# EXPLORING THE TRANSFERABILITY OF SENTENCED PERSONS ACROSS VARYING LEGAL INSTRUMENTS

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**ABSTRACT**

This article analyzes the international transfer of sentenced persons (also called prisoners, inmates or convicts), a distinct form of international judicial cooperation in criminal matters. The procedure appears straightforward at first, as it requires the prior consent of three parties: the sentencing country, the country of the person's nationality that may receive the individual, and the individual himself. However, practical contradictions frequently arise. Notable challenges include the possibility of the receiving country granting pardons to the transferee and the question of how time already served abroad, either in the sentencing country or in a third country before surrender, should be deducted.

The article addresses these and other contentious issues, such as the applicability of the speciality rule, in the context of transfers. The findings aim to strengthen the capacity of countries to implement this comparatively underutilized mechanism of judicial cooperation. Particular attention is given to the divergent approaches between European and non-European legal systems regarding pardons: European systems generally permit pardoning by the receiving countries, whereas non-European systems tend to exclude it. The article also examines prior detentions abroad and their deductability from punishments to be served in different receiving countries.

**Keywords:** *Country Of Nationality, Deduction, Extradition, Sentenced Person, Prisoner, Transferee.*

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## I. INTRODUCTION

This international transfer involves the repatriation of a sentenced foreign national to his/her country of nationality to serve the remaining (non-executed) part of his/her imprisonment punishment[1]. By the time of the surrender, the transferee had already been detained in the sentencing country. The sole ground to justify the deprivation of liberty of the person in that country after its criminal case there is the commenced execution of his/her imprisonment punishment. Unlike extradition, there is no provisional detention before international transfer proceedings. The detention is secured by the execution of the imposed imprisonment punishment. Thus, the sentenced person is already a prisoner in the transferring country. However, to avoid misunderstanding or confusion, the term "sentenced persons", as the prevailing one in Europe, is used in this paper. Either way, it is to be borne in mind that by the time of their surrender, these persons are already prisoners also.

Everywhere, legal frameworks for the international transfer of sentenced persons enhance cooperation between countries to ensure better correction of nationals convicted abroad and, in particular, their rehabilitation. In Europe, the transfer of sentenced persons is a comparatively well-regulated modality of inter-state cooperation at both the domestic and international levels. The principal international legal instruments of Greater Europe produced under the auspices of the Council of Europe (Strasbourg) are the Convention on the Transfer of Sentenced Persons and the 1997 Additional Protocol thereto. These instruments are of particular relevance to the present research, which examines the challenges faced by countries that apply them, as well as by countries that rely on comparable legal frameworks, such as the Arab Riyadh Agreement for judicial cooperation. The analysis focuses primarily on the international and domestic laws of countries situated in and close to the Eastern Mediterranean region.

The present research seeks to provide clarifications and modestly propose solutions to some of the most pressing challenges surrounding the international transfer of sentenced persons. It follows a number of remarkable manuals, books and papers on the issue. Such are: The Handbook on the International Transfer of Sentenced Persons, UN, New York, 2012; Bhui, H.S., 'Foreign National Prisoners: Issues and Debates', in H.S. Bhui (Ed), Race and Criminal Justice, Sage, London, 2009, pp. 154-169; Bosworth, M., 'Deportation, Detention and Foreign-National Prisoners in England and Wales', Citizenship Studies, Vol. 15, No. 5, 2011, pp. 583-595; De Wree, E., Vander Beken, T. & Vermeulen, G., 'The transfer of sentenced persons in Europe', Punishment and Society, Vol. 11, No. 1, 2009, pp. 111-128; Vermeulen, G., 'Material Detention Conditions and Cross-border Execution of Custodial Sentences in the EU', in AA.VV., Framework Decisions on the Transfer of Prisoners and on Probation, Abstracts, European Commission, 2012; and also the literature given in the end of this paper under References.

## II. TRANSFEREES AND EXTRADITEES FOR EXECUTION OF PUNISHMENT

A. The precise definition of a transferee's legal status is crucial, extending beyond mere terminology. It distinguishes transferees from extraditees for execution of imprisonment

1 M Cherif Bassiouni (ed), International Criminal Law, vol II: Multilateral and Bilateral Enforcement Mechanisms (3rd edn, Brill Nijhoff 2008) 553.

punishment imposed on them. This is necessary as both individuals are sentenced persons surrendered to a foreign country to serve their imprisonment punishment in its territory.

Transferees are surrendered by the countries that sentenced them to the countries of their nationality. Before their surrender, these individuals have been imprisoned in the sentencing country. They are already prisoners there awaiting repatriation to continue serving the punishments imposed on them in their countries. Their deprivation of liberty before surrender is grounded in the ongoing execution of their imprisonment punishment in the sentencing country.

In view thereof, if transferees are understood to be only sentenced persons before their surrender rather than prisoners as well[2], they would not be properly distinguished from extraditees for execution of punishment[3]. Actually, only such extraditees are, until surrendered, not more than sentenced persons. Unlike transferees, these individuals, while awaiting extradition in the requested country to the sentencing one requesting them, are not yet considered prisoners. They become prisoners later: only after their surrender to the requesting country, if and when their imprisonment punishment imposed on them in that country is executed there.

Contrary to transferees, these persons are, before their surrender, only individuals wanted for extradition by another (requesting) country. As such, usually, they are held in provisional and/or full extradition detention in the requested country. This is the justification for their deprivation of liberty as the imprisonment punishment imposed on them in the requesting country is not enforceable in the requested one, detaining them, and, in general, no other such punishment on them exists there, either.

Indeed, extradition detentions in the requested country are later deducted from the imprisonment punishment imposed in the requesting country once this punishment is executed in its territory. However, as the execution of the punishment and the deduction of detentions from it begin after the surrender of the extraditee to the requesting country, these actions cannot retroactively affect the status which this person had in the requested country. Unlike a transferee before being the surrendered, the wanted person was not more than a detainee in the requested country awaiting extradition therefrom, a limited status which remains unchanged.

Only later, if the extradition is executed, it will be the requested country's job to imprison the extraditee it receives, turning him/her into a prisoner. This is done on the grounds that the receiving country had already sentenced this person and his/her extradition was obtained for enforcement of this sentence.

The transfer of sentenced persons (prisoners) and the extradition of sentenced persons are confused; sometimes, transfers are mischaracterized as extradition for execution of punishment[4]. For this reason, it is essential to distinguish these two modalities of cooperation

2 Convention on the Transfer of Sentenced Persons (adopted 21 March 1983, entered into force 1 July 1985) ETS No 112.

3 European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 24, art 1(ii); Turkey, Law No 6706 on International Judicial Cooperation in Criminal Matters (5 May 2016).

