

CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES: TRANSFER OF SENTENCED PERSONS

*Candido Cunha**

Sovereignty limits the space of those who fight crime

Both the theory and the practice of State sovereignty have always prevented the arms of the judge, as those of the policeman¹, from stretching any farther than the border of other countries.

Indeed, States are all the more eager to assert their privilege of sovereignty in respect of criminal matters that the right to punish is a right that States jealously keeps to themselves alone. Moreover, criminal law expresses certainly the requirements of a given society, not necessarily universal concerns.

There is in principle no question for State A to allow State B to exercise, within the territory of State A, the right of State B to punish. Otherwise the sovereignty of State A might be questioned. Adding to that there is the assumption that the values with reference to which State B would exercise its right to punish may differ from the values pursued under the criminal law of State A.

Nothing limits the space of criminals

Crime however knows no borders, in that borders do not confine crime, not even do they deter crime. Quite on the contrary, borders attract crime to the extent that they hinder the action of all those whose task it is to control crime. Borders also produce crime in the sense that whatever it is that they seek to separate often is

matched with a demand to bring together. Often, the action of bringing together again amounts to crime or is easier done, or done in a more profitable way, by resorting to crime.

Human relations have crossed the walls of the family home to go beyond the bushes of the village, the limits of the county and the borders of the state: we are in this global village all in contact with each other. Most of us all now share the net, Coca-Cola and Champagne, drive Toyotas, fly Boeings, work for a multinational company or organisation. In particular, the global economy has brought men and women from all over the world to be in contact each other, often to visit each other. It was different with our grand-parents.

Therefore, the chances are high that crime committed today has an international dimension; the chances are even higher that crime committed tomorrow will have an international dimension.

How to deal with transborder crime

Because national judges and policemen cannot act beyond their respective borders, States have since early civilisations² agreed on methods of inter-state co-operation in criminal matters, designed to overcome that difficulty.

* Head of Division, Council of Europe

¹ References in the masculine gender are intended to include both genders.

² Cherif Bassiouni (cf. *International Extradition: United States Law and Practice*, Oceana, New York 1999) mentions the Egyptian, Chinese, Chaldean and Assyro-Babylonian civilisations)

The simplest and most common method is that of mutual legal assistance. The underlying philosophy of mutual assistance is that, to the extent that State A may not carry out action in State B, State B carries out action on behalf and at the request of State A, for purposes relating to proceedings pending in State A. State B acts in lieu of State A. Mutual assistance may also consist in State B authorising State A to carry out action on its territory.

Because there is virtually no limit to what may be requested under the banner of mutual assistance, all other methods of inter-state co-operation should be considered. Traditionally however many methods of co-operation are autonomously identifiable and indeed separately regulated both in domestic and international law.

The oldest method is extradition. It is the surrender of a person by State A to State B, at the request of State B, where the person is being proceeded against in State B or is wanted by State B for the carrying out of a sentence. Extradition applies when the person wanted is in one state while the person's criminal file is in another State.

The classical approach to extradition is the following. Firstly States accept to extradite a person for the sake of reciprocity. Where reciprocity is not guaranteed, extradition is not possible.

Secondly, extradition is only granted to the extent that the person concerned is not a person protected by the State to which extradition is requested. Thus nationals of that State are usually not extraditable. Nor are persons otherwise protected, such as refugees.

Thirdly, extradition is not granted when the interests at stake, beyond the criminal

nature of the case, are closely linked to the sovereignty of the State requesting extradition. Thus, tax matters, military matters and political offences are usually not extraditable.

Lastly, where the consequences of extradition might shock fundamental values of the State to which extradition is requested, it is usually refused. The circumstance that death penalty may be applied is for many countries one such example.

A simplified method of extradition has developed these last years. It applies to cases in which the person concerned consents to his extradition.

When the person wanted is in one state and the person's criminal file is in another State, instead of transferring the person by way of extradition, it may be possible to transfer the file. Where the file takes the shape of proceedings, that is called transfer of proceedings in criminal matters. It applies in particular where extradition is not an option. It also applies, regardless of whether extradition is or is not an option, where the interests of justice so require, for example where evidence or important evidence is to be found in the country where the person is, not in the country where the file is.

An extension of the concept of transfer of proceedings allows a state not only to transfer the proceedings but also to transfer the person concerned along with the proceedings. One is no longer in a situation where the file is in one country and the person in another. The situation is one where both the file and the person are in the same country although there are reasons to transfer both to another country. Such reasons may have to do with the availability of evidence or with the circumstance that different persons are

being prosecuted for the same acts in different countries and justice would better be served by trying them together in the same courtroom.

Where the file is transferred in the shape of a final sentence, that is called international validity (or recognition) of criminal judgments. Such a method allows State A to recognise and enforce a criminal judgment passed by a court of State B. It applies in particular where the sentenced person is in one state and the sentence was passed in another state. However it may also apply in a situation where the person is in the same state where the sentence was passed although there are reasons to transfer both to another country. Such reasons may have to do with better chances for the rehabilitation of the person concerned, for example, where the person is a national of the other state.

An extension of that latter form of international validity of criminal judgments may allow a state to transfer both the person and the sentence under a simplified procedure. That is called transfer of sentenced persons. I am going to concentrate on that method of international co-operation in criminal matters.

