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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field

(PC-OC)

Convention on the Transfer of Sentenced Persons
ETS 112
Information on obstacles to ratification
Reasons for reservations
Difficulties with its application

Secretariat Memorandum
prepared by the
Directorate General of Legal Affairs

At its 48th plenary session (June 1999), the CDPC was called upon to review the implementation of Convention ETS 112 and, in particular, to discuss possible obstacles to its ratification, as well as the reasons having led States to enter reservations in respect of the application of this Convention.

In anticipation of the plenary session of the CDPC and on the basis of replies to a questionnaire which it circulated to Delegations, the Secretariat prepared a document (CDPC (99) 9) reviewing obstacles relating to the ratification and the application of the Convention on the Transfer of Sentenced Persons.

The CDPC examined that document and instructed the Secretariat to update it in the light of new information received and submit it to the PC-OC.

This document is an updated version of document CDPC (99) 9. It contains:

- the text of the questionnaire circulated to Delegations ;
- a summary of the replies to the questionnaire received by the Secretariat from Andorra, Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey and the United Kingdom;
- practical difficulties in the application of the Convention, discussed by the PC-OC.
- a table showing the state of signatures and ratifications of Convention ETS 112;
- the text of all reservations and declarations made by States party to ETS 112;
- Recommendations adopted by the Committee of Ministers on the practical application of the Convention;

A. QUESTIONS ADDRESSED TO STATES THAT HAVE NOT RATIFIED THE CONVENTION

NB: The following five member States have not ratified the Convention:
Albania, Andorra, Moldova, Russia and San Marino.

1. *(a) Are your country's reasons for not ratifying the Convention legal, political or practical?*
- (b) Please describe the precise nature of those problems.*
- (c) When do you think your country will be in a position to ratify the Convention?*
- (d) Would ratification of the Convention by a greater number of States affect your country's attitude towards ratification?*
2. *Are there any measures which the CDPC and/or the Secretariat might take which might help your country to ratify more quickly?*
3. *If you think it likely that, when ratifying the Convention, your country will make reservations and/or declarations, please also reply to questions 1, 2 and 3 in Part B below.*

Only difficulties of a practical nature have so far prevented Andorra from ratifying the Convention. Such difficulties however are on the verge of being solved and thus the Government is resolved to proceed with ratification as soon as possible, probably within the next ten months.

Ratification will in particular tend to solve Andorra's historical shortage of penitentiary

means, both in terms of prisons and in terms of its ability to run rehabilitation programmes.

It is anticipated that, upon ratification, Andorra will enter no reservations. It will make four declarations, namely to the effect of:

- excluding the conversion system (Article 9.1.b) – thus opting for continued enforcement;
- defining “nationals”;
- establishing the channel of communication (Ministry of Foreign Affairs);
- choosing languages (Catalan, Spanish, French).

B. QUESTIONS ADDRESSED TO STATES THAT HAVE RATIFIED THE CONVENTION WITH RESERVATIONS AND/OR DECLARATIONS LIMITING THE SCOPE OF APPLICATION OF THE CONVENTION

1. *Please provide a list of the reservations and/or declarations that limit the scope of application of the Convention.*
2. *Please state why the reservation / declaration was made.*
3. *Please indicate the practical implications of each reservation / declaration.*
4. *Please indicate what prospects there are of withdrawing the reservation / declaration and within what timescale.*
5. *Are there any steps which the CDPC and/or the Secretariat might take which could facilitate withdrawal of the reservation / declaration?*
6. *Are there any other difficulties related to the practical application of the Convention?*

Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland, “the ex-Yugoslav Republic of Macedonia”, Turkey and the United Kingdom have made no reservations. The declarations entered by those States do not limit the scope of application¹ of the Convention.

Austria is prepared to review its position concerning the translation of requests and supporting documents where reciprocity applies. Should other States do the same – perhaps in a bilateral and informal way - that would facilitate the application of the Convention.

Austria reserves the right to refuse the transfer out of its territory of sentenced persons who would be conditionally released as soon as they entered the territory of the administering State. Such in Austria’s view is not covered by, and is inconsistent with the aims of, the Convention.

Belgium reports two difficulties, namely:

¹ The scope of territorial application is not being considered in this paper.

- (a) differences between the criminal law in the different States often make it difficult to ascertain whether or not the double incrimination requirement is met;
- (b) obtaining additional information from the partner State often takes a very long time.

Cyprus reports that, prior to the letter from the Consul General of the USA dated 2.9.97 registered at the Secretariat on 3.9.97, they were surprised to have applications by Cypriot nationals sentenced in the USA to serve the remaining of their sentences in Cyprus rejected in the USA on the ground that the state law did not allow transfer of persons sentenced to life imprisonment. Indeed Cyprus feels that additional information on such prohibitions by state laws in the USA, or any other Party for that matter, would make life easier for practitioners and would be most welcome.

