory memorandum by Mr Philippe Mahoux, rapporteur

1. On 29 September 2016, the Committee of Ministers invited the Parliamentary Assembly to present an opinion on the draft protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167, hereafter “the Additional Protocol”).

2. The Assembly is aware of the sensitive nature of cases relating to the transfer of sentenced persons to their country of origin and fully acknowledges the difficulties that may be encountered in implementing the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Additional Protocol to the convention. Transfer-related cases may, therefore, raise a number of questions pertaining to human rights.

3. The convention dates back to 1983 and its Additional Protocol to 1997. The main aim of the convention is to further the social rehabilitation of sentenced persons by facilitating the transfer of foreign prisoners to their countries of origin. This approach is based on humanitarian considerations, as 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.³ The convention has a broad geographical scope. It is open to signature by non-member States⁴ of the Council of Europe and, to date, 46 member States (all except Monaco) have acceded to it and 19 non-member States have ratified it (including the observer States of the Council of Europe and/or the Assembly: Canada, the United States of America, Israel, Japan and Mexico, along with certain South American countries, such as Chile, Honduras and Venezuela).⁵ It should be noted that public opinion in the sentencing States is almost always in favour of the execution of the sentence in the country of the sentenced person.

4. In general, a transfer requires the consent of the State in which the sentence has been handed down (the “sentencing State”), the State of which the sentenced person is a national (the “administering State”) and the sentenced person. However, the Additional Protocol provides for exceptions to this rule, in particular as many States cannot extradite their own nationals.⁶ The Additional Protocol, the aim of which is to supplement the scope of the convention, has been ratified by 37 member States (and by no non-member States).⁷ The two exceptions to the rule requiring the need to obtain the consent of the sentenced person are, first, sentenced persons who have fled from the sentencing State to the State of which they are nationals (Article 2) and, second, sentenced persons subject to an expulsion or deportation order resulting from their conviction (Article 3).

5. The Assembly has already addressed issues relating to the application of the convention in 2001 and 2014. In 2001, our committee’s rapporteur, Mr Tom Enright (Ireland, EPP) presented a report on the “Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – critical analysis and recommendations”,⁸ in which he identified several problems in the practical implementation of the convention. On the basis of this report, on 27 June 2001, the Assembly adopted [Recommendation 1527 \(2001\)](#), in which it addressed a number of recommendations to the Committee of Ministers with the aim of improving the application of the convention. In addition, in 2014, our committee and the Assembly looked at the application of Article 12 of the convention (which confirms the rights of States Parties to grant a pardon or an amnesty) in the context of the case of Mr Ramil Safarov, an Azerbaijani soldier who had been convicted in Hungary for the murder of an Armenian soldier during an event under the “Partnership for Peace” programme of the North Atlantic Treaty Organization (NATO), and who had been transferred to his country of origin after serving part of his sentence, and was released within hours of his return.⁹

6. In its [Recommendation 1527 \(2001\)](#), the Assembly called on the Committee of Ministers to draw up a new recommendation to member States on the interpretation and application of the convention, with the particular aim of urging contracting States “to give utmost consideration to the family ties and personal relationships of the prisoner when considering a transfer request” and “to respect the right of consent of prisoners, so as to prevent forced transfers that are contrary to the humanitarian spirit of the Convention”.¹⁰ In

3. Paragraph 9 of the [Explanatory report to the Convention on the Transfer of Sentenced Persons](#).

4. See Article 19 of the convention.

5. https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/112/signatures?p_auth=J041WoQ4.

6. See the Preamble to the Additional Protocol.

7. https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/167/signatures?p_auth=J041WoQ4.

8. [Doc. 9117](#).

9. Report on “Measures to prevent abusive use of the Convention on the Transfer of Sentenced Persons (ETS No. 112)”, [Doc. 13540](#) (rapporteur: Mr Christopher Chope, United Kingdom, EDG). See also [Resolution 2022 \(2014\)](#), [Recommendation 2057 \(2014\)](#), and the reply from the Committee of Ministers, adopted at the 1235th meeting of the Ministers’ Deputies (15-16 September 2015), [Doc. 13877](#).