Transfer of sentenced persons Foreign detainees

In many countries - certainly in most European countries - the number of foreign inmates is disproportionately high when compared with the total number of inmates. That is not because human beings have some special propensity for offending when they move beyond the borders of their native community, as if social control dropped when people are amidst foreigners. In the fringes there may be a little of that. For the main bulk of the offences, the reasons are elsewhere.

I mentioned above that the chances are high that crime committed today has an international dimension. Adding to this there is the fact that offences of trafficking, especially drug trafficking, are amongst the most intensively investigated and heavily punished. Indeed they account for a high number of foreign detainees. And of course there is the circumstance that non nationals are less likely than nationals to benefit from such measures as bail and conditional release, because of the suspicion that they might easily take refuge in their native country, i.e. abroad.

Foreign prisoners frequently encounter particular difficulties on account of such factors as different language, culture, customs and religion. If they do not understand the language of the country of detention they may not be able to communicate with staff and other inmates and may not have access to information and reading material, and thus risk being excluded from participating in the prison's activities and facilities. Imprisonment in a foreign environment poses additional problems, especially if customs and food are unfamiliar or incompatible with the prisoner's religious precepts. All this produces alienation and isolation which is increased by the fact that foreign prisoners will have difficulty in maintaining contact with family, friends and others in their country of origin; visits are rare or non-existent. In addition, lack of a common language will impair communication with those persons and agencies responsible for assisting the prisoner in his resocialisation. As a result, the foreign prisoner's chances of social resettlement are greatly reduced.

At the same time, the problems of communication with foreign prisoners and the necessity to take account of their special needs and problems place an additional burden on prison administrations: they must seek to provide

interpretation and translation, to make special arrangements for prison visits and other contacts with the outside world, to adjust educational and professional training facilities, to observe special dietary requirements - to mention but a few of the problems posed by the detention of foreigners.

Under such circumstances the purposes of imprisonment are partially impaired. The nationality of the offender has no incidence on objectives such as to keep the offender away from society, to prevent him from offending again, to defend the society against him, to show that society reacts to crime, or to ensure that serious crime does not remain unpunished. However, the objective of resocialising or resettling or rehabilitating the offender, is highly impaired by the circumstance that the offender is not a member of that community, in particular where he is an alien.

It follows that, all else being equal, the same sanction is harsher when imposed on a foreign prisoner than it would otherwise be if applied to a national. There is an element of justice that requires being taken into consideration when the prisoner is not a national.

And it also follows that the burden put on the prison administration is heavier with respect to foreign prisoners than nationals. A heavier burden means extra expenses which, in an environment where resources are limited, usually will be compensated by bringing down the level of expenditure elsewhere in the system with obvious disadvantages to the system as a whole.

The need therefore is there, on different accounts, to reduce the number of foreign prisoners. One way of achieving that result is to transfer.

THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

Historical background

The Convention of the Transfer of Sentenced Persons, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC), was opened for signature on 21 March 1983.

At their 11th Conference (Copenhagen, 21 and 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of a Resolution (No. 1), by which the Committee of Ministers of the Council of Europe was invited to ask the European Committee on Crime Problems (CDPC), inter alia, "to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member states or by member states in their relations with non-member states".

Following that initiative, a Select Committee of Experts on Foreign Nationals in Prison was set up in June 1979.

The committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, at its own request, the Select Committee was authorised to prepare a multilateral convention rather than a model agreement, provided it would not conflict with the provisions of existing European conventions.

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The Select Committee was composed of experts from fifteen Council of Europe member states (Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers.

The Convention on the Transfer of Sentenced Persons of 21 March 1983 is an example of European legal co-operation which has been extended well beyond Europe. 45 States are a Party to the Convention, 37 of them European and 8 non-European. Its purpose is to provide a procedure under which a person serving a prison sentence in a country of which he is not a national may be transferred to the country of his nationality in order to serve there the remainder of the sentence.

The draft was finalised in May 1982 and forwarded to the Committee of Ministers that approved it in September 1982 and decided to open it for signature on 21 March 1983.

General considerations

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

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

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

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

observers and actively associated with the elaboration of the text.

Presently, the Convention is in force with respect to 45 States, 8 of which are non-member States.

The convention distinguishes itself in four respects:

With a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.

A transfer may be requested not only by the State in which the sentence was imposed ("sentencing state"), but also by the state of which the sentenced person is a national ("administering state"), thus enabling the latter to seek the repatriation of its own nationals.

The transfer is subject to the sentenced person's consent. Thus, for all practical purposes, the Convention operates on the basis of a threefold consent, namely, the sentencing State, the administering State and the person concerned.

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

Its objectives according to the preamble are (a) further the ends of justice and (b) contribute to the social rehabilitation of sentenced persons.

The question has been raised of how to establish priorities between the two objectives stated in the Preamble if and when such objectives enter into conflict with one another.

In this respect it has been recognised that the ends of justice, including the enforcement of the sentence, are a major aim of the Convention. The latter therefore does not authorise action designed to obviate or by-pass the execution of the sentence. Indeed, upon agreeing to a transfer, administering States undertake to execute the sentence, either by way of continuing enforcement, or by way of conversion.

Difficulties may arise where there is great discrepancy between the actual length of the prison term that the transferee, should he not be transferred, would have to serve in the sentencing State and the actual length of the prison term that the transferee, should he be transferred, would have to serve in the administering State.