4 See IRNA, 'Iran extradites 10 Somalia convicts' (13 February 2019) <https://en.irna.ir/news/83208644/Iran-extradites-10-Somalia-convicts> accessed 14 December 2024.

with precision[5]. Above all, it must be emphasized that transferees are surrendered by the sentencing country in order to continue serving their punishments, whereas extraditees for execution of punishment are surrendered to the sentencing country to commence serving their punishments.

B. It is a common requirement for any transfer of a sentenced person that the person shall be a national of the receiving country or, exceptionally, its permanent resident at the time of the decision on the transfer. This is crucial because rehabilitation is more likely to occur in one's home country. It is well-known that the successful rehabilitation of transferees is a key objective of this modality of international cooperation[6]. This is why even if the sentenced person acquired another nationality while remaining a national of the sentencing country, the transfer of this person to the country of his/her new nationality might be preferred if it would increase the chances of his/her rehabilitation[7].

The assumption that rehabilitation is more likely in the country of the sentenced person's new nationality stays and even gets stronger if s/he acquired this nationality after the commission of his/her crime. In such a situation, however, contrary to extradition cases, the receiving country's penal law would be, generally, inapplicable to the crime of the transferee. This is because the transferee had committed his/her crime before becoming a national of the receiving country.

In contrast, the extraditee does not need any nationality or even permanent residence in the receiving country[8]. Usually, it is sufficient that the person is not a national of the country that surrenders him/her. As a general rule Continental-European ("Civil Law"/Latin) countries do not extradite nationals – Article 38 (11) of the Turkish Constitution, Article 25 (2)(ii) of the Ukrainian Constitution, etc.

C. Besides, when it comes to the transfer, the law of the surrendering country must have been applicable to the crime of the transferee. Otherwise, this person could not have been held criminally responsible in that country. S/he could not be convicted there and there might be no basis for the subsequent transfer, either.

Conversely, when it comes to extradition, it is necessary as a rule that the law of the surrendering (requested) country is not applicable, e.g. Article 11 (1)(c)(4) of the Turkish Law on international judicial cooperation in criminal matters. It is required, on the other hand, that the law of the receiving (requesting) country is applicable to the crime of the wanted person. Otherwise, extradition does not make sense (see Article 18 (1)(a) of the Turkish PC):

5 Mohammad Badar and others, Legal and Gaps Analysis: Extradition and Transfer of Sentenced Persons / Conflicts of Jurisdiction and Transfer of Proceedings: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Tunisia (Euromed Justice 2018) <https://www.euromed-justice.eu/wp-content/uploads/2020/02/Legal-Analysis-Extradition-TSP-CoJ.pdf> accessed 14 December 2024.

6 Michael Plachta, 'Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective' (1993) 53(4) Louisiana Law Review 1043–1089 <https://digitalcommons.law.lsu.edu/lalrev/vol53/iss4/2/> accessed 14 December 2024.

7 Council of Europe, Explanatory Report to the Convention on the Transfer of Sentenced Persons (ETS No 112, 21 March 1983) 4, 20 <https://rm.coe.int/16800c917e> accessed 14 December 2024.

8 Parvuz Abdulloev and others, 'The Concept and Legal Basis of the Transfer of Sentenced Persons: on the Example of the Post-Soviet Countries' (2020) 9 International Journal of Criminology and Sociology 3134, 3135.

the receiving country can neither detain and prosecute, nor trial and punish the extraditee for the crime. Penal repression for any other criminal activity of the person is even less likely. It is prohibited by the speciality principle, e.g. Article 10 (4) of the Turkish Law on international judicial cooperation in criminal matters and Article 14 of the European Convention on Extradition.

The applicability of any penal law to a given crime is determined by the time of its commission. In the situation with a transferee, it is most likely that s/he committed the crime beyond the receiving country's territory and that s/he has not yet become its national. As a result, none of the typical principles that trigger territorial application may support the applicability of the receiving country's penal law: neither the territoriality principle, e.g. Article 8 of the Turkish Penal Code [PC], nor the personality principle, e.g. Article 11 of the Turkish PC, respectively. Thus, the chances of applying the penal law of the receiving country to it are minimal[9]. Nevertheless, unlike extradition, its non-applicability to the crime of the sentenced person does not constitute any hurdle to his/her transfer.

D. It is noteworthy, in the end, that since the sentenced person is present within the territory of the sentencing country, justice towards him/her can be carried out without any transfer. This individual may fully serve his/her imprisonment punishment there as well.

However, this result is not achievable for persons wanted for extradition if they are not surrendered to the requesting country, which prosecutes or shall execute the punishment imposed on them. Persons wanted for extradition typically reside in a country that, in most cases, neither prosecutes nor shall execute any punishment imposed on them. In such circumstances, punishment of these individuals is executable there in exceptional situations, namely: only if the country in question takes charge of some foreign criminal proceedings against such a person[10] and concludes them with an imprisonment punishment on him/her, or takes charge of the execution of a foreign punishment already imposed on the person[11].

Foreign countries usually initiate these two modalities of international judicial cooperation as substitutes for extradition that is impossible or rejected (whether for prosecution, or execution of imprisonment punishment, respectively) by the country of the wanted person's residence. Such substitutions are common in cases when extradition cannot be granted because the wanted person is a national of the country where s/he resides. Consequently, there would be no prosecution or punishment of him/her in another country, including the one requesting the person in question. On the other hand, the fact that this person is a national of the country of residense, allows for his/her prosecution and punishment there ("at home"), especially if requested by other countries. His/her nationality does not constitute any impediment for the country of residense to taking over foreign criminal proceedings against him/her instituted in another country, e.g. Articles 24 (1)(a) and

9 Certainly, the Turkish PC might have been applicable on the grounds the crime committed abroad by a person who is not yet a Turkish national was detrimental to the Turkish state or to another Turkish national (Article 12. 1, 2 of this Code). However, such an offender would hardly be granted Turkish nationality, let alone agree to arrive in Türkiye.

10 European Convention on the International Validity of Criminal Judgments (adopted 28 May 1970, entered into force 26 July 1974) ETS No 70, arts 62–63.

11 European Convention on the Transfer of Proceedings in Criminal Matters (adopted 15 May 1972, entered into force 30 March 1978) ETS No 73.

25 (1)(b) of the Turkish Law on international judicial cooperation in criminal matters, or to taking over execution of punishment already imposed on him/her in another country, e.g. Articles 26 (1) and 28 (1)(a) of the Turkish Law on international judicial cooperation in criminal matters.

E. Curiously enough, in the end, even a European legal instrument refers to something, which is actually extradition for punishment, as a transfer of a sentenced person. Thus, Article 3 (1) of the Additional Protocol to the Convention on the Transfer of Sentenced Persons [CoE, 1997] stipulates that if the two States agree the sentencing one may "transfer" the person to the country of nationality (the administering State), "*without the consent of that person, where the sentence passed on the latter… 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*".

