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EUROPEAN COMMITTEE ON CRIME PROBLEMS
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Committee of Experts on the Operation
of European Conventions in the Penal Field
(PC-OC)

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Presentation by the
European Group for Prisoners Abroad

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INTRODUCTION

We come here in some humility and in a positive spirit of co-operation. I know that some of you have long experience in, and are international experts on the Transfer Convention and have a strong commitment to it.

So I want to thank you for the opportunity afforded to the European Group for Prisoners Abroad to address the PC-OC on these new recommendations about the operation of the Transfer Convention. EGPA is an independent group of national, statutory and non-governmental agencies who care for our nationals imprisoned abroad. (some are based in *probation* services (NL, Sweden, UK, Germany), others in *church* services (Ireland, Poland,) and others have a *mixed* funding base (Spain, UK). The purpose of our presentation today is that we want to strongly endorse the recommendations from a family and prisoner rehabilitation perspective. EGPA members care for some 4,000 prisoners and their families.

We base our opinion on 3 areas (a) our experience of 20 years of individual agency and EGPA research of working with prisoners and their families. Transfer is the most frequently raised matter by both prisoners and their families. Our opinion is based also on (b) the PC-OC guide to transfer procedures and (c) a more recent transfer survey circulated by the Legal Affairs and Human Rights Committee. The guide to procedures and the survey between them cover 40 States, including all members of the Council of Europe who are party to this Convention and identify delays and other problems with the operation of the Convention. Maeve Ní Liatháin can address some issues which emerged from the survey if this would be of interest.

These recommendations have been passed by the Parliamentary Assembly and were endorsed by the both the Legal Affairs and Human Rights Committee and the Social, Health and Family Affairs Committee. I'm sure that in the course of your debate on the recommendations yesterday that you will have fully considered the recommendations and their merits. We will briefly explain why we would urge you to also endorse the recommendations and to recommend to the Council of Ministers that further action be taken to encourage or indeed oblige states to foster the political will to implement the spirit of the Convention and to harmonise measures to assist prisoners families- who are often innocent victims.

PURPOSE OF THE CONVENTION

The Explanatory Report to the Convention¹ states that when the Convention was being drafted in the 1980s, developments in penal policy had begun to place greater emphasis on the rehabilitation and social reintegration of offenders. It was widely perceived, as it still is among the States party to the Convention, that foreign prisoners have a reduced ability to participate in rehabilitative programmes for addressing offending behaviour, or gain education or training to avoid relapsing into criminal behaviour on release due to language, social and cultural difficulties. It was also identified that programmes for their reintegration into society such as the provision of support services, half-way houses, supervision and employment are largely redundant in the case of foreign prisoners because they generally return to their own country on release, either voluntarily or by being deported at the end of sentence. Therefore, from a penal policy point of view, it was considered better to transfer prisoners who so desired to their home country. An informal Canadian survey of prisoners transferred back to Canada found that 88% of prisoners successfully completed their sentences and did not re-offend, a percentage which is much higher than normal rates of not re-offending.

From a humanitarian and rehabilitative point of view, prisoners benefit from being near to their families and we believe that this lowers the possibility of recidivism.

However worthy the aims of the Convention however, it must be acknowledged by everyone who deals with the Convention that there are problems with its application. There have been previous attempts to speed up the process (in 1984 and 1993), unfortunately these have not been widely applied and are not as effective as envisaged.

¹ Council of Europe, Explanatory Report on the Convention on the Transfer of Sentenced Persons, Strasbourg 1983, para. 9, p. 6&7.

One of the primary purposes of the Transfer Convention is to provide a transfer procedure which is simple as well as expeditious. According to the Explanatory Report, it was developed partly in response to the inadequacy of the Convention on the International Validity of Criminal Judgements in effecting transfers: whereas the latter convention did not provide a system for the rapid transfer of foreign prisoners, the Transfer Convention system was designed "to provide a simple, speedy and flexible mechanism for the repatriation of prisoners."² However, in practice, the Convention is not operated in a simple, speedy or flexible manner. The experience of statutory organisations and NGOs working in the area has been that its operation is bureaucratic, slow and inflexible to the point that transfer applications cannot generally be expedited even in humanitarian cases. Our agencies know of many cases where prisoners have withdrawn their applications because of the length of time involved, have been released before a transfer could take place or have even died while waiting for a transfer.