Where there is great discrepancy, some States tend to consider that, should the person be transferred under such conditions, the ends of justice are not served.

It has also been recognised that the social rehabilitation of sentenced persons is equally a major aim of the Convention. This aim can better be served by allowing sentenced foreign persons to serve their sentence within their own society, i.e. by transferring them.

The two aforementioned aims of the Convention are placed on the same footing in the Preamble. In technical terms, there is no gradation of importance or priority between them. It follows that both

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objectives must be pursued compatibly with one another.

However, whilst the ends of justice may be achieved regardless of the Convention, rehabilitation of foreign detainees can better be achieved through the Convention. The objective of rehabilitation is the “raison d’être” of the Convention.

Furthermore, the Convention has a humanitarian dimension. Indeed, bringing foreign detainees back home amounts to reducing their hardship to the same level as that of national detainees, by way of giving them the same chance that the latter already have, i.e. “to serve their sentences within their own society”.

In principle, the objective of rehabilitation is served in all cases of transfer; the objective relating to the aims of justice might, in the view of some States, not be entirely served in all cases. Hence, the situation where States may have to ponder between either (a) serving rehabilitation while not entirely fulfilling the ends of justice, or (b) not serving rehabilitation while ensuring the fulfilment of the ends of justice.

Whilst recognising that the balance between the two terms is not even, one must accept that there is no straightforward answer to the dilemma. Only on a case by case basis, depending on the particular circumstances of each case, will it be possible to decide one way or the other.

Scope

The definition of “sentence” makes clear that the convention applies only to a punishment or measure imposed by a court of law, which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

Article 9.4 provides that any State which cannot avail itself of one of the procedures referred to in that Article to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

That Article implicitly extends the scope of the Convention to persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence.

Due however to the variety of procedural ways of dealing with such persons, it remains to be confirmed whether all the Parties to the Convention are in a position both to transfer out and transfer in mentally disturbed offenders.

Ways and means ought to be found to transfer such persons to their countries of origin. Indeed, it makes no sense to keep them in a country where little can be made to take proper care of them. Their transfer, however, should take place under formal arrangements that take due care of:

- the interests of the person concerned, who probably cannot give his or her consent;
- the need to ensure that the society into which the person is being transferred is properly protected against him or her;
- the need to ensure that the person does not move on, uncontrolled, to another country, including the country from which he or she was transferred out.

General principle

The application of the convention is

governed by the general principle that states shall afford each other “the widest measure of co-operation in respect of the transfer of sentenced persons”. This is intended to emphasise the convention’s underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned.

Although Parties are in no way under an obligation to proceed to any requested transfer, they must examine in all good faith, with respect to each such request, whether transfer is not an option.

The right of initiative

Transfers may be requested by either the sentencing state or the administering state. Thus the Convention acknowledges the interest which the prisoner’s home country may have in his repatriation.

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

Seven conditions for transfer

(1) Nationality

The first condition is that the person to be transferred is a national of the administering state.

In an effort to render the application of the convention as easy as possible, the reference to the sentenced person’s nationality was preferred to including in the convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms “ordinarily resident in the other state” and “the state of origin”

Contracting States may, however, define, by means of a declaration, the term “national”. And indeed many have defined

that term in such a way as to include persons having their permanent residence in their territory.

It should be pointed out that any State may define the term national for the purposes of this Convention only as far as it is concerned (Article 3.4). That means that each State may describe which persons it wishes to come under the category of its own nationals. Such a definition is relevant where the state concerned is the administering state, not the sentencing state. No state is authorised to define the category of nationals of any other given state. It is important to note this because an analysis of the declarations entered by some states shows that they have interpreted the provisions of Article 3.4 in a different way.

One consequence of this is that dual nationality should not prevent a person from being transferred from the country of one of its nationalities to the country of the other nationality.

The question may be raised of re-transfer to a third State, as follows. A person that has two nationalities, after having been transferred to one of the countries of his nationality, may request to be re-transferred to the other country of his nationality. The question is whether a person transferred under the Convention may be re-transferred to a third State and, if so, under which conditions.

In this respect the following observations are relevant. The Convention must not be used as if it were a travel agency. However, it is the primary purpose of the Convention to facilitate the rehabilitation of the sentenced person and, thus, re-transfer must not be ruled out. Re-transfer should require the agreement of (1) the person concerned, (2) the sentencing State, (3) the first (or intermediate) administering State

and (4) the second (or final) administering State. The question of who may take the initiative is irrelevant in practical terms.

(2) Final and enforceable judgment

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

(3) Length of sentence

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

(4) Consent of person concerned

The fourth condition is that the transfer must be consented to by the person concerned.

This requirement constitutes one of the basic elements of the transfer mechanism set up by the convention. It was noted above that the simplified procedure provided by this Convention is possible only because the person concerned consents to it.

Where in view of the age or physical or mental condition of the person concerned, one of the two states considers it necessary, the consent of the sentenced person's legal representative is required in lieu of the sentenced person's consent.

While the requirement for consent is laid down in Article 3.1.d, the rules applicable to consent are laid down in Article 7.

The sentencing State must ensure that the person required to consent to the transfer - either the sentenced person or his representative, as appropriate - does so voluntarily and with full knowledge of the legal consequences which the transfer would entail for the sentenced person.

The procedure for giving consent is governed by the law of the sentencing state.