Although formally referred to as a transfer, this trans-border surrender of the convict constitutes extradition for punishment. This is because the person is handed over to a country that is legally competent to enforce the imprisonment sentence. It is irrelevant that the sentence originates in another country and that the one receiving the person is not executing its own judgment. Once a country is authorized to enforce the imprisonment sentence[12], the surrender of the convict to it by another country must equally be regarded as extradition.

Secondly, this is extradition because it is not a voluntary procedure for surrendered persons, as the transfer of sentenced persons is. As the above-quoted text states, the surrender takes place even if the person does not consent.

Thirdly, paragraph 4 of the same Article 3 confirms that this is an extradition. According to its text, the result of the person's surrender displays another distinct feature of this modality of international judicial cooperation. Under the indicated paragraph, the surrendered person is protected by the Speciality Rule, typical of extradition. He or she "*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*".

## III. PARDONING BY THE RECEIVING PARTY

In 2007, six Bulgarian medical workers, sentenced in Libya to life imprisonment, were transferred to Bulgaria to serve their punishments there[13]. The transfer was arranged and executed in accordance with the 1985 treaty between the two countries on judicial cooperation in criminal matters, as it included provisions on the transfer of sentenced persons (Articles 43-48 of the treaty). Soon after the arrival of the transferees in Bulgaria, they were pardoned by the Bulgarian President.

A. The responsible Libyan authorities argued that the pardon violated the bilateral treaty because it did not contain any provision that allowed the receiving country to pardon

12 European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 24, art 14.

13 Initially, on 06 May 2007, they were all sentenced to death in Libya. But later, on 17 July 2007, the Supreme Judicial Council of this African country commuted their punishment to life imprisonment. This opened the way for their transfer to Bulgaria.

transferees. However, this argument, referring to the treaty regulation of the issue, turned against the stance of the Libyan authorities.

Actually, there was no provision at all to regulate in any way the issue of pardoning by the receiving (administering) country. The bilateral treaty, therefore, neither permitted nor prohibited the pardoning of transferees. Hence, in the lack of a specific provision, the general rule determining the applicable law shall be valid. This rule is Article 47 (1) of the treaty. It reads:

*"Issues related to the execution of the judgment in the contracting party that has agreed to execute it are decided by the competent authorities of that country in accordance with its internal legislation".*

It follows that it is the domestic law of the receiving country that governs the pardoning issue. In the case under examination, this is the national law of Bulgaria. In particular, it is Article 74 of the Bulgarian PC: *"The President may, by granting pardon, exempt from serving the entire or part of the imposed punishment, and in the case of capital punishment, life imprisonment without the right of substitution, and life imprisonment - to grant pardon, or to substitute it for another punishment."*

No existing rule (national or international) excludes any of the sentenced persons from being pardoned, including transferees, as they also have the status of sentenced persons in accordance with Article 461 of the Criminal Procedure Code of Bulgaria. This is why any transferee to Bulgaria might be pardoned if the President so decides in view of his/her discretionary powers under Article 98, p. 11 of the Bulgarian Constitution.

B. The conclusion that such transferees are pardonable, derives also from the systematic interpretation of the treaty between the two countries. This interpretation corresponds to non-European thinking and, particularly, to the prevailing legal spirit of the Arab world that Libya is expected to adhere to.

To better understand the issue, a comparison is necessary between European and non-European, including Arabic, approaches to solving it. In Europe, legal frameworks such as Article 12 (i) of the Convention on the Transfer of Sentenced Persons state that *"Each Party may grant pardon... in accordance with its Constitution or other laws."* Article 114 of the CIS [the former Soviet Union] Convention on legal assistance and legal relations on civil, family and criminal cases (The Chişinău Convention, 2002) adopts the same approach. The two provisions of the Conventions authorize the receiving country to pardon transferees. This justifies their existence. The provisions would not be needed if the receiving country inherently possessed the power to pardon without them. Thus, the afore-mentioned provisions are the necessary source of the receiving country's authority to grant a pardon to transferees.

Non-European conventions resort to the opposite approach: no explicit provision is necessary to empower receiving countries to pardon transferees. The mere absence of a prohibition on pardoning is considered sufficient authorization. Therefore, to prevent a receiving country from granting a pardon, the respective convention must expressly prohibit the activity. Otherwise, such countries retain the discretion to pardon them.

For the purposes of stopping its Parties from doing this, Article 13 (1) of the British Commonwealth Scheme for the Transfer of Offenders and Article VIII [Sentence 2.1] of the Inter-American Convention on Serving Criminal Sentences Abroad expressly disallow them from pardoning of received transfrerees. Article 61 (2) of the 1983 Riyadh Arab Agreement

for Judicial Cooperation is in the same sense. Libya is a Party to this multilateral Agreement as of 08 January 1988 and is expected to stick to its underlying ideas[14].

In short, non-European receiving parties are prohibited by the rules of the above-mentioned Conventions from pardoning transferees. Per argumentum a contrario, if no such rules existed, receiving parties would have been allowed to pardon transferees under the applicable law, which is their domestic one[15].

Likewise, a bilateral treaty on the transfer of sentenced persons, such as the one between Bulgaria and Libya (Articles 43-48), may prohibit its parties from pardoning transferees only if it contains an explicit disallowing provision. Conversely, in the absence of such a provision – as is the case with the current treaty between the two parties – neither country is bound by any prohibition to grant pardons. As a result, each party maintains the right to pardon received transferees in accordance with its own domestic law. According to a general principle, domestic law is what governs the execution of a transferee's punishment in the receiving country. This law invariably contains provisions for pardoning sentenced individuals, including received transferees, and its applicability remains fully intact. In the case of the transfer of the six medical workers to Bulgaria, they were pardoned by its President on the grounds of Article 98, p. 11 of the Bulgarian Constitution and Article 74 of the Bulgarian PC.

C. A similar situation, raising the issue of pardoning received transferees, occurred in East Africa several years ago. On 29 July 2019, the Somaliland President pardoned 19 pirates who had been sentenced in the Seychelles and, later, transferred to Somaliland [SL]. He referred to his constitutional right to grant pardons under Article 90.5 of the SL Constitution in conjunction with Article 7 (2) of the afore-mentioned Memorandum of Understanding, which reads: *"The continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the receiving State or Authority…"* Some foreigners disagreed with this act of the SL President. They argued that the President had no right under Article 7 (2) of the Memorandum of Understanding to pardon. This is why, by pardoning the sentenced pirates, he eventually violated the Memorandum[16].

It is well known that Somalia, including SL, does not adhere to the European international treaties model of using explicit concretizing permission to the receiving party for pardoning transferees. As a Party to the Riyadh Arab Agreement for Judicial Cooperation, Somalia, incl. SL, follows the opposite international treaties model (Arab, British and American; the non-European one, in general). Under it, the lack of any prohibition in the

14 Libya (as of 2010) is also a Party to the Arab Convention on the Transfer of Inmates in Punishment and Rehabilitation Facilities for Enforcement of Penal Provisions Judgments (signed Cairo 2010) art 12(2): "*The provisions regarding general or special amnesty, or the reduction of the penalty imposed in the enforcing State shall not apply to an inmate serving the penalty or custodial measure under Article (two) of this Agreement, except with the written consent of the convicting State*".

