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**COMMITTEE OF EXPERTS ON THE OPERATION  
OF EUROPEAN CONVENTIONS IN THE PENAL FIELD**  
**PC-OC**

45<sup>th</sup> meeting  
Strasbourg, 30 September – 2 October 2002

Convention on the Transfer of Sentenced Persons  
Relations with the USA  
Report of a Seminar

Secretariat memorandum  
prepared by the  
Directorate General of Legal Affairs

Upon an invitation addressed to the Council of Europe by Ms Paula A. Wolff, Chief of the International Prisoner Transfer Unit, Department of Justice of the USA, a member of the Secretariat of the Council of Europe attended the “Seminar on International Prisoner Transfer Program for State Officials” organised by her and her colleagues, in Washington D.C. on 10 and 11 June last.

The list of participants includes i.a.

- European experts who travelled from Europe at CoE request (Czech Republic, Germany, Italy, Spain, Sweden and United Kingdom);
- European consular or legal officers in the USA (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Spain, Sweden, United Kingdom);
- Representatives from the American states with whom most difficulties arise, namely California, Florida and Texas;
- Representatives from other American states (Alabama, Alaska, Arizona, Maryland, Michigan, New Jersey, New Mexico, Pennsylvania, Tennessee, Virginia, West Virginia)
- Representatives from other countries (Brazil, Canada, Mexico, Panama, Venezuela).

The Agenda was organised in panels. Officials from the DOJ chaired the different panels. They were themselves panellists, along with one official of the Department of State. I was also a panellist (copy of my intervention is attached) and so were most of the “CoE experts”. In

particular, Mr Örjan Landelius (Sweden), ex-Chairman of the PC-OC, made a substantial intervention in which he outlined a perspective which is largely followed this side of the Atlantic. Canada, Mexico and Panama were also active panellists.

The high number of panellists did not leave much time for discussion and Q/A. In particular, we could not hear enough the viewpoints of the American states.

### Background

After having participated in the Committee of Experts that prepared the CoE Convention on the Transfer of Sentenced Persons, the USA signed it on the day of its opening for signature (21.03.83) and became a Party with effect as from 01.07.85, having entered no declarations/reservations. Until then, national experts (experts in criminal matters, rather than in American constitutional law) had not been aware of the fact that the United States having signed the Convention meant no more than an undertaking from the federal authorities within the limits of their powers as set by the constitution. Consequently, because the federal authorities have no authority over prisoners sentenced and imprisoned under the law of individual American states, the Convention could not operate in respect of such prisoners, unless the state in question graciously accepted. States could not accept unless (a) they had previously passed state legislation providing for such transfers and (b) were prepared to exercise authority under such legislation, in the specific case. Once European experts started operating with the Convention in respect of the USA, they realised with surprise (a) that some of their national imprisoned in the USA were state prisoners rather than Federal prisoners, and (b) that most American states had no intention whatsoever of transferring prisoners to Europe under the Convention.

The USA were led to entering a formal declaration, which they transmitted to the Secretary General on 02.09.97. It reads in particular that “In the case of the United States of America, where a sentenced person has been convicted by a state of the United States of crimes under the laws of that state and is in the custody of authorities of that state, the Government of the United States will not agree to a transfer unless the competent state authorities first give their consent.”

The American position was clearly stated before the PC-OC at the latter’s 38<sup>th</sup> meeting (22-25 February 1999) by Ms Sylvia Royce [cf. Appendix V to PC-OC (99) 6].

On the whole, the USA attitude is not always understood by many. Criticism is sometimes voiced, in particular within the PC-OC. The latter has repeatedly called for action from the Federal Government in order to persuade state authorities to “enter the programme”.

The Seminar in question is to be seen as a concrete response from Washington to PC-OC “pressure”. Therefore, it was welcomed by all in Europe.

However, the Seminar was also concerned with the transfer of prisoners under other treaties, in particular the Mexico/USA bilateral convention and the Organisation of American States (OAS) multilateral treaty.