The sentencing State shall afford an opportunity to the administering State to verify through a consul or other official agreed upon with that state, that the consent is given in accordance with the conditions set out in the Convention.

A document certifying the consent of the person concerned must be forwarded by the sentencing state to the administering state.

The circumstance that consent is required led the drafters to consider it not necessary to lay down a rule of speciality. It results that any person transferred under the convention may be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. That information must of course be included in the information on the substance of the convention which is to be given to sentenced persons.

(5) Dual criminality

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

The condition is fulfilled if the act which gave rise to the judgment in the sentencing state would have been punishable if committed in the administering state and if the person who performed the act could, under the law³ of the administering state, have had a sanction imposed on him.

The basic idea is that the essential constituent elements of the offence should be punishable in the administering State.

An interesting question has been raised in Norway. A Norwegian citizen applied to be transferred to Norway to serve a sentence imposed on him in another state. He claimed that he had been provoked by the police into performing the illegal act for which he was sentenced. Such provocative methods by the police are accepted and legal in the sentencing state; however, they may not substantiate a conviction in Norway. Thus, the Director of Public Prosecution concluded that, had the act been committed in Norway, no punishment could have been imposed. The Norwegian authorities thus rejected the application for transfer. However, internal Norwegian procedures under the Public Administration Act allow for an appeal. On appeal, it was found that the conditions in Article 3(1)(e) had been met and, therefore, transfer was finally granted.

In reaching conclusions in the appeal, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2.

Once transferred, the person claimed that he was illegally detained in Norway because the act for which the sentence was imposed, does not constitute a criminal offence in Norway.

The first question here is whether the expression <<double criminality>> should be interpreted as double criminality *in concreto* or double criminality *in abstracto*.

Most experts are in favour of dual criminality being assessed in *concreto*.

Dual criminality should mean : (a) looking at the law of both countries, as it applies, or as it would apply, to the concrete circumstances of the case, and (b) assessing whether there is sufficient overlap in view of the effect sought. In fact, once the person concerned - not a hypothetical person in a hypothetical case - is transferred, there must not be any legal impediment, in particular of a constitutional nature, that would prevent the administering state from executing the sentence passed by the other state. In most states individuals are protected against deprivation of liberty by strict rules of a constitutional nature that cannot be overruled, for example, by the provisions of this Convention. It follows that the Convention would be prevented from operating should double criminality in *concreto* not apply.

One must however be careful in establishing the limits of such a concept. Indeed it cannot be interpreted to mean that in both states concerned the law provides likewise in respect of the circumstances of the case. Sufficient overlap was used above to mean the following. The facts for which the person was sentenced, under the circumstances in which they occurred, including the circumstances relating to the persons involved, should they have come under the law of the administering state, would have carried a criminal sanction.

In the case under review, it should be recalled that Article 7.1 requires that the person requested to give consent to the transfer does so voluntarily and with full knowledge of the legal consequences thereof. Such a consent must therefore be seen to carry with it the acceptance of the effects of transfer in the administering state.

One must have in mind that the Convention operates in particular on the

³ Unless where it results otherwise from the context, the word "law" is always used to mean both enacted law and common and customary law.

basis of respect for a legitimate interest of the sentencing state in that the sentence be served. Such an interest cannot be frustrated by allowing for the sentence to be challenged in the administering state. The possibility must therefore not be considered of giving transferred persons the right to challenge the effects of transfer in the administering State.

Moreover, it would be circumventing the provisions of Article 13 (i.e.: "The sentencing State alone shall have the right to decide on any application for review of the judgment.") to give transferred persons the right to apply to the administering state for a direct or indirect review of the judgment.

Because the world is not perfect, it can always happen that it is not before the actual transfer of the person that it becomes apparent, or that it is found, that the dual criminality requirement was not met. In such circumstances, the remedy could not be to free the person, but rather to annul the transfer and return the person.

(6) Agreement of the sentencing state

The sixth condition is the agreement of the sentencing state.

(7) Agreement of the administering state

The seventh condition is the agreement of the administering state.

In the view of certain experts, the Convention is too rigid and in that way inadequate to cope with present-day needs. It is not flexible in the sense that requests are either to be totally granted or totally rejected. It does not provide a mechanism for ad hoc arrangements that may take care of the particularities of each case. Because the Convention does not preclude ad hoc arrangements, more should be done in order to facilitate such arrangements.

Others however think that the Convention should not be used as an instrument under which ad hoc arrangements may be agreed upon, according to which the States involved would follow a course of action opposite to that which is foreseen under the Convention. They question whether ad hoc arrangements are consistent with the spirit of the Convention. Is it not one of the purposes of any Convention to close negotiations as to how to deal with a given category of situations? Should it now become routine practice to discuss from scratch the terms under which sentenced persons are transferred, then the Convention would become purposeless.

Obligation to furnish information

The Convention provides for an obligation to furnish information at four different levels. Firstly, the sentencing state must inform the sentenced person on the substance of the convention, provided of course that the sentenced person may be eligible for transfer under the convention (Article 4.1). In order to facilitate that information, the Council of Europe has prepared a standard text with all the information deemed to be necessary at that level. The Secretariat of the Council of Europe invites all states that become a Party to the Convention to translate that text into their own language or languages, adding if appropriate any other relevant information. The translated version is then distributed to all the other states. It becomes then possible to any state to provide to any person eligible to transfer under the convention relevant information in that person's language.