15 Also Людмила Санташова. Зарубежный опыт института передачи лиц, осужденных к лишению свободы, для отбывания наказания в государство их гражданства// В-к Саратовской государственной юридической академии. – 2015. – № 3, p. 227.

16 Somaliland Standard, 'Somaliland Bids Farewell to 19 Pirates from Somalia after Serving 9 Years behind Bars' (2 August 2019) <https://somalilandstandard.com/somaliland-bids-farewell-to-19-pirates-from-somalia-after-serving-9-years-behind-bards/> accessed 7 August 2019.

treaty to the receiving country for pardoning is sufficient to open the way to the act of pardoning any transferee there. Should, however, this country be prevented from pardoning transferees, an explicit prohibition in this sense is necessary for the respective treaty with the sentencing country. Such necessary disallowing provisions are in the texts of the already mentioned Article 61 (2) of the Riyadh Arab Agreement for Judicial Cooperation, also in Article 13 (1) of the British Commonwealth Scheme for the Transfer of Offenders and Article VIII (Sentence 2.1) of the Inter-American Convention on Serving Criminal Sentences Abroad[17]. But, in contrast to all these international agreements, no such disallowing rule exists in the Memorandum with Seychelles[18], let alone one supported by a special Constitutional provision which excludes the applicability of the general Constitutional authorization of the President to pardon prisoners. In view thereof, critics against the SL President seem unfounded. It follows that there is no applicable provision that may prohibit SL as the receiving (executing) party from pardoning transferees from the Seychelles.

Moreover, it is solely the SL state authorities which are empowered to officially interpret their Constitution and the Memorandum of Understanding in such cases. In the examined situation, they found that the President granted a pardon on the basis of the Constitution and in conformity with the Memorandum of Understanding. This Memorandum of Understanding expresses and confirms the Constitutional provision establishing the power of the President to pardon the transferees. But even if the SL Constitution conflicted with the Memorandum of Understanding, this Memorandum cannot prevail over the Constitution. Actually, it would be the other way around, namely: the Constitution would override the Memorandum of Understanding. As a result, only the SL Constitution would be applicable to eventually preserve the President's power to pardon. Being inapplicable, the Memorandum of Understanding cannot be violated at all.

In general, the Constitution of any country allows the pardoning of prisoners, including transferees, and, as explained, it prevails over international agreements in case of conflict between them. This is why even if an international agreement prohibits the pardoning of transferees, the Constitution, with its general permission for pardoning, would nevertheless prevail unless it contains a special provision, empowering the applicability of the international agreement under which transferees shall not be pardoned. But if the Constitution does not contain any such provision, which is the typical case, no pardoning of a received transferee might violate law, as the prohibiting international agreement, if any, would be derogated and rendered inapplicable by the overriding Constitutional permission to grant pardon.

Extradition relations, as more developed, might be a good example to get this derogation point when it comes to civil law countries, including Somaliland. It is well known that many Constitutions prohibit the extradition of nationals. At the same time, some civil law countries are parties to international agreements which contemplate the extradition of persons

17 Also, pursuant to Article 12 (2) of the Arab Convention on the Transfer of Inmates in Punishment and Rehabilitation Facilities for Enforcement of Penal Provisions Judgments, "*The provisions regarding general or special amnesty, or the reduction of the penalty imposed in the enforcing State shall not apply to an inmate serving the penalty or custodial measure under Article (two) of this Agreement, except with the written consent of the convicting State*".

18 It is noteworthy that such disallowing rules may be found in bilateral treaties also. An explicit provision in a bilateral treaty prohibiting the accepting country from pardoning transferees is, for example, Article 12 (3) of the 2008 Agreement between Afghanistan and the UAE on the transfer of sentenced persons.

irrespective of their nationality. Hence, nationals may also be extradited under such agreements. However, to make these agreements applicable also to own nationals, the Constitutions of certain Continental-European countries, e.g. Bulgaria [19], Poland [20], Romania[21], have conceded themselves to the agreements with regard to nationals. To this end, the indicated Constitutions contain a special provision that such persons are also extraditable under international agreements. This special permissive provision of the respective Constitution excludes the applicability of the general Constitutional prohibition of extraditing own nationals to eventually empower the agreements allowing their extradition.

It follows that, as a general rule, if the Constitution of a given country prescribes something – such as a prohibition on extraditing specific persons or the president's right to pardon received transferees – no international agreement can override this prescription. Exceptionally though, such an override is achievable if the derogation of the constitutional prescription has been (self-) authorized by the constitution itself through a specific provision. Obviously, this was not the case with the transfer relations between the Seychelles and Somaliland as there was no provision in the SL Constitution allowing the agreement between the two countries to override the President's right to pardon received transferees.

## IV. THE SPECIALITY PRINCIPLE

A. Traditionally, this principle highlights a primary distinction between extradition and traditional transfer of sentenced persons. It is a hallmark of the extraditee's status. Once extradited to the requesting country, the wanted person may be subject to penal repression only for the crime(s) in respect of which s/he was extradited. This person shall not be prosecuted, tried, punished, detained, or restricted in any other way there for any other, probable or actual, criminal activity committed prior to his/her extradition[22].

By contrast, an individual who is transferred as a sentenced person does not typically benefit from any such restriction. This person enjoys no immunity from penal repression for crimes other than the one(s) for which s/he was punished in the sentencing country before being transferred to his/her country of nationality. However, unlike extradition, the transfer requires, as some balancing factor, the consent of the sentenced person. Without it, the transfer cannot proceed.

The sentenced person's consent shall not be obtained by compulsion, fraud or come out of a lack of sufficient knowledge. The consent of this person must be "informed", e.g.

19 Article 25 (4) (ii) of the Bulgarian Constitution.

20 Article 55 (2) of the Polish Constitution.

21 Article 19 (2) of the Romanian Constitution.

22 For example, under Article 721 (1) of the Italian Criminal Procedure Code, "T*he extradited person may not be subjected to restriction of personal freedom in the execution of a penalty or security measure or subject to any other restrictive measure of personal freedom for a fact prior to delivery other than that for which extradition has been granted, unless there is the express consent of the foreign state or that the extradited person, having had the opportunity, has not left the territory of the state passed forty-five days after his final release or that, after leaving him, he made voluntarily return*". Also, Article 576 of the Ukrainian Criminal Procedure Code, Article 14 of the European Convention on Extradition and Article 52 Riyadh Arab Agreement for Judicial Cooperation.

Articles 5 (iii) and 6 of the UN Model Treaty on the Transfer of Foreign Prisoners[23]. The consequences of his/her transfer must be explained to him/her before s/he agrees to be transferred to the his/her country of nationality. Such consequences include the general possibility of detaining, prosecuting, trying and/or punishing the transferee for any crime before his/her surrender, different from the one(s) in respect of which s/he was transferred. This person might be subject to penal repression in the receiving country for any such different crime, even if s/he is convinced that the competent authorities of that country cannot and will not be aware of his/her crime.