Luxembourg reports difficulties resulting from long delays by some States (e.g. Belgium, Italy, Portugal).

The Netherlands report that the transfer of mentally disturbed offenders presents difficulties. This topic is presently under discussion at the PC-OC.

Norway mentions two areas where difficulties arise, namely:

- long delays, and
- requesting States often do not cope with the Norwegian requirements as to languages; that prolongs and complicates the procedure.

Poland is, under special circumstances, prepared to waive its requirements concerning the translation of requests and supporting documents.

Poland reports difficulties, namely:

- (a) in common law States, especially the United Kingdom, the constitutive elements of the offence and the sanction carried by the offence are often contained in different provisions. Amongst the documents forwarded by such States under Article 6.2 of the Convention, often only the first set of provisions are found. In Polish procedure it is necessary also to have the provisions concerning the sanction at the early stage of the court examination of the request;
- (b) the delay in answering by some States; some do not answer before a decision is taken, whereas it is in practice useful to inform the requesting State about the stage of the procedure and, at least, to acknowledge receipt of the request.

Romania thinks that the provisions of Article 3.1.c are not realistic to the extent that they imply that the duration of transfer procedures is shorter than six months. It follows that, either a way is found in order to speed up procedures, or the provisions of Article 3.1.c cannot be respected.

According to Sweden, the purpose of the Convention is to facilitate the transfer of

foreign prisoners by a procedure which is simple as well as expeditious. Nevertheless, transfer procedures tend to take time and additional information is often needed.

The “Guide to transfer procedures” contains valuable information. It would be appreciated if all States that are a Party to the Convention would contribute to that guide.

Turkey reports that the only difficulty related to the application of the Convention is that some Parties disregard the purpose of the Convention by refusing requests without giving reasons for that. Even if the Convention does not expressly contain an obligation on Parties to comply with a request for transfer, it bears a moral obligation to act in favour of transfer requests. The main aim of the Convention is to give an opportunity to foreign offenders to serve their sentences in their home country for the sake of social rehabilitation and humanitarian considerations. Difficulties in communication by reason of language, alienation from local culture and customs, as well as the absence of contacts with relatives cause detrimental effects on foreign prisoners. For these reasons Parties should consider positively requests for transfer.

According to the United Kingdom, arrangements regarding the early release or remission of sentences differ between the States operating the Convention. It is not always clear from the information provided exactly when a prisoner could expect to be released, or how much credit a prisoner should receive prior to his repatriation. The UK would find it helpful if the Secretariat could produce a document highlighting the release/remission arrangements for each of the Convention’s signatory States.

PRACTICAL DIFFICULTIES IN THE APPLICATION OF THE CONVENTION **DISCUSSED BY THE PC-OC.**

Preamble / aims of the Convention

(meet 31)

20. The Committee 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.

21. The Committee also 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.

22. 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 objectives must be pursued compatibly with one another.

23. 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 Committee thus considered that the objective of rehabilitation is the "raison d'être" of the Convention.

Furthermore, the Committee shared the view that 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".

24. 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, the Committee however accepted 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.

The Committee took note that, when confronted with such a dilemma, some States tend to give priority to the objective of rehabilitation.

25. The Committee deemed that, in deciding upon a transfer case, the sentencing State should take into consideration the actual length of the prison term that the transferee, should he not be transferred, would have to serve in that State, rather than the term of imprisonment imposed by the sentence. This does not preclude sentencing States from also taking into consideration the actual length of the prison term that the transferee, should he be transferred, would have to serve in the administering State.

In general

(meet 30)

14. The Bureau of the PC-OC met in Strasbourg from 5 to 7 December 1994 and i.a. examined certain difficulties that States meet with the operation of Convention ETS 112. On that occasion, it adopted a questionnaire that was circulated to all the members of the Committee. The PC-OC examined the replies to that questionnaire and found as follows:

Difficulties met when working with the Convention:

15. Long delays, originating both from domestic reasons and from reasons pertaining to the partner State, are a major problem:

- delay in replying or failure to reply to transfer requests;
- procedural slowness makes it difficult to transfer persons serving short sentences;
- it takes so long to complete all the preliminary formalities that the sentenced person may even lose interest in transfer and withdraw consent;
- delays in receiving documents;
- delays in collecting together and forwarding documents;
- channels of communication.

17. Obtaining information can be another major difficulty, as well as the cause of undue delay:

- difficulties in receiving the right information necessary for acceding to transfer requests;
- difficulties in obtaining precise information on the rules pertaining to the implementation of custodial sentences in the administering State;
- difficulties in obtaining precise information on the penal situation of the sentenced person.

18. Translation of documents can be yet another cause of delay. Agreeing on partial, as opposed to full, translation of long sentences could help.

19. Other sources of difficulties that might usefully be further discussed include:

- the question of the consequences of the withdrawal of consent by the sentenced person before his transfer;
- the transfer of non-sentenced mentally disturbed offenders.