Secondly, once the sentenced person has expressed an interest in being transferred, information between the two states concerned is required. (Article 4, paragraphs 2, 3 and 4)

Thirdly, the sentenced person shall be informed, in writing, of any action taken by one state or the other, as well as of any decision taken by either state on a request for transfer.

Fourthly, Article 15 of the Convention provides for the administering state to inform the sentencing state on the state of enforcement:

- a. when it considers enforcement of the sentence to have been completed;
- b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- c. if the sentencing State requests a special report.

Requests and replies

Requests, replies and supporting documents are dealt with under Articles 5 and 6 of the convention. They must be in writing and should follow channels of communication determined beforehand.

Article 6.2.(a) of the Convention provides that the sentencing state must provide the administering state i.e. with a certified copy of the judgment. However, in some cases the full facts on which the sentence is based are not apparent from the text of judgement. That is the case for example with judgements on appeal. A comprehensive statement of the facts is in any case necessary for the administering State to ascertain double criminality. And indeed Article 4.3.(c) requires the sentencing State to forward to the administering State a statement of the facts upon which the sentence was based.

In order to increase efficiency and save time, states should, when providing copies of judgements that do not contain a full description of the facts, also forward a separate statement to that effect.

Where a translation of the judgment is

required by the administering state, and the original sentence is long and/or complicated, as a general rule translation of select extracts of the judgment, or a summary thereof, should suffice. Where and when the administering state deems necessary to have more information than that contained in the translated extracts of the judgment, it may of course so request from the sentencing state.

All the information that is necessary in order to carry on speedily with the procedures should promptly be made available in order to avoid unnecessary delays. In particular, the "penal" situation of the person concerned (duration of remand in custody, how long he has served the sentence, any credit of time due to some special reason, etc) must be clearly spelt out in the documents.

Effects of transfer for sentencing state

Article 8 provides that transfer shall have the effect of suspending the enforcement of the sentence in the sentencing state. As from the point in time in which the administering State considers enforcement of the sentence to have been completed, the sentencing state may no longer enforce the sentence.

It results from the wording of this Article that the Convention does not prevent the sentencing State to resume enforcement of the sentence after transfer in so far as enforcement will not have been completed. Such would be the case, for example, where the transferred person escapes from the administering state and ends up being recaptured in the sentencing state.

This Article aims at preventing transfer from leading to the same person being punished twice for the same facts (*ne bis in idem*).

Effect of transfer for administering state

According to Article 9, the administering state may choose between two ways of enforcing the sentence. It may either:

- continue the enforcement immediately or through a court or administrative order; in that case, the administering state continues to enforce the sanction imposed in the sentencing state, possibly adapted;
- or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing state; the sanction is converted into a sanction of the administering state, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing state.

The alternatives are respectively called “continued enforcement” and “conversion of sentence”.

It must be underlined that, under Article 3.3, States may enter a formal declaration excluding one or the other of these methods in their relations with other Parties. Such declarations have as a result, not only that the state having made the declaration chooses once and for all the alternative that it will follow, but also that that state will not transfer any person to any state that follows the barred alternative.

In fact only two states, namely France and Italy, have entered declarations that can be interpreted to mean that. Other States have invoked Article 3.3 to make declarations to the effect of announcing beforehand the alternative of their choice where they act in the capacity of administering states.

Rule common to both alternatives

In both cases, the enforcement is governed by the law of the administering state.

Continued enforcement

Where the administering state opts for the “continued enforcement” procedure, it continues to enforce the sentence imposed in the sentencing State, as if it had been imposed in the administering state. In particular, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing state.

The “legal nature” of the sentence refers to the kind of sanction imposed, as it is defined under the law of the sentencing state.

The administering State is nevertheless allowed to “adapt” the original sentence. In practice that will prove necessary in most cases. Indeed, the “legal nature” of sanctions available is often not exactly the same in any two countries. For example, in most countries imprisonment breaks down into a diversity of sanctions involving deprivation of liberty, known by different names that cannot be translated. Thus “adaptation” is often necessary on such grounds in order to reach the nearest equivalent available in order to make the sentence enforceable.

Adaptation of the original sentence may also be necessary in order to ensure that it does not exceed the maximum prescribed by the law of the administering state.

Moreover, the administering state is usually faced with the need to prescribe some kind of legal procedure leading to a decision that fixes the amount of time — duration of sentence — that remains to be served, taking into account the time served and any remission earned in the sentencing state up to the date of transfer. Indeed,

any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence to be continued in the administering state.

The administering state thus continues to enforce the sentence imposed in the sentencing state, but it does so in accordance with the requirements of its own penal system.

Conversion of sentence

The conversion of the sentence to be enforced is the judicial or administrative procedure by which the sanction imposed in the sentencing state is replaced by a sanction prescribed by the law of the administering state.

Procedures of this kind, for example in civil matters, are often called *exequatur* procedures. The name should probably be avoided in this case because of the fundamental difference between procedures under this Convention which are based on the consent of the person concerned and any legal procedure allowing for the coercive enforcement of a foreign judgment.

The conversion of the sentence is governed by the law of the administering state. However, four conditions are to be observed by the administering state.

Firstly, the administering state is bound by the findings as to the facts insofar as they appear - explicitly or implicitly - from the judgment pronounced in the sentencing state.