However, the sentenced person's consent may not always be conscientiously "informed". Most of all, explanations and clarifications provided to the potential transferee do not necessarily include revealing confidential information. Understandably, such information might be the fact that a criminal investigation against him/her is likely to be initiated or is already underway in the future receiving country (the one of his/her nationality) for a crime, committed before his/her surrender, different from the one for which s/he has been punished in the sentencing country. For the purposes of protecting the transferee from unfavourable surprises of this sort where his/her consent is distorted or missing, actually, some countries in Europe grant him/her procedural immunity in respect of such different crimes as in extradition cases. It is taken into consideration that the sentenced person may have fallen into a trap, as s/he is likely to not have agreed to be transferred if aware of what may happen to him/her in the receiving country. Thus, the speciality principle is being taken over from extradition to gradually penetrate the transfer of sentenced persons' relations. It was assumed, initially in Europe, that transferees deserve similar if not the same legal protection as extraditees. The introduction of the speciality principle in transfer relation takes place despite the mandatory consent of the transferee involving his/her assumption of risk of being detained, prosecuted, trialled and/or punished for another crime s/he committed before his/her surrender.

B. The legal protection of transferees in relation to other crimes is granted, first and most of all, in the European Union Member States. To this end, Article 18 (1) of Framework Decision 2008/909/JHA of 27.11.2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union requires that no transferred person shall be subjected to penal repression for his/her other crimes prior to his/her transfer. It reads:

*"A person transferred to the executing State pursuant to this Framework Decision shall not … be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her transfer other than that for which he or she was transferred".*

This text has been reproduced in the domestic laws of all EU Member States. As a result, all EU countries have committed themselves to mutually respect the principle of speciality in favour of the transferees so that no such person runs any risk of being unpleasantly surprised with new prosecutions and/or punishments in the receiving country. The EU

23 Also, Article 31 (1) (ii) of the Turkish Law on international judicial cooperation in criminal matters and, for example, Article 8 of the Agreement between Türkiye and Uzbekistan on the transfer of sentenced persons (2024).

countries have undertaken a legal obligation to adhere to the principle of speciality when a national is transferred to them as a sentenced person.

C. However, there are also countries outside the EU that have unilaterally undertaken the legal obligation – in relation to all other countries in the world (regardless of whether or not any transfer treaty with them exists) – to respect the principle of speciality for the benefit of convicts that foreign countries would transfer to them. Serbia is such a country. Pursuant to Article 66 (1) of its Law on Mutual Legal Assistance in Criminal Matters, *"If the convict is transferred to the Republic of Serbia, he/she cannot be detained, criminally prosecuted, or subjected to the execution of a criminal sanction for the criminal offence committed prior to his/her transfer, except for the offence for which he/she was transferred"*[24]. Article 102 (1) of the Croatian Law on Mutual Legal Assistance in Criminal Matters reads the same, basically. It is applicable to countries beyond the EU.

These provisions are an interesting example and, to some extent, a legislative experiment as well. But it would be a mistake not to be cautious with such innovations. Currently, it is difficult to determine whether and when the general introduction of the speciality principle in transfer relations of Serbia/Croatia with all countries in the world may produce a positive effect. At this point, the following potential circumstances require more attention.

Unless the foreign sentencing country partnering with Serbia/Croatia is also legally obliged to respect the principle of speciality in favour of own nationals transfered from Serbia/Croatia, the result is an unacceptable inequality. In particular, if, unlike Serbia/Croatia, the foreign country is not bound by the principle of speciality in cases of incoming transfers, the consequences are as follows:

Nationals of the foreign country sentenced in Serbia/Croatia and transferred back to it as a their country of nationality could face there detention, prosecution, trial and punishment for other crime(s) not included in the transfer procedure, although Serbian/Croatian nationals sentenced in the same foreign country and transferred back to Serbia/Croatia are exempt from such a penal repression under its speciality principle. Thus, transfers are favourable to Serbaians/Croatians and detrimental to nationals of the foreign country. In these conditions, that foreign country is likely to make this inequality less visible by reducing the number of transfers of sentenced person to Serbia/Croatia.

At the same time, no transferring foreign country will be able to efficiently monitor Serbia's/Croatian compliance with the principle of speciality. The foreign country is interested in monitoring the compliance not only with regard to the persons it has extradited,

24 Ministry of Justice of the Republic of Serbia, 'Law on Mutual Legal Assistance in Criminal Matters' (2017) <https://www.mpravde.gov.rs/files/Law%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters_2017.pdf> accessed 15 December 2024. 12.2024. It is noteworthy that the provisions in EU countries seem to envisage only situations under Article 9 (1) of the European convention on the international validity of criminal judgments, where the sentenced person has not actually agreed to his/her surrender (see the Explanatory Report to this Convention, The Hague 1970, p. 24). Therefore, this looks like some extradition, unrequested in advance (carried out on the initiative of the country where the person resides) and accompanied by transfer of execution proceedings/recognition and enforcement of that country's judgment against the extraditee. However, I do not see any indications in this regard in the Serbian text. Nothing makes me assume that its provision applies solely to such persons rather than anyone transferred as a prisoner to Serbia, contrary or not to his/her will.

but also with regard to the persons it has transferred to Serbia/Croatia. Not to face additional difficulties, this other country will have another motive to desist from transferring sentenced Serbian/Croatian nationals.

It follows that beyond the European Union, the principle of speciality in favour of transferees is hardly appropriate for the time being. It is difficult to justify this principle in transfer relations with foreign countries whose laws do not provide for this principle in favour of the received transferees. Unilateral compliance with the principle in question, by virtue of domestic law alone, may create unexpected difficulties. In particular, foreign countries whose laws do not provide for the principle of speciality in favour of received transferees are likely to be more reluctant to transfer relations with countries, such as Serbia and Croatia, whose laws impose this principle.

## V. THE DEDUCTION FROM THE PUNISHMENT OF DETENTIONS CARRIED OUT ABROAD

Pursuant to Article 63 (1) of the Turkish PC, *"The conviction periods realized prior to final decision and created by reasons resulting in a punishment limiting personal liberty are deducted from the adjudicated punishment of imprisonment"*. Following the available interpretation of this provision[25], any prior detention of the convict shall be deducted from the imprisonment punishment imposed on him/her, regardless of whether they are linked to the crime for which s/he was punished. Thus, even if the convict was detained for a different crime (actual or not, punished or not) his/her prior detention shall be deducted from the imprisonment punishment imposed on him/her.