While prisoners do not have a right to transfer, the Convention imposes a clear obligation of co-operation on member states for a commonly defined goal (the transfer of prisoners to their home state). This normative basis laid down by the convention suggests that co-operation was intended to be motivated by the common goal, as opposed to the individual interests of the States Parties. Indeed with regard to international treaties whose objectives are 'purely humanitarian and civilising' the International Court of Justice has emphasised that parties generally have no interest of their own: 'they merely have a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages or disadvantages to states....'³

Unfortunately, certain States sometimes appear to be guided by their own separately defined penal goals rather than the common interest laid down in the Convention. This can result in States not co-operating with each in accordance with the provisions of the Convention. And even where States do co-operate with each other, the procedures for transfer laid down in the Convention are problematic, in that they are cumbersome and bureaucratic and exclude groups of prisoners from the possibility of transferring.

It is for these reasons that we would urge you to endorse these recommendations and will now outline more specific reasons for doing so.

THE RECOMMENDATIONS

1. First of all, the recommendations that those member States who have not yet ratified the Convention do so as soon as possible is fully supported by EGPA. It is undoubtedly desirable to see prisoner transfer an option for prisoners throughout the member states of the Council of Europe.

2. Secondly, the recommendation that non-member States should be actively encouraged to accede to the Convention is also strongly supported by EGPA. We have calculated that around 30% of European nationals detained abroad are held in countries who are not signed up to the Council of Europe Convention. Over three-quarters of these are held in countries where prison

² Para. 8, p. 6.

³ See Genocide Convention Advisory Opinion, ICJ Reports, 1951, 15, quoted from *Treaty-making in the Council of Europe*, by Jörg Polakiewicz, Council of Europe Publishing, 1999.

conditions are particularly poor. We would particularly encourage efforts to be made to interest countries such as Thailand, Morocco, Peru and Brazil to accede to the Convention. Over 90% of the member states who are party to the Convention are also party to other bi- and multi-lateral transfer agreements. A concentrated effort by the Council of Europe as a body would save the time, effort and expense spent by states individually negotiating agreements and would allow all member states to benefit from transfer agreements with new countries.

3. In considering the different components of the third recommendation, we would, again, fully support the first proposal that information sought by member states when processing a transfer application should be streamlined and harmonised. The Legal Affairs and Human Rights Committee's survey found that where transfer applications had taken more than a year, almost half of these were due to incomplete information being sent by the sentencing state.

4. We particularly welcome some of the suggestions put forward by the Norwegian advisor, Mr Berg, in his report to this committee. For example, consideration should be given to proposals

- That the "forms for request for co-operation" should be extended to include a more comprehensive list of necessary documents.
- That training be given to prison staff in preparing transfer applications
- That information sheets should be developed for prisoners which include information on the conditions under which they will serve the remainder of their sentences after transfer, including rules for release. We feel this is especially important as our research has found that prisoners are currently deterred from applying due to lack of adequate information.
- and that an updated list of experts to the Council of Europe with addresses and all appropriate contact details should be produced and made accessible on the internet.

5. We also welcome the proposal that a maximum response time is introduced for information requests. We noted that, whilst some states already have such targets, the majority do not and lengthy delays in receiving information from states is contributing greatly to the time taken to process transfer applications. Currently, states have no control over the response time taken by other states.

6. The recommendation that it should be explicitly stated that the Convention is not designed to be used for the immediate release of prisoners is also welcomed by EGPA. We know that some countries are reluctant to sign up to the Convention because they think the aim of it is for prisoners to benefit from immediate release in their home country.

7. Moreover, we strongly endorse the recommendation that contracting states should not refuse transfers on the grounds that the prisoner might possibly benefit from earlier release in the administering state. The PC-OC Guide to Procedures shows that 85% of states believe that the purpose of contributing to the social rehabilitation of prisoner is a priority over the purpose of the enforcement of the exact sentence as originally handed down. However, our experience is that transfer applications are commonly refused if it is felt by the sentencing state that the prisoner will serve less time after transfer. The suggestion in recommendation 9.3(e) that a minimum threshold should be specified above which states ought to facilitate a transfer could be useful here. We are aware that the suggestion that a minimum threshold of 50% of the sentence be served below which transfer applications can be refused was drafted in order to encourage transfers, particularly from countries like the USA. However we are concerned that the 50%

threshold may actually be too restrictive, particularly on countries operating conversion of sentence or processing applications from prisoners with particularly lengthy sentences.