10. Paragraph 9.3.h and i of the recommendation.

its reply to that recommendation, the Committee of Ministers underlined the fact that the convention was to be applied on a case-by-case basis and considered that while family ties might be an adequate criterion, they were not necessarily a “determining factor in all cases”, and that the habitual residence criterion was more appropriate. With regard to the consent of prisoners, it pointed out that the Additional Protocol provided for cases in which it was possible to transfer prisoners without their agreement.¹¹

7. The primary aim of the draft protocol amending the Additional Protocol is to introduce a number of changes to the latter in order to address certain difficulties identified by its Parties. The idea behind these is to address two separate issues: 1) to extend the scope of Article 2 of the Additional Protocol to include situations in which the person, subject to a final sentence, did not flee but *moved freely* to the country of his or her nationality; and 2) to delete the consequential link between the expulsion or deportation order and the sentence imposed (Article 3.1).¹² In addition, the draft protocol amending the Additional Protocol seeks to extend the scope of Article 3.3.a (which stipulates that the sentencing State must provide the administering State with an opinion given by the sentenced person) to cover situations in which the sentenced person refuses to give an opinion on the transfer: the sentencing State must therefore provide the administering State with a statement that the sentenced person refuses to provide an opinion in this regard. Two further proposed changes to Article 3.4 of the Additional Protocol are purely procedural in nature and seek to introduce a 90-day time limit for the decision on application of the “rule of speciality”¹³ (Article 3.4.a) and to reduce the time limit of immunity against prosecution, linked to the speciality principle, from 45 to 30 days (Article 3.4.b).

8. The first situation referred to in the preceding paragraph, namely where the sentenced person moved freely to the country of his or her nationality, would not appear to pose any problems, given that the person in question has decided himself or herself to return to his or her own country. The second situation – where a sentenced person subject to an expulsion order not directly related to the sentence imposed – could give rise to more complex situations, as the sentenced person may not always wish to return to the country of his or her nationality. Nonetheless, this person must leave the territory of the sentencing State, even after having served the sentence.

9. It should be emphasised that a transfer carried out in connection with an expulsion order may take place only once all internal remedies against the expulsion order have been exhausted.¹⁴ Furthermore, the Additional Protocol clearly provides that such a transfer may take place only at the request of the sentencing State and with the agreement of the administering State (Article 3.1); in addition, the administering State is obliged to take account of the opinion of the sentenced person (Article 3.2; this is of particular relevance in the case of persons who have several nationalities). The draft protocol amending the Additional Protocol does not change these rules; it provides merely a procedural change, obliging the sentencing State to provide the administering State with a statement, where applicable, that the sentenced person refuses to give an opinion in this regard. Both the Explanatory report to the Additional Protocol and the Explanatory report appended to the draft protocol amending the Additional Protocol state that any expulsion must be in compliance with the provisions laid down in Article 1 of Protocol No. 7 to the European Convention on Human Rights (ETS No. 117) which requires procedural safeguards in the event of the expulsion of a foreigner legally resident on the territory of a State Party.¹⁵

10. The return of a sentenced person to his or her country of origin without his or her consent, on the basis of a decision requiring that person to leave the territory of the sentencing State, may raise certain questions in respect of the European Convention on Human Rights, in particular Article 3 (prohibition of torture and inhuman or degrading treatment or punishment), Article 5.1.a (arbitrary deprivation of liberty, in particular where there is a risk that the applicant may serve a longer sentence than the sentence he or she would serve

11. [Doc. 9670](#), reply of the Committee of Ministers adopted at the 825th meeting of the Ministers’ Deputies (22 January 2003).

12. See Article 3.1 of the Additional Protocol: “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.” The change consists therefore of deleting the words “consequential to that sentence”.

13. This principle grants any sentenced person transferred under the provisions of Article 3 of the Additional Protocol immunity against prosecution for any offence committed prior to transfer, other than that for which the sentence to be enforced was imposed; nevertheless, Article 3.4 provides for exceptions to this rule. See paragraph 31 of the [Explanatory report to the Additional Protocol to the Convention on the Transfer of Sentenced Persons](#).