A. Detentions of the convict abroad are not excluded from deduction. Türkiye has an explicit provision that the prior detention in the sentencing or in a third country of persons serving imprisonment punishment in Turkish territory, incl. transferees, shall be deducted from his/her imprisonment punishment, subject to execution in the receiving country. According to Article 16 (1) of the Turkish PC, *"Any time spent in custody, detention, under arrest or serving a prison sentence in a foreign country in respect of an offence, irrespective of where the offence was committed, shall be deducted from the penalty to be given for the same criminal offence in Türkiye"*[26].

Article 31 (2) of the Turkish Law on international judicial cooperation in criminal matters is more specific. It stipulates that the transferee's sentence shall be executed in accordance with Turkish laws. Obviously, they include the cited Article 63 (1) of the PC. The deduction it stipulates is not restricted to detentions in the territory of Türkiye only.

25 Turkey, Turkish Penal Code (Law No 5237) (2004) art 63.

26 Thus, unlike the Bosnian PC, it addresses not only extradition detentions in requested countries but all other detentions abroad as well, including transferees' detentions. Article 57 (i) of the Bosnian PC reads: *"The detention, deprivation of freedom in the course of an extradition procedure …, shall be credited toward service of the sentence imposed by the domestic court for the same criminal offence"*.

On the other hand, Article 82 (i) of the Portuguese PC covers all detention of the sentenced persons abroad. It reads: *"Any procedural measure … that the actor has undergone, for the same act or acts, abroad is deducted …"*

However, Turkish law contains no specific provision for transferees on the deduction of their detentions abroad[27].

B. Most laws prescribe, in general, that detentions abroad shall be deducted[28]. The laws may create the wrong impression that all such detentions are fully deductible, as in the case of domestic detentions of sentenced persons. Usually, the texts of such laws do not make any difference at all.

However, when it comes to the detention of the transferee, it is not necessarily deductible in full in the receiving country. If his/her detention was carried out in the sentencing country, it is to be clarified whether that country's authorities have not already deducted the detention there from the imprisonment punishment imposed on him/her. They may have done this before surrendering the sentenced person to the receiving (his/her home) country. Should this be the case, the authorities of that country shall be careful enough not to deduct any detention period for a second time.

Spain has an appropriate provision for avoiding double deductions. It is Article 58 (1) (ii) of the Spanish PC: *"In no event may the same period of pre-trial custody be credited to more than one case."*[29] This provision is recommendable to any other country in the world.

C. Typically, the deduction of previous detentions is the duty of the transferring country that detained, prosecuted, tried and punished the person. This activity might be difficult, if the individual had been detained in a third country before being punished in the transferring country. Most often, this third detaining country is the one which afterwards extradited the individual for trial to the transferring country. The third country had held the wanted person in provisional detention, up to 40 days in most cases (pending the official extradition request)[30] and/or, at least, in full detention, unlimited in time in most cases (after the arrival of the official extradition request)[31]. Once extradited to the future transfering country, this country may, after sentencing this person, redirect him/her as a transferee to his/her country of nationality. If the extradition detentions were not deducted in the transferring coutry, their

27 Such as Article 457 (5) of the Bulgarian criminal procedure code, Section 54 of the Hungarian law on international mutual assistance in criminal matters, Article 17 of the Malaysian international transfer of prisoners act, etc …

28 E.g. Article 13 (1) of the Portuguese Law on international judicial cooperation in criminal matters reads: "*Any period of remand in custody abroad as well as any arrest ordered abroad as a result of one or another of the forms of co-operation provided for in this law, shall be taken into account in the framework of the Portuguese proceedings or deducted from the sentence, under the terms of the Criminal Code, as if the deprivation of liberty had occurred in Portugal*".

29 Similar is the provision of Section 38 (1) (2) of the Austrian PC.

30 E.g. European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 24, art 16: "*In case of urgency, the competent authorities of the requesting Party may request the provisional arrest of the person sought … Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition... It shall not, in any event, exceed 40 days from the date of such arrest*". See also Riyadh Arab Agreement for Judicial Cooperation (signed 6 April 1983) art 43.

31 E.g. Article 16 (5) of the European Convention on Extradition and Article 16 of the UAE Law on international judicial cooperation in criminal matters: "*The Public Prosecutor or his delegate immediately after receiving the request for surrender may order the arrest of the requested person for fear of his escape*." Also, Article 39 of the Bosnian Law on mutual assistance in criminal matters and Article 43 of the Romanian law on international judicial cooperation in criminal matters.

deduction shall neessarily be considered by the authorities of the receiving country, namely: the country of the transferee's nationality.

Further more, the future transferring country may have been not only a country requesting extradition from a third country and triggering extradition detentions in its territory. The future transferring country could have been, in turn, a requested and detaining one for some other modality of international judicial cooperation. Thus, if the person resided in its territory, s/he might have been detained there at the initiative of some third country. The third country may petition for the provisional detention, again up to 40 days, of the person if it has launched criminal proceedings against him/her and intends to handover them to the future transferring country, e.g. Article 27 and 29.5 of the European Convention on the Transfer of Proceedings in Criminal Matters [CoE, 1972]. Thereafter, if the official request for the handover of the proceedings arrives, the person would be put in full detention in the requested and future transferring country, until its case for this modality of international judicial cooperation lasts, e.g. Article 28 of the same Convention. If this future requesting country agrees takes over the proceedings, the person is likely to be detained also for them. Then, after his/her sentencing and following transfer, each mentioned detention shall be considered for deduction in the receiving country, unless it has been deducted in the sentencing (and transferring) country from the imprisonment punishment it imposed on the transferee.

Alternatively, the third country prosecuting the person may not have handed over the criminal proceedings against him/her to the country of his/her current residence. Instead, it may have decided to complete them and impose its punishment on this person. In case s/he was already missing, the trial would have been conducted *in absentia*, if feasible at all. After that, this sentencing country may attempt to transfer the execution of the punishment to the country of the person's current residence: the future transferring country. To this end, the sentencing country in question would have asked the country of the person's residence for recognition and enforcement of its criminal judgment, including the punishment imposed on that person. In this situation, again, two detentions are likely:

- A provisional detention: once the sentencing country (the first one in the row) announces its intention to the future transferring (the intermediary) country to request from it the execution of its punishment imposed on the future transferee for some crime, e.g. Article 32 (2) of the European Convention on the International Validity of Criminal Judgments [CoE, 1970]. This detention is only up to 18 days pending the request from the interested sentencing country – Article 33 (2)(b) of the said Convention.

- A full detention: once the future transferring (intermediary) country receives the official request of the sentencing country for taking over the execution of the punishment imposed on the future transferee. Pursuant to Article 32.1 of the same Convention, upon receipt of such a request, the requested (and future transferring) country may detain the person sentenced in the requesting sentencing country to secure his/her appearance at the court procedure for deciding on the takeover of the execution proceedings against him/her.