8. *EGPA feels that the recommendation that contracting states should interpret the nationality requirement broadly and in line with the Convention's rationale is of considerable importance. The Convention allows for nationality to be interpreted broadly to include citizenship, prior residence or strong ties to a particular contracting state. However, some countries are not only imposing strict definitions of nationality but are, in addition, demanding that a prisoner prove strong ties with the country. The Legal Affairs and Human Rights Committee's survey showed that five states would refuse the transfer of one of their nationals if they felt the prisoner could not prove sufficient family ties in the country.*

9. The next recommendation that a clear statement be issued to emphasise that the Convention applies to mentally disturbed prisoners and that their transfer should a matter of the highest priority is extremely important to EGPA agencies. We believe that Article 1 of the Convention allows for these transfers. Furthermore states can make a declaration under Article 9.4 stating their intention to allow such transfers. However, the majority of states who commented on this issue in the Legal Affairs and Human Rights Committee's survey believed that it was not possible to transfer prisoners detained under mental health legislation.

10 Recommendation 9.3(g) that states should be strongly discouraged from blocking transfer because of outstanding fines is of considerable importance to EGPA. Our research suggests that states are not fully aware that many prisoners do not even apply to transfer as they know this will be an impossibility because of outstanding fines.

11. EGPA also endorses the recommendation that contracting states are urged to give the utmost consideration to the family ties and personal relationships of the prisoner when considering a transfer and feels that this recognises the importance that transfer has for prisoners' families and the humanitarian nature of the Convention. However, in the event that a prisoner has little or no family ties left in the administering state, consideration should still be given to allowing the transfer.

Moreover, recommendation 9.3(i) that contracting states respect the right of consent of prisoners so as to prevent forced transfers is welcomed by EGPA as it goes to the core of the Convention, based as it is on a three-way consent given by the two states involved and the prisoner. The Explanatory report to the Convention states that "the consent of the prisoner is rooted in the Convention's primary purpose to facilitate the rehabilitation of offenders and that transferring a prisoner without his consent is counter-productive".

12. We feel that the recommendation that a series of training seminars be organised at which state parties could present their domestic transfer procedures, exchange information and explore how to improve their systems and make them more transparent is extremely valuable. Improved awareness of each other's systems would lead to greater mutual trust and co-operation.

In conclusion, we feel that all the above recommendations could greatly improve the operation of prisoner transfer and be of huge benefit to prisoners and their families. We urge that the PC-OC agree that these recommendations be sent on the Council of Ministers for further consideration. The drawing up of a new additional protocol to encompass some of these recommendations would, we feel, add weight to the impact these recommendations

have where previous sets of recommendations have not been widely applied and as effective as envisaged.

CONCLUSIONS

We wish to re-state that the original humanitarian purpose of the Convention is still relevant. It seems, however, that there may be a growing tendency to use other mechanisms where a prisoner's consent is not needed such as the Convention on the International Validity of Criminal Judgements', the Schengen Agreement or the Protocol to the Transfer Convention. This leaves us with the question as to whether the Transfer Convention is of less importance because its purpose is humanitarian rather than serving the strict interests of states. In practice, state sovereignty and political goals take precedence and become the guiding rubric.

Our appeal is for states to respect the intention of the Convention and approach individual requests with an open and positive mind even if, in some instances, the request has to be refused in the end. We want to note the lack of consistency in states' views on the integrity of sentence when sending prisoners out as opposed to receiving them into their country. What is happening is that requests are often processed according to political views about specific crimes rather than on any legal basis. Thus, certain offences are considered "ineligible" although the Convention is silent on the nature of offences. It does not seek to harmonise the laws or sentencing policies of states but rather accepts divergences as given and superimposes on them an overriding goal: transfer prisoners home for humanitarian and rehabilitation purposes.

A further problem is that conventions in the field of interstate co-operation in criminal matters have been framed in isolation from one another and in terms of states' interests only. They overlap and are even contradictory with a lack of attention to human rights concerns. We need a new approach to international co-operation in criminal matters – one that is holistic and rights based.

We urge states, and indeed the Council of Europe to contribute resources to implement the transfer Convention properly and to promote its use. Essential to these goals will be goodwill to implement the "spirit" of the Convention. We urge that the Convention be used to maximum effect for both public security and humanitarian/family reasons so that the most vulnerable people can get transfers. It will require mutual trust that each others' criminal justice and sentence management systems will act wisely and ultimately in the interests of the public good.

We commend the Recommendations from the Parliamentary Assembly to the PC/OC for your approval and stress how important it will be to seek further action by the Council of Ministers to ensure proper implementation of what is considered by all to be one of the most favoured Conventions. Once again, we would like to thank the PC-OC for the consideration it is giving to this issue and for giving us the opportunity to present our views.