This requirement may lend itself to difficulties. For example, sentences imposed are often aggravated because the court takes into consideration the circumstance that the person is a recidivist. Once the person is transferred, the question might be raised of whether the

circumstance that the person was found to be a recidivist in the sentencing state is, or is not, a binding "fact" in the meaning of Article 11.1.a of the Convention. In other terms, the question is whether or not the court entrusted with converting the sentence in the administering state is bound by the circumstance that the person was a recidivist in the sentencing state.

It might be said on this count that the court in the administering state is bound by the findings of the court in the sentencing state, including its findings with respect to the criminal record of the sentenced person. It may not, for example, based on the fact that the person has a clean criminal record in the administering state, find that the person is not a recidivist and thus disregard the findings in this respect of the court in the sentencing state. However, it does not follow that the court in the administering state is bound to draw any legal consequences from the finding that the person is a recidivist.

Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction.

Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering state.

Fourthly, the penal position of the sentenced person must not be aggravated.

This latter condition must be interpreted with care because there is usually a great variety of factors that contribute to defining the penal position of the person concerned, such as the duration of the sentence, requirements for remission, prison regime, etc. It is often delicate to establish a fair balance between such factors in order to reach an overall assessment.

Pardon, amnesty, commutation

The administering state alone is responsible for the enforcement of the sentence, including any decisions related to it, such as any decision to suspend the sentence. However, according to Article 12, pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering state, in accordance with their respective laws.

Review of judgment

The condition that the judgment must be final and enforceable does not preclude the possibility of a later review of the judgment in the light of fresh evidence. In such cases, the sentencing state alone has the right to take decisions on applications for review of the judgment.

This raises a difficulty because both the interests of justice and the interests of the person concerned require the personal appearance of the person concerned before the court that reviews his judgment. That court, according to Article 13, sits in the sentencing state while the person sits in a prison in the administering state.

The Convention makes no provision for the transfer-back of the person. At the time of preparation of the Additional Protocol to the Convention, the question was discussed of whether it should not be proper to include provisions designed to cover such a situation. However, the conclusion was that the solution should be found within the framework of arrangements on mutual assistance between the states concerned.

In fact, with respect to states that are a Party to the European Convention on Mutual Assistance in Criminal Matters, the issue is being solved by including in a Protocol to that Convention, presently being prepared, provisions on the personal appearance of transferred sentenced

persons

Such provisions will render applicable to such persons the provisions of Articles 11 and 12 of that Convention, on the personal appearance of persons in custody for purposes of being heard.

Termination of enforcement

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

Transit

Article 16 imposes an obligation on Contracting states to grant requests for transit, in accordance with their national law, where the transfer in question has been agreed upon by two other Contracting States.

Languages

The Convention privileges the languages of the countries involved, as well as the official languages of the Council of Europe which are French and English. However, the rules applicable change with circumstances.

In this respect, the Convention provides for the communication of information and/or documents on three different sets of circumstances, namely:

- (a) at a preliminary stage where the person has expressed an interest in being transferred (Article 4, paragraphs 2 to 4);
- (b) requests for transfer, replies and supporting documents (Article 5 and Article 6, paragraphs 1 and 2);
- (c) information and documents asked by

either state before any request for transfer is made (Article 6.3).

Article 17 deals with the question of languages to be used. It distinguishes between the situations described above under (a) and (b) and makes provision for languages to be used in one case as in the other.

In the cases described under (a) information must be furnished in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

In the cases described under (b) the rule is that no translation shall be required. However, any State may, by way of a declaration, require that requests for transfer and supporting documents be accompanied by a translation. The requesting State has a choice between translating into the other state's own language or into one of the official languages of the Council of Europe or into such one of these languages that the other state will have indicated in its declaration.

However, Article 17 remains mute with regard to the situation described under (c).

No other article of the Convention makes provision for languages to be used in the situation described under (c).

Hence the question: which languages may be used for the purposes of applying Article 6.3 of the Convention, i.e. when a State provides information and/or documents asked for by another State before any of them having requested the transfer of a sentenced person.

Firstly it should be recalled that several articles of the Convention clearly indicate that the latter applies even before a request for transfer is made. Thus the reply to the

question above should be found within the Convention.

There appears to be no reason for considering that declarations made under Article 17.3 - which in fact have the purpose of derogating from the rule laid down in Article 17.2 - should apply to any information and/or documents other than "requests for transfer and supporting documents".

Which leaves us with the rule under Article 17.1 and the rule under Article 17.2. The first applies to information under Article 4, paragraphs 2 to 4; the second applies to requests for transfer and supporting documents. None apply to "information and/or documents asked by either State before any request for transfer was made".

One is thus led to investigate, for the purposes of the Convention and bearing in mind its operation, which of the two situations (i.e. (a) above and (b) above) is closest to "information and/or documents asked by either State before any request for transfer was made".

Article 4 bears the title "obligation to furnish information". That has to do with an obligation imposed on both States to seek and furnish such information as may be required so that each and all the three actors are in a position where they may decide either to agree or not with the transfer.

The context of Article 4 leads to the conclusion that it was drafted having in mind information and/or documents asked by either State before any request for transfer was made.

Conversely, no clear argument appears that would allow to bring closer together "information and/or documents asked by

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either State before any request for transfer is made” and “requests for transfer, replies and supporting documents”.

