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COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS (CDPC)

COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS

COMITÉ D'EXPERTS SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPÉENNES DANS LE DOMAINE PÉNAL (PC-OC)

**Special session on the transfer of sentenced persons
(ETS 112 and 167)
Session spéciale sur le transfèrement de personnes condamnées
(STE 112 et 167)
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PRESENTATIONS / INTERVENTIONS

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The Convention on the Transfer of Sentenced Persons as reflected in the case-law of the European Convention on Human Rights

by Mr Vincent A. DE GAETANO

Thank you Mr Chairman¹ for giving me the floor.

When I was first invited, some weeks back, to make this short presentation, I have to admit that I was very pleased, and this for a personal reason. The reason is that I have a soft spot for the Convention on the Transfer of Sentenced Persons and before your minds start going off in all the wrong directions in connection with this statement, I will explain why.

The year was 1988. The previous year there had been a major change of Government in Malta, and after years that Malta had practically ignored most of the work in the legal field of the Council of Europe, the incoming new Government was determined to sign and ratify as many CoE² instruments as possible. The long term goal was EU accession, and it was patently obvious that unless Malta got into line and in step with the various CoE conventions, the prospect of joining the EU would be just a chimera. Suffice it to point out that up to 1987, the previous Government, which had been in office for fifteen years, had consistently refused even to consider the possibility of individual petitions being brought against Malta -- the competence of the then Commission and of the Court to receive such petitions was only recognised by the Government of the day on 30 April 1987, with effect from the following day, and that was only a few days before the general elections that ushered in a new Government.

I was then a very junior lawyer in the Attorney General's Office, dealing mainly with criminal prosecutions. So I was given the task of reviewing the CoE's instruments touching upon the penal field and to advise on possible signature and ratifications. The instructions were clear: concentrate first on those conventions which Malta could sign and ratify without the need of having to amend any laws by Act of Parliament.

The Convention on the Transfer of Sentenced Persons³ (hereinafter Transfer Convention) had by then been in force for just over two years. Although at the time Malta could not lay claim to any special experience with the transfer of sentenced persons beyond the obvious, albeit very rare, cases of extradition of convicted fugitive offenders – and extraditions were, up to that time (1988), still covered by the various treaties that the United Kingdom had entered into with foreign states prior to Malta's acquisition of independence from Britain in 1964, treaties which had been extended to Malta by Order-in-Council, and which Malta had, in 1964, specifically accepted to continue honour – I was pleasantly surprised to find that our Prisons Act of 1976 (which had replaced the previous colonial Prisons Ordinance), already had in place provisions which allowed for persons sentenced abroad to continue serving their sentence in Malta. In fact Article 4(1)(c) as it then was provided that there shall be confined in prison – and I quote – “any person who, having been sentenced abroad by a foreign Court having criminal jurisdiction or by any competent authority, has been sent to Malta by such foreign Court or authority for the purpose of undergoing any punishment, in the cases contemplated by law.” There was no need – or so I thought – for any amendments to domestic law. Our law did not – and still does not – require any conversion of the sentence as provided in Articles 9(1)(b) and 10 of the Transfer Convention; nor is there any need for a court or administrative order, as provided in Article 9(1)(a), for the continued enforcement of the sentence. My advice was that it could be signed and ratified immediately. In fact it was signed in November of 1988, but it was not until three years later – on 26 March 1991 – that it was ratified – I thought there must have been some concern as to how many Maltese were serving prison sentences in other CoE countries and who might eventually want to return to Malta to continue serving that sentence at home. The real reason for the delay, however, was that the Attorney General was of the view that the abovementioned Article 4(1)(c) had to be recast so as to include a specific reference to treaty undertakings instead of the generic expression “cases contemplated by law”. In fact, by Act XIII of 1990⁴ the said paragraph (c) of Article

¹ Mr Per Hedvall (Sweden), Chair of the Special Session.

² Council of Europe.

³ European Treaty Series (ETS) 112.

⁴ The Act was signed into law by the President of Malta on 3 April 1990.

