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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)

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Transfer of Mentally Disordered Offenders

Contribution from
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At the 761st meeting (18 July 2001) of their Deputies, the Committee of Ministers addressed the following terms of reference to the PC-OC:

> "*To give an opinion on Parliamentary Assembly Recommendation 1527 (2001) on the operation of the Council of Europe Convention on the Transfer of Sentenced Persons and to submit it to the Committee of Ministers through the European Committee on Crime Problems (CDPC)*."

Having discussed the issue at its 43rd (24 – 26 September 2001) and 44th (25 – 27 February 2002) meetings, the PC-OC adopted an opinion that it submitted to the Committee of Ministers through the European Committee on Crime Problems (CDPC). The Opinion included, amongst other things, the following recommendation regarding the transfer of mentally disordered prisoners;

"Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

> *to issue a clear statement that the convention applies to all mentally disturbed prisoners and that their transfer should be a matter of highest priority, and to recommend that all states parties implement Article 9 of the convention, which gives states discretion regarding how to continue the treatment of mentally disturbed prisoners after transfer;*

Some experts think that a pragmatic approach to this question, based on declarations made under Article 9.4 of the Convention, would suffice. The Committee however agrees on the utmost importance and priority of this question, which nevertheless is a most difficult one, as shown by the work it has already invested in it. That work has shown that a binding instrument appears to be necessary. Further work should integrate a multidisciplinary approach comprising expertise from the fields of (a) criminal law, (b) the transfer of sentenced persons, (c) the human rights dimension of the treatment of mentally disabled persons and (d) the national and international administrative regulations governing the treatment of mentally disabled persons. The Committee therefore suggests that a multidisciplinary group of experts be set up in order to study this and connected questions and make proposals."

With regard to the question of a binding instrument the PC-OC also stated the following in the opinion;

"Having in mind the above considerations concerning the requirement of flexibility, legally binding texts such as protocols are not to be considered as a first option. However, the Committee does not exclude resorting to that solution in order to solve one or both of the following difficulties: (a) the transfer of mentally disordered offenders, and (b) the transfer of persons sentenced to prison who are otherwise under a duty towards the sentencing State to pay a fine or produce goods or money."

However, in PC-OC (2003) 07 REV it is stated that, at least, some States consider that the provisions of the Transfer Convention already cover the transfer of mentally disordered persons. Furthermore seven States have made declarations under Article 9.4 of the Convention (Greece, Iceland, Ireland, Malta, Norway, Sweden and Israel). This would imply that these States consider that the Convention cover the transfer of mentally disordered offenders. One could argue that the fact that Article 9.4 was included in the Convention shows that it was the intention of the drafters to include these cases in the scope of application of the Convention.

In the report from the 36th meeting of the PC-OC it is stated in Para 93 that all the Parties to the Convention appear to be in a position both to transfer out and in mentally disordered offenders. In Para 94 it is however said that this conclusion should be confirmed by the Secretariat by way of a written question circulated to the members of the Committee.

It is not clear to the Swedish delegation whether or not such a question was circulated. In part the question was posed in the study that was undertaken regarding the transfer of non-custodial sentences (which was reported in PC-OC (2003) 07).

Considering the above the Swedish delegation would appreciate the view of the other delegations on the following;

- Should the PC-OC once more bring to the attention of the Committee of Ministers the question of a recommendation regarding the transfer of mentally disordered offenders?

- Is it necessary to set up a multidisciplinary group to study this issue?

- Would other delegations, when dealing with matters regarding the transfer of mentally disordered offenders, find it useful to have a compilation of information of other Members States system with regard to sentencing of mentally disordered offenders? Please, find enclosed a draft questionnaire in this respect.

APPENDIX I

Draft Questionnaire on the Transfer of Mentally Disordered Offenders

1. Under what circumstances are mentally disordered offenders sentenced to, or surrendered to, a prison sentence or forensic care? What forensic assessment is done?

2. What assessments are done regarding the criminal intent?

3. What assessments ore done regarding the accountability?

4. How many foreigners are, due to a decision or order of a court, sentenced or surrendered to forensic care? In how many of these cases does the decision or order of the court include an expulsion or detention order?

5. Can a transfer be made under the Convention on Transfer of Sentenced Persons and its Additional Protocol? Are there any specific requirements?

6. If the Convention is not applicable, are there any other means of transferring the forensic/psychiatric care to the state in which the offender is a national?