If the request is granted and the execution proceedings are taken over by the requested country (and future transferring as well), that country obtains a final and enforceable criminal judgment against the future transferee. As it conducts no criminal proceedings in this case, no "domestic" detention of the transferee takes place there. In view thereof, no such detention is to be deducted. Only detentions in this (future transfering) country within its

case for the recognition and enforcement of the sentencing country's criminal judgment shall be considered for deduction.

D. Any previous detentions abroad are subject to deduction from the punishment the transferee serves in his/her country of nationality in accordance with its law, e.g. Article 7 (ii) of the Bulgaria PC and Article 18 (1) of the Romanian Law on international judicial co-operation in criminal matters. In addition to the necessity for avoiding double deduction of the same detention[32], the following peculiarities of deduction seem valid everywhere and should always be taken into account:

- The deduction has no time limits. The sentenced person's right to the deduction of his/her detention is not extinguishable by any lapse of time. It is necessary, though, that the detained person was sentenced in a timely manner. Otherwise, especially if the statute of limitations period has expired[33], no punishment is imposable on him/her. As a result, there would be nothing from which to deduct his/her detention.
- The deduction has no territorial limits as regards the deductible detention. Subject to deduction is not only the detention in the country that executes the imprisonment punishment imposed on the person who has been detained. His/her detention abroad might also be subject to deduction.
- The deduction does not depend on the legality of the detention. Illegal detentions (in terms of grounds, length, authorization, etc.) are also deductible. The deduction is not restricted to lawful detentions only. This is why, when it comes particularly to detention abroad, the competent authorities shall not have the duty to evaluate its legality. The mere established fact of detention is sufficient to trigger the procedure of its deduction[34].
- The deduction of the detention from the imprisonment punishment is effected in full (if necessary, from the total length of the punishment to be served) to the extent this is possible. The deduction is unconditional as well. It is not revocable under any circumstances. No following behaviour of the sentenced person, even if s/he commits a crime prosecutable *ex officio*, may entail the withdrawal of the deduction of his/her detention.
- If the sentencing country has imposed life imprisonment on a detainee who was transferred, his/her detention prior to the transfer would hardly be deducted from this punishment before the surrender of the person. Deduction in the transfering country does not make much sense to it, as incarceration would in any case remain life-long. This is why, under many national laws, detention is deductible not from

32 The sentenced person is not expected to cooperate. It is in his/her genuine interest to maintain that nothing from his/her detentions has been deducted to insist on deducting all of them in the country which executes his/her punishment. In view thereof, Article 13 (2) of the Portuguese Law on international judicial cooperation in criminal matters, for example, expressly prescribes that "*With a view to making it possible to take into consideration any period of remand in custody, as well as any period of sentence actually served, information as necessary shall be exchanged*".

33 See Articles 66-67 of the Turkish PC for orientation.

34 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990, Resolution 17, para 2(j).

all custodial punishments but from ordinary (fixed-term) imprisonment[35]. Thus, according to Section 51 (1) (i) of the German PC, "*If a convicted person had been remanded in custody or otherwise been kept in detention because of an offence which is or was the object of the proceedings, any time spent in such custody or detention shall be credited towards a fixed term of imprisonment or a fine*".

- In such situations, the country receiving the transferee may adapt the life imprisonment imposed on him/her to its national criminal law by converting it to ordinary (fixed-term) imprisonment where the crime, for which the person has been sentenced, carries such a punishment[36]. In turn, this conversion opens the way to the deduction from the new punishment. In this situation, the deduction now makes sense, as it would actually reduce the time spent in prison.

E. Like any other sentenced person, the transferee may have been detained during the criminal proceedings against him/her in the sentencing country. Usually, that country deducts, before the transfer, this person's detention from the imprisonment punishment that it imposed on him/her. If this was not done, the accepting country shall carry out the deduction – see Article 475 (5) of the Bulgarian Criminal Procedure Code and Section 54 (i) of the Hungarian Law on International Mutual Assistance in Criminal Matters.

It is noteworthy that, in general, the detention of the transferee in the sentencing country is conditioned by the crime for which s/he was punished. This punishment on him/her is the one from which his/her detention is deducted. Thus, the deduction of the transferee's detention is carried out from the punishment for the same crime in connection with which s/he was detained.

However, the transferee could have been detained for an act (an alleged crime) other than the one for which he or she was punished. Moreover, this act may have been one for which no punishment was imposed on the transferee: s/he could have been acquitted of it, or the criminal proceedings (prosecution) against him/her for it could have been terminated. As a result, his/her detention cannot be deducted from any punishment for that other act for which s/he was detained, as no punishment was imposed for it at all. Thus, the transferee was detained in connection with one act but was punished only for another.

The problem is that it is not always possible to deduct detentions, conditioned by one act (crime or not), from the imprisonment punishment imposed for another act, which is necessarily a crime. Under the laws of some countries, the detention is deductible only from the imprisonment punishment for the crime in connection with which the sentenced person was detained. Thus, according to Article 73 (1) of the PC of Kosovo, *"Time served in detention as well as any period of deprivation of liberty related to the criminal offence shall be included in the punishment of imprisonment, of long-term imprisonment and of a fine."*[37]Therefore, the deduction is allowed only from the punishment imposed on the detainee for his/her crime, which conditioned his/her

35 E.g. Article 57 (1) of the Albanian PC, Article 56 (1) of the Bosnian PC, Article 59 (1) of the Bulgarian PC and Article 88 (3) of the Moldavian PC.

36 See, for example, Articles 10 and 11 of the Convention on the Transfer of Sentenced Persons.

37 Also, Article 56 (1) of the Bosnian PC, Article 62 (3, 4) of the PC of Georgia, Section 92 (1, 2) of the PC of Hungary, Article 47 (1) of the PC of North Macedonia, Article 82 of the Portuguese PC and Article 71 (3, 4) of the Russian PC.

detention. This restriction is also valid for detentions abroad. Under Article 73 (1) of the Romanian PC, for example, *"custodial preventive measures carried out outside the country shall be deducted from the sentence imposed for the same criminal offence in Romania"*[38].

Some countries, though, decided to allow deducting a detention – conditioned by one act, which most often is not criminal – from the punishment for another act, necessarily a crime. In Austria, for example, such deductions are feasible if no compensation was paid for the detention – see Section 38 (1) (2) of the Austrian PC. In most other countries, however, this is not necessary. This compensation does not seem relevant and the fact that it is not paid cannot constitute any impediment to the deduction from the punishment imposed on the person for another crime.

In countries, such as Türkiye, it is necessary for the deduction that the detention has took place before the criminal judgment imposing the punishment from which the deduction is to be effected. Pursuant to Article 63 (1) (i) of the Turkish PC, *"Any period of custody served in any of the circumstances occurring prior to the final judgment shall be deducted from the sentence"*. This or any other provision does not exclude from deduction any prior detention of sentenced persons, at home or abroad, either, for crimes that have not conditioned the detention.