### Different concerns

The announced overriding concern of the USA in this field is to ensure that Americans are returned to the USA. They also recognise a subsidiary advantage, namely that there is a financial benefit in transferring prisoners out of the country [average cost of a federal prisoner is circa US\$ 25 000 per year]. They possibly also recognise that consenting to out-transfers encourages their treaty partners to reciprocate. However, the USA appears not to value the social rehabilitation of sentenced persons as an objective requiring that foreigners should be given the opportunity to serve their sentences within their own society. Hence difficulties sometimes encountered in the Convention relations between the USA and European partners.

It must be added that an objective analysis would show that the USA have changed their views in this respect in the past 15 – 20 years. Indeed, when (a) entering into their bilateral treaties with Mexico and Thailand respectively and (b) when signing the CoE Convention, the USA recognised the value of social rehabilitation. Conversely, CoE member States attach more and more importance to social rehabilitation, in particular those aspects of social rehabilitation that are closer to human rights.

With respect to individual American states, the situation is different to the extent that they do not regard themselves as being at all concerned with the transfer of their own citizens back to the USA. In their view, that is a federal concern, not theirs. Therefore states can see no point in consenting to out-transfers other than that of relieving themselves of the burden and the cost of keeping a prisoner in prison.

From another angle, the states (as well as the federal authorities) take a strong view on the value of retribution: for them justice requires that the sentenced person “pays” by serving all the term of imprisonment. In many instances early release, if at all possible, is just not an option. Hanging on to prisoners appears to be a popular policy.

The USA in general and the individual states in particular have great difficulties in accepting that the transferred person might be released much earlier in the administering State than he or she would have been in the USA had he or she not been transferred.

Even though from a constitutional point individual American states are bound by the Convention they do not feel so, nor do they feel any kind of involvement resulting from the Convention. As a consequence they may subordinate out-transfers to requirements, such as the previous consultation of the public prosecutor’s office, the sentencing judge, the victim, the police, the Attorney General’s Office, but also that a “removal order” be passed in respect of the prisoner. The effect sought with the removal order is to render illegal any re-entry into the USA.

Moreover, victims in the USA tend to be recognised a “droit de suite”, or a right to follow the execution of the sentence. Where consulted, victims tend not to agree to transfers.

## Strategy

It is difficult under these circumstances to persuade individual American states to consent to transfers. However, a certain amount of persuasion has in the past been exercised by the Federal authorities, by European consular authorities throughout the USA, by European officials, etc. Certainly, this seminar contributed to that effort. However, this is a long-term venture that requires both persistent efforts and consistency in the argumentation.

The following line of argumentation has been followed until now and – I suggest – should be strictly kept to in the future:

- the USA claim to take seriously their international commitments in general and this Convention in particular. They claim that treaties are not just symbolic signs of international accord: treaties are living instruments that must be respected and with which one must live. Individual American states too must feel that they have a strong responsibility under the Convention and live up to such responsibility. These points are a good basis for dialogue with the individual states;
- dialogue with the states must pursue. It should seek to avoid confrontation, but rather to build bridges;
- the Federal Government has no objection to foreign governments establishing direct contact with the individual states. Most of that dialogue however will be carried out by consular officials. It would be proper to keep communication lines open between the PC-OC and the consular officials in order to ensure consistency in the dialogue and keep track of developments;
- moreover, the federal government could be invited to enter a plea with individual states asking them to grant consular authorities all possible assistance in their endeavours to obtain the transfer of sentenced persons;
- individual American states should also be reminded that CoE states envisage international co-operation in criminal matters as a package and therefore can hardly accept to co-operate in some fields and not in others;
- because we cannot unify our laws and our procedures, we must actively build bridges and otherwise seek solutions that respond to the needs and requirements of all.

## Follow-up

In order to assist the federal authorities in their efforts to bring about change in the attitude of individual states it is vital to keep this issue in the CoE's Agenda

The PC-OC will no doubt keep following this file which is doomed to become more and more political.