7. How is the forensic care organised?

8. Any other information that might be of interest of other Members States?

9. In case of further questions concerning forensic care, who can be contacted?

APPENDIX II

Sweden's reply to the Draft Questionnaire on the Transfer of Mentally Disordered Offenders

1. Under what circumstances are mentally disordered offenders sentenced to, or surrendered to, a prison sentence or forensic care? What forensic assessment is done?

A person who commits a crime under the influence of a serious mental disorder may not be sentenced to prison. If the suspect is also suffering from a serious mental disorder at the time of the judgment and the sanction cannot be limited to a fine, the court can surrender the offender to forensic care. Forensic care is not restricted to a specific length of time.

For the court to surrender the offender to forensic care, a forensic investigation must be carried out. Special government units of the National Board of Forensic Medicine carry out such an investigation. A psychologist, social worker and nursing staff, under the direction of a forensic psychiatrist, perform the 4-6 week investigation.

Forensic care can be combined with a stipulation of special discharge examination. In such cases, the county administrative court rules on discharge and leaves. If forensic care is not combined with special discharge examination, the doctor makes such decisions.

If the offender suffers from a mental disorder that is not serious in the legal sense of the term, the court can impose a more lenient sanction than would ordinarily be the case.

2. What assessments are done regarding the criminal intent?

Normally the offender must have acted premeditatedly for the court to impose a criminal sanction. When a mental disorder is involved, there is a tendency to ignore the requirement of premeditation in favour of surrendering the offender to forensic care so as to better protect society.

3. What assessments are done regarding the accountability?

Sweden does not use the concept of accountability. It uses the broader concept of serious mental disorder instead. That chiefly includes psychotic conditions regardless of aetiology, serious personality disorder with impulse control disorder or obsessive-compulsive behaviour, and depression with suicide risk.

4. How many foreigners are, due to a decision or order of a court, sentenced or surrendered to forensic care? In how many of these cases does the decision or order of the court include an expulsion or detention order?

Approximately 375 offenders are surrendered to forensic care every year. Some 65 of them are foreign nationals, of which 2-3 have no ties (residence permit or residence) to Sweden. Six to ten foreign nationals are sentenced to expulsion and forensic care every year.

5. Can a transfer be made under the Convention on Transfer of Sentenced Persons and its Additional Protocol? Are there any specific requirements?

When transferring forensic care patients, Sweden can apply the European Council's 1983 Convention on the Transfer of Sentenced Persons and the 1997 Additional Protocol.

For a person convicted *in Sweden* to be transferred, the patient's condition must be such that he can be transported, he must consent to be transferred (except when the Additional Protocol is applicable), and conditions must be deemed suitable for satisfactory care in the country to which he is to be transferred. If these criteria are met, Sweden is favourably disposed to transfer.

When a person convicted or surrendered to forensic care abroad is transferred to Sweden, current regulations stipulate that the sentence be converted into a Swedish sentence. That generally involves surrendering, after a forensic investigation and court ruling, the transferee to forensic care with special discharge examination.

An offender can be transferred also when, based on his mental condition, he has not been held criminally responsible for the commission of the offence (see Article 9.4 of the 1983 Convention on the Transfer of Sentenced Persons).

6. If the Convention is not applicable, are there any other means of transferring the forensic/psychiatric care to the state in which the offender is a national?

In cases where there is no judgement in the meaning of the Convention and the offender is surrendered to psychiatric care, there are possibilities to transfer the care to and from Sweden. At the request from the patient or the Chief Medical Officer the National Board of Health and Welfare can decide to transfer the patient to the State where he or she is domiciled. Prerequisites for the transfer is that the patient is received by that State and that the patient can get satisfactory care there.

A request from another State for the transfer of a patient to Sweden can be made to the County Council where the patient is domiciled. A request can also be sent to the National Board of Health and Welfare for forwarding to the relevant County Council. The County Council will then make an assessment if psychiatric care can be offered in accordance with Swedish legislation.

7. How is the forensic care organised?

As is the case with all public health care, Swedish county councils manage and finance forensic care under the supervision of the National Board of Health and Welfare. Regional forensic care units treat offenders with the most severe mental disorders. The psychiatric clinics of county and country hospitals treat other forensic care patients. The purpose of care is to improve the patient's mental health so that he can return to a normal life, as well as to reduce the risk of recidivism. Offenders sentenced to forensic care with special discharge examination are treated for an average of 4.5 years. Those without special discharge examination average just over 1 year with major individual differences.

8. Any other information that might be of interest of other Member States?

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9. In case of further questions concerning forensic care, who can be contacted?

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