The conclusion therefore is that information and/or documents asked, under the provisions of Article 6, paragraph 3 of the Convention, by either State, before any request for transfer is made, should be transmitted in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

Costs

The main rule on costs is given in Article 17.5 that reads that <<any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.>>.

This Article has been interpreted in the following way.

Where the person is being delivered at a common border, the sending State bears all the costs incurred with transporting the person to the border; and the receiving State bears all the costs incurred as from that point onwards.

Where the person is carried by air, the sending State bears all the costs incurred with transporting the person to the airport of departure; and the receiving State bears all the costs incurred as from that point onwards, including the price of the air fare and escort.

This means that - in principle - it would be (examples) for the Australian authorities to bear the costs incurred with taking a prisoner from Tasmania to Sydney and for the French authorities to take care of the air fare from Sydney to Paris, both for the prisoner and his escort.

However, practice may be different since

States are often ready to go beyond their commitments in order to speed up the procedures or to overcome some technical or other difficulty.

It may indeed be the case that - in some States - the issue of costs plays a role in the decision of whether to agree or not with a given transfer.

It is therefore advisable to remain open in terms of internal regulations in these matters.

The question may be raised of whether the costs of transfer that the Convention allots to the administering State (the receiving end) may be, or ever are in practice, devolved to the person concerned. Thus, the following concerns only the administering State.

Different countries have different practices in this respect.

- one country may require persons who wish to be transferred to sign a “promissory note” with respect to costs, then the government bears the costs and then the government endeavours to execute the promissory in order to recover the costs. Thus the question of the actual transfer of the person is separated from the question of the financial implications of the transfer;
- in other countries, the person concerned is not required to pay the costs of transfer. However it is known that, should the person wish to pay, the pace of the procedure will significantly speed up;
- the costs of transfer are as a general rule borne by the State in a number of countries;
- it may happen that the costs of transfer are either borne by the State or devolved to the person concerned, depending on a case by case appraisal.

It should be noted that where transfer is made subject to the person paying the costs, that will prevent many persons from being transferred and thus constitutes an obstacle to the application of the Convention. Moreover it is a discriminatory practice.

In fact, it is often in the financial interest of the sentencing state to bear the costs of transfer. The provisions of Article 17 of the Convention do not prevent States from making arrangements to that effect in between them.

Choice between extradition and transfer

Where a national of State A was sentenced and serves a sentence in State B; and proceedings are pending in State A against the same person for an offence other than the offence for which he was sentenced in State B; and State A seeks the presence of the person on its territory for investigation and trial; one might raise the question of whether State A has an option between requesting the extradition of the person and seeking that person's transfer under the Convention.

Under the above-mentioned circumstances, State A does not have an option between extradition and transfer since the only legally appropriate procedure in order to achieve its aim is extradition; to obtain the transfer of the person under the Convention in order to obtain a result that cannot be subsumed under the aims of the Convention would amount to abusing the transfer procedure and to achieve a disguised extradition.

It is a general principle of international law that treaties must be executed in good faith. It follows that the application of a treaty for purposes other than the purposes recognised by the treaty itself is contrary to international law. And it may be challenged unless all the parties concerned

explicitly or implicitly consent. Thus, the transfer procedure can only be legitimately used in order to try the person if all the interested parties are well aware of what is going on and consent to it. This also applies to the person concerned because his consent is a conventional requirement for the operation of the Convention.

The same conclusion can be drawn from another ground. Indeed, the Convention requires that, in giving his consent to his transfer, the person must have "full knowledge of the legal consequences thereof". It follows that, should the administering State abstain from revealing to the person certain legal consequences, the person's consent will not have been fully knowledgeable.

Some, however, might follow a different, more pragmatic, approach according to which:

- transfer procedures, because they are quicker and less burdensome than extradition procedures, may be used instead of the latter;
- it is legitimate to do so because the person concerned is necessarily aware of its past behaviour in the administering State and, when he consents to transfer, he implicitly consents to proceedings and trial for past behaviour, regardless of whether proceedings have already been initiated or will be initiated in the future;
- the requirement in Article 7 of the Convention concerns "legal" consequences only, present and future, meaning consequences resulting from the law, abstract as it is, not concrete consequences.

The Additional Protocol to the Convention on the Transfer of Sentenced Persons

An Additional Protocol to the Convention on the Transfer of Sentenced Persons was

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opened for signature on 18 December 1997. On 1 June 2000, it will enter into force in respect of three States only (Estonia, Poland and Macedonia). However fifteen other States have signed it.

The purpose of the Additional Protocol is to provide rules applicable to the transfer of the execution of sentences in two different cases, namely:

- (a) where a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed; and
- (b) where the sentenced person is subject to expulsion or deportation as a consequence of the sentence.

As with the mother Convention, the Protocol imposes no obligation on the sentencing State or the administering State to agree to transfer. It sets the framework within which States involved may co-operate, if they so wish, and provides a procedure for this purpose.

Persons having fled from the sentencing State

In this respect, the Protocol envisages a situation where a national of State A is sentenced in State B and subsequently leaves State B before or while serving the sentence and voluntarily enters State A. It would apply most commonly to cases where the sentenced person escapes from legal custody in the territory of the sentencing State and flees to the territory of the State of his or her nationality, seeking thereby to avoid the execution, or full execution, of the sentence.