14. See paragraph 23 of the Explanatory report to the Additional Protocol and paragraph 29 of the Explanatory report appended to the draft protocol amending the Additional Protocol.

15. See paragraphs 30 and 36 respectively.

in the sentencing State), Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion) and Article 4 of Protocol No. 7 (right not to be tried or punished twice; this right might be at stake in cases in which an expulsion order has been issued against a foreigner who had already served his or her sentence). Given that thus far the Additional Protocol has been ratified only by Council of Europe member States, at present the transfer without consent of the sentenced person can take place only between two Council of Europe member States, which are obliged to comply with the European Convention on Human Rights. If the Additional Protocol were to be ratified by non-member States of the Council of Europe and a prisoner were to be transferred to a non-member country where there was a risk that he or she would be subjected to torture or inhuman treatment, the sentencing State would be held responsible for any violation of Article 3 of the European Convention on Human Rights.¹⁶

11. The European Court of Human Rights (“the Court”) has examined several cases concerning the transfer of sentenced persons.¹⁷ In the *Veermäe v. Finland* case, it states that “to lay down a strict requirement that the sentence served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is reflected in the Transfer Convention and is in principle in the interests of the persons concerned”.¹⁸ It has examined cases in which the applicants had been sent back to their countries of origin following transfer of sentence decisions taken on the basis of Article 2¹⁹ or Article 3 of the Additional Protocol and have complained of poor conditions in prisons,²⁰ more restrictive requirements for obtaining conditional release in their country of origin²¹ or sentences not provided for in the legislation of that country.²² In the *Csoszanszki v. Sweden* case,²³ the Court stated that Article 6 of the European Convention on Human Rights did not apply to expulsion procedures²⁴ or to sentence enforcement procedures²⁵ and that the Convention did not guarantee the right to conditional release or the right to serve one’s sentence under a particular regime.

12. In conclusion, even though the transfer of sentenced persons may, in certain circumstances, raise problems in respect of the European Convention on Human Rights, the Court has rarely found violations of the Convention in cases concerning the application of the Additional Protocol. On a number of occasions, it has found that the complaints of transferred sentenced persons were manifestly ill-founded or incompatible *ratione materiae*. The proposed changes in the draft protocol amending the Additional Protocol introduce just a few new elements to improve the practical application of the Convention. Overall, they have been carefully drafted by the European Committee on Crime Problems (CDPC) and its Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) under the supervision of the Committee of Ministers, and are fully justified. They should in practice help rationalise and modernise the Additional Protocol to the Convention on the Transfer of Sentenced Persons and they should all be welcomed.

16. See, in particular, *Soering v. United Kingdom*, Application No. 14038/88, judgment of 7 July 1989.

17. See, in particular, *Smith v. Germany*, Application No. 27801/05, judgment of 1 April 2010; *Buijen v. Germany*, Application No. 27804/05, judgment of 1 April 2010; or *Groni v. Albania*, Application No. 25336/04, judgment of 7 July 2009.

18. *Veermäe v. Finland*, Application No. 38704/03, decision of 15 March 2005, p. 11. See also *Drozd and Janousek v. France and Spain*, Application No. 38704/03, judgment of 26 June 1992, paragraph 110.

19. *Garkavyy v. Ukraine*, Application No. 25978/07, judgment of 18 February 2010. In this case, the Ukrainian authorities applied the Additional Protocol without the request of the Czech authorities and despite the fact that the applicant had been convicted *in absentia* (in general, the European Convention on Human Rights does not apply to such convictions). The Court found a violation of Article 5.1 of the Convention.

20. See, in particular, *Veermäe v. Finland* (see footnote 18) and *Csoszanszki v. Sweden*, Application No. 22318/02, decision of 27 June 2006.

21. *Ibid.*

22. *Müller v. Czech Republic*, Application No. 48058/09, decision of 6 September 2011.

23. *Csoszanszki v. Sweden* (see footnote 20).

24. See also *Maaouia v. France*, Application No. 39652/98, judgment of 5 October 2000 (Grand Chamber), paragraphs 33-41.

25. See also *Aydin v. Turkey*, Application No. 41954/98, decision of 14 September 2000.