In other countries, the exact timing of the detention for another act (non-criminal, usually) is not relevant. It may have taken place at any time. E.g. pursuant to Article 442 of the Libyan Criminal Procedure Code, *"If the accused is pronounced innocent of a crime for which he had been placed under provisional detention, the time spent in detention shall be subtracted from the punishment for any other crime for which the accused has been found guilty"*. Therefore, the detention, conditioned by the act for which the detainee was pronounced innocent, may have even occurred after the person was found guilty of and punished for a different crime. Nevertheless, the detention in question remains deductible.

Besides, under the cited Libyan provision, the detainee is not punished for the act that conditioned his/her detention solely because s/he was acquitted of it. The text of the provision does not mention the termination of criminal proceedings for this act (often, not a crime) as a reason for the non-punishment of the detainee for it. This omission is arguably open to criticism. Furthermore, Libyan law does not require any link between the act (crime or not) that conditioned the detention and the crime for which the detainee was sentenced to the imprisonment punishment from which his/her detention might be deducted.

In contrast, Bulgarian national law requires a link between the two acts[39]. Article 59 (3) of the Bulgarian PC specifies that the rules on deducting detention from the imprisonment punishment imposed "shall also be applied where the convict has been detained under charges for another crime, the proceedings for which were terminated or ended by acquittal, if the provision of Article 23 (1) may be applied with respect to the acts". The provision of Article 23 (1) refers to the concurrence of crimes[40]. Therefore, the act that conditioned the

38 Also, Article 139 (i) of the Montenegrin PC and Section 45 (5) of the Slovak PC.

39 Article 716-4 of the French Criminal Procedure Code, for example, also requires such a link.

40 It reads as follows: "*If by one act several crimes have been committed, or if a person has committed several separate crimes before the issue of sentence that has entered into force for any of them, the court shall, after determining punishments for each crime separately, impose the most severe thereof*".

detention, if it were a crime, and the act for which the detainee has been punished (which is necessarily a crime) must be linked as forming a concurrence of crimes.

The cited Article 59 (3) of the Bulgarian PC includes both reasons for the non-punishment of the detainee for the act conditioning his/her detention, namely: termination of the criminal proceedings for this act and acquitted of it. Besides, in contrast to Article 63 (1) (i) of the Turkish PC and similarly to Article 442 of the Criminal Procedure Code of Libya, the Bulgarian Article allows for a deduction after the detainee was punished for his/her other act, which is necessary a crime. Such a deduction can be effected later, in accordance with Article 306 of the Bulgarian Criminal Procedure Code.

Lastly, Article 59 (3) of the Bulgarian PC is not restricted by geography or the status of the convicted person. This provision is fully applicable to detentions abroad, including those of individuals transferred to Bulgaria to serve their punishments.

## VI. DEDUCTION FROM THE EXECUTED PUNISHMENT AND REDUCTION OF THIS PUNISHMENT

A. Deductions from punishments of transferees shall be distinguished from all possible reductions of the term of their imprisonment punishments under the law of the receiving country. Technically, the deduction does not make the punishment under the judgment shorter (it shortens the duration of its execution/the time to be served only). In contrast, the reduction of the punishment does shorten the punishment term given in the judgment.

Obviously, both legal phenomena affecting the punishment imposed on the transferee in a way beneficial to him/her are based on circumstances that occurred in the past, before the transfer, and in the sentencing country, usually. Detention and other circumstances that entail deduction from the punishment existed, most often, before its execution, whereas circumstances that shorten the punishment come into existence during its execution. For example, labour before prison may carry a deduction from the punishment[41], whereas labour in prison may result in the reduction of its term[42.]

However, only former circumstances (detentions, most of all) in the sentencing country may affect the punishment being executed in the receiving country as they are always deductible from it. If the sentencing country has not deducted from this part of the punishment that had already been executed there, the executing country is in the position to do this. At the same time, the latter circumstances that occurred in the sentencing country during the execution of the punishment there before the transfer of the convict do not produce any such effect. The receiving country may not shorten the total punishment term based on the existence of such a circumstance in the sentencing country, unless that circumstance constituted a ground for shortening the punishment under the sentencing country's law as well.

In particular, no previous circumstance in the sentencing country, especially one that reduces the term of the punishment, e.g. prison labour by the convict, may shorten the

41 E.g. pursuant to Article 59 (5) of the Portuguese PC, if "*the convict has to serve a sentence of imprisonment but has already rendered work in favour of the community, the court shall deduct from the time of imprisonment to be served the days of work already rendered*".

42 E.g. pursuant to Article 41 (3) of the Bulgarian PC, "*Labour in prison shall be recognized as a way of diminishing the term of the punishment, 2 work days being considered for 3 days of imprisonment*".

portion of the punishment that the individual has already served before the transfer. This shortening may be possible only if the law of that country stipulated such a result. Otherwise, no reduction of the executed part of the punishment might be performed in the receiving country. Its law may, unlike the law of the sentencing country, prescribe such a reduction. Nevertheless, the receiving country's law cannot be applied retroactively to any circumstance that occurred in the sentencing country, let alone override the latter country's law to reduce the term of what the transferee has already served there before the transfer. Though favorable to him/her, no such reduction is allowed.

B. Not long ago, the Bulgarian judiciary experienced such a case with Denmark. By a judgment of 28.11.2012, Mr. Ognyanov, a Bulgarian national, was sentenced in Denmark to 15 years imprisonment for murder and aggravated robbery. He served part of his period of imprisonment in Denmark, from 28.11.2012 until 01.10.2013. While detained in Danish prison, Ognyanov worked from 23.01.2012 until 30.09.2013. On 01.10.2013 he was transferred to a prison in Bulgaria.

Bulgarian law provides that work done by a prisoner reduces the length of his/her punishment. The law prescribes that two days of work shall equate to three days of imprisonment – see Article 41 (3) of the PC, footnote 42. In view thereof, the competent court in Bulgaria accepted that this Article applies in a situation where a sentenced person has carried out work during the period of his/her detention in a foreign country before being transferred to Bulgaria for the enforcement of the remainder of his imprisonment punishment. Before transferring Ognyanov to Bulgaria, the Danish authorities expressly stated that their legislation did not permit any reduction in imprisonment punishment on the grounds of work in prison.

In this situation, the competent Bulgarian court, the City Court of Sofia, asked the European Court of Justice whether the national rule of the administering country (Bulgaria in this case) is applicable to grant the transferee a reduction in sentence because of work carried out by him in the period of his detention in the sentencing country (Denmark in this case). The European Court ruled that "the custodial sentence of a prisoner may not be reduced, when he is transferred from one Member State to another, by reason of time spent working in prison in the first Member State if that Member State has not, under its national law, granted such a reduction in the sentence" (Judgment in Case C-554/14 Atanas Ognyanov vs Sofiyska gradska prokuratura).

Transfer relations might turn out unexpectedly complicated, sometimes. This is why it makes sense to be aware of the laws and practices of different foreign countries before deciding whether or not to transfer to them sentenced persons who are their nationals.

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