The mother Convention is of no use in such situation because the sentenced person is not present in the sentencing State and is thus unavailable for transfer. Nor can the problem in practice be dealt

with under existing forms of international co-operation. For example, the normal method of returning a fugitive from justice - extradition - is generally not available because most countries do not extradite their own nationals. Apart from this, the only other option which may be available at present is for the person to be prosecuted and sentenced afresh in State A for the same facts - a process which is both expensive and cumbersome. If neither option is available, the consequence is that the person goes unpunished and thus the ends of justice are frustrated.

It was recognised that the Convention is to a great extent founded on humanitarian principles and that, for this reason, the consent of the person is an integral element in it. But it was thought that where the person has deliberately sought to frustrate the judicial process by fleeing from justice, he or she has thereby taken himself or herself outside the ambit of the Convention. Consequently, it was considered that under such circumstances the need for his consent was no longer appropriate.

Article 2 of the Additional Protocol provides that, upon a request from the sentencing State, the administering State may, pending the arrival of documents supporting the request, arrest the person concerned on a provisional basis. The maximum length of time for the provisional arrest of the person concerned is however not mentioned.

In normal circumstances, there should be no great danger that the person might abscond, because in any other third State the person is no longer protected against extradition.

There is a sense of urgency in such situations, which is inherent to any situation where a person is arrested on a

provisional basis. However, under the circumstances described above, one might rightly suggest that the person cannot benefit from a presumption of innocence, but rather, on the contrary, that there is a presumption - based upon the declaration of a competent authority of the sentencing State - that the person concerned is a sentenced person whose sentence has not yet been entirely served.

It follows that the sense of urgency inherent to any situation where a person is arrested on a provisional basis is less pressing in the instant case than in other cases. In particular, it is less pressing that in a situation where extradition is requested.

One might therefore conclude that where a limit is established for provisional arrest under Article 2 of the Additional Protocol, that limit may go beyond the limit of 40 days provided in Article 16 of the European Convention on Extradition.

Sentenced persons subject to an expulsion or deportation order

It does not serve the objective of rehabilitation of the sentenced person to keep such a person in the sentencing State when it is likely that, once he or she has completed the sentence to be served, he or she will no longer be permitted to remain in that State.

The situation here is one where the person is subject to deportation or expulsion as a consequence of the sentence.

Acknowledging that the Convention operates on the basis of a three-fold consent, i.e. the sentencing State, the administering State and the sentenced person, provision was nevertheless made for the Convention to operate on the basis of a two-fold consent, namely the consent of both the sentencing State and the

administering State, where the person concerned as a consequence of the sentence passed is subject to deportation or expulsion from the sentencing State.

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

INFORMATION DOCUMENTS AVAILABLE

PC-OC / INF 1 *A Chart showing the state of signatures and ratifications of the Council of Europe Conventions in the penal field;

PC-OC / INF 2 *The full text of the Reservations and Declarations entered by States Party to those Conventions

*This information is available on the Council of Europe Internet site(<http://conventions.coe.int>).

PC-OC / INF 3 A compendium of Recommendations adopted by the Committee of Ministers of the Council of Europe on the practical application of those Conventions;

PC-OC / INF 5 A guide to procedures on the transfer of sentenced persons in States Party to ETS 112;

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| PC-OC / INF 6 | The list of <u>officials responsible</u> for the practical application of Conventions ETS 24 (Extradition), ETS 30 (Mutual Assistance) and ETS 112 (Transfer of Sentenced Persons); [<i>classified document</i>] | PC-OC / INF 19 | Legal co-operation in criminal matters and the rights of the defence - Case-law of the European Commission and Court of Human Rights |
| PC-OC / INF 7 | A chart showing requirements of States with respect to <u>languages used</u> in requests received under Conventions ETS 24 (Extradition), ETS 30 (Mutual Assistance), ETS 112 (Transfer of Sentenced Persons), ETS 141 (Laundering) | PC-OC / INF 20 | SLOVAK REPUBLIC : Selected legal provisions applicable to international legal cooperation in criminal matters [Engl. only] |
| PC-OC / INF 8 | A list of <u>bilateral treaties</u> on criminal matters involving member States | PC-OC / INF 23 | ICELAND : Extradition of Criminals and Other Assistance in Criminal Proceedings Act N° 13 of 17 April 1984 [Engl. only] |
| PC-OC / INF 12 | A standard text providing information about Convention ETS 112 (Transfer of Sentenced Persons), translated into the national languages of the Parties to the Convention | PC-OC / INF 26 | HUNGARY: Act on International Legal Assistance in Criminal Matters [Engl. only] |
| PC-OC / INF 14 | <u>FINLAND</u> : International Co-operation in the Enforcement of Certain Penal Sanctions Act (16 January 1987/21) [Engl. only] | PC-OC / INF 30 | ISRAEL: Law on Transfer of Prisoners [Engl. only] |
| PC-OC / INF 18 | The <u>Swedish</u> system for international mutual legal assistance
Le système suédois d'entraide judiciaire internationale | PC-OC / INF 32 | USA: State Laws relating to international prisoner transfer [Engl. only] |
| | | PC-OC / INF 33 | COSTA RICA: Rules for the application of the Convention on the transfer of sentenced persons |
| | | PC-OC / INF 35 | ITALY: Case-law [Engl. only] |