20. Individual countries/experts raised specific questions as follows:

- CANADA would like a wider interpretation of "deprivation of liberty";
- in FRANCE a solution is being envisaged for the well known question of the transfer of sentenced persons who are in debt of customs fines;
- TURKEY meets with apparently unfounded refusals by other States to accede to its requests.

Review of sentences

(meet 33)

14. The Committee discussed the following hypothetical case: where (a) a sentenced person is transferred from one State to another for the purpose of serving the sentence, and (b) new facts made surface that lead the sentencing State to initiate procedures for a review of the sentence, how can the presence of the sentenced person in the sentencing State be obtained (?).

15. ... the Convention on the Transfer of Sentenced Persons does not cover this situation.

NB: The 2nd Additional Protocol to the Convention on Mutual Assistance in Criminal Matters should contain provisions allowing for a solution to that difficulty.

Choice between extradition and transfer

(meet 34)

39. If:

- a national of State A was sentenced and serves a sentence in State B;
- 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;
- State A seeks the presence of the person on its territory for investigation and trial.

Questions:

- does State A have an option between (a) requesting the extradition of the person and (b) seeking that person's transfer under the Transfer Convention ?
- where State A seeks the transfer of the person, is it under an obligation to inform State B / inform the person concerned / inform both, that proceedings are pending ?
- where either State B or the person seeks transfer under the Convention, is State A under an obligation to inform State B / inform the person concerned / inform both, that proceedings are pending ?
- what are the legal consequences when the person consent to his transfer while being unaware of the proceedings in State A ?

40. Some experts considered that, 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 Transfer 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.

41. 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.

42. 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.

43. Some experts, however, followed a 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.

Transfer of recidivists

(meet 34)

49. If:

- a court that convicted a person in State A has aggravated the prison sentence imposed on that person because it took into consideration the circumstance that the person was a recidivist;
- that person is subsequently transferred under the Transfer Convention to State B;
- State B applies Article 11 of the Convention (conversion of sentence);

Question:

- is the circumstance that the person was found to be a recidivist in State A a binding "fact" in the meaning of Article 11.1.a ? In other terms, is the court entrusted with converting the sentence in State B bound by the circumstance that the person was a recidivist in State A ?

50. The Committee considered that the court in State B is bound by the findings of the court in State A, 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 State B, find that the person is not a recidivist and thus disregard the findings of the court in State A. However, it does not follow that the court in State B is bound to draw any legal consequences from the finding that the person is a recidivist.

Re-transfer to a third State

(meet 36)

69. The basis for the discussion was the case of a person having two nationalities who, after being transferred to one of the countries of his nationality, requested to be re-transferred to the other country of his nationality. The question was whether a person transferred under the Convention could be re-transferred to a third State and, if so, under which conditions.

70. Most speakers appeared to agree on the following:

- 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.

71. It was noted that the transfer of an extradited person, once that person has been sentenced, does not require the consent of the State from which that person was extradited.

72. The Committee failed to reach a consensus on the issue of determining, between the sentencing State and the first (or intermediate) administering State, which should be considered as the sentencing State for purposes of re-transfer. It will come back to this matter at its next meeting.

Unfounded refusals

(meet 36)

88. Some experts reported that too often their requests for transfer met with an apparently unfounded refusal from one of the Parties to the Convention.

89. It was recalled that this matter had been discussed by the Committee at its 30th and 31st meetings (February and September 1995).

90. This matter should be taken up again at a forthcoming meeting, preferably when the USA are represented.

Article 6.2.(a)

(meet 28)

25. The expert from Germany raised the following question. Article 6.2.(a) of the Convention on the Transfer of Sentenced Persons provides that the sentencing State shall provide the administering State i.a. 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 e.g. with judgements on appeal.

A comprehensive statement of the facts is 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.

26. The Committee agreed that, in order to increase efficiency and save time, Parties to the Convention should, when providing copies of judgements that do not contain a full description of the facts, also forward a separate statement to that effect.

27. On a related issue, the Committee agreed that, 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.

Article 6

(meet 28)

30. It was also pointed out by many that often all the information that is necessary in order to carry on speedily with the procedures is not promptly made available. That can be the cause of many avoidable 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) is not clearly spelt out in the documents. Another document which is perceived as essential and often does not meet the requirements is the document certifying the consent of the person concerned.

Article 17 (costs)

(meet 39)

123. The question was raised (by the expert from the Slovak Republic) 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.

124. Different answers were given to this question, as follows:

- the USA 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;

- 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 (TK);
- the costs of transfer are borne by the State (N, P, CY, ROM, ISL);
- the costs of transfer can be billed to the person concerned although in practice they are borne by the State (ISL);
- the costs of transfer are either borne by the State or devolved to the person, depending on a case by case appraisal (MLT).

125. The Committee agreed 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.

126. It was suggested that it might often be 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.