4(1) was amended to read as follows: "any person, having been sentenced abroad by a foreign Court or other competent authority to a punishment involving deprivation of liberty for a limited or unlimited period of time on account of a criminal offence, is sent to Malta to continue serving such sentence in Malta in accordance with any treaty, convention, agreement or understanding for that purpose for the time being in force between Malta and the foreign country concerned or which applies to both such countries or to which both countries are a party."⁵

But the story does not end there. In 1990 I was appointed by the Attorney General to be the contact or liaison person at the AG's Office for purposes of co-operation in criminal matters with respect to all CoE member states. At the time I remember there was a system of contact persons – I do not know whether this system still exists – after I became a judge in 1994 I did not follow as closely developments in this respect – a system of contact persons to facilitate co-ordination. We then worked mainly by telephone and fax; we were not yet into internet.

Soon after the Transfer Convention came into force with respect to Malta on 1 July 1991, sure enough the first request came through for a transfer to Malta. A young Maltese man had been sentenced in Sweden to a number of years in prison for grievous bodily harm. Although he was serving this sentence – at least at the time that he made his request – in an open prison which allowed him (or so I understood) to go to work in a neighboring town every morning, he wanted to serve the remaining part of it in the closed prison in Malta, a fact which raised not a few eyebrows when he did return to Malta. But Christmas was approaching and he was desperately missing his girlfriend in Malta! So, I made all the necessary arrangements with my Swedish counterpart, all the documents were exchanged, and the date was set for the transfer – the whole process did not take more than four or five weeks. The day before two Maltese police officers were due to fly to Stockholm to bring the prisoner back to Malta, they called at my office just to say hello, and I casually asked which flights they were going to take to and from Stockholm. Only then did I realize that we did not have – and still do not have – direct flights to the Swedish capital. I had completely ignored Article 16! They were going via Schiphol Airport in The Netherlands, and I could just see the diplomatic incident which would follow as soon as two Maltese police officers, albeit in mufti, landed there with a co-national under arrest. I also had apocalyptic visions of the end of my legal career in the Attorney General's office. So I immediately contacted my Dutch counterpart to inform him of the impending disaster. It was so reassuring to hear his voice – he must have sensed that I was having kittens – saying that there was no need to panic, that there was no problem: both the two officers and their prisoner would be accommodated at the police barracks at the airport for the twelve hours that were required for them to take the plane to Malta, and that he would see to all that was necessary immediately. Ever since then I have been a great admirer of the Dutch administrative system and of the efficient and very practical and hands-on way that The Netherlands handle all matters of international criminal co-operation. I would probably not be a Judge here in Strasbourg today were it not for my Dutch counterpart that day!

The Convention on the Transfer of Sentenced Persons *per se*, and the Additional Protocol⁶, have, as I am sure many of you are aware, not given rise so far to any serious problems under the European Convention on Human Rights. We are, of course, always dealing with the enforcement in a prison context of a sentence, and therefore issues which may arise in connection with the execution of sentences of imprisonment in a so-called "ordinary" setting are also potentially issues which may arise when an administering state is responsible for the execution of a judgment delivered by the sentencing state: issues of prison conditions, principally under Articles 3 and 8. Indeed, from the few cases before the Court here in Strasbourg which have originated directly from the application of the Transfer Convention or its Protocol, I would hazard to say that both have fared fairly well – or, looking at it from another perspective, one could say that the European Court of Human Rights has treated both the Transfer Convention and its Protocol with kid gloves. In the short time at my disposal, I cannot of course go into all the possible interactions between the ECHR and ETS 112: I will limit myself to highlighting what I believe are the strengths and weaknesses of the Transfer Convention and its Protocol; and, secondly, I will briefly describe how the Court has dealt with cases stemming directly from this Convention and its Protocol, or in which the said convention was in some way invoked.

⁵ Paragraph (c) was again amended by Act XXIV of 2002. The words "foreign Court" were substituted by the words "foreign or international court"; and immediately after the words "for that purpose" the words "to which Malta is a party or which is" were inserted.

⁶ ETS 167.

To my mind, the striking feature of the Transfer Convention is its adaptability. Many of the articles expressly allow for declarations to be made to enable it to find its proper niche in the domestic system and to ensure that it is integrated into that system. The Transfer Convention assumes that the domestic system – particularly if a conversion of the sentence is required – is also compliant with the Convention on Human Rights. The requirement of the convicted person's consent for the transfer – under the main Convention (ETS 112), of course, not under the Protocol – also does away with many potential problems: if the sentenced person has consented to the transfer, the scope for complaints later is greatly diminished – but, as we know, it is not eliminated. When the Transfer Convention entered into force in 1985 and the number of member States of the CoE was limited, this adaptability (or, to use another word, flexibility) was probably sufficient to ensure a workable convention – not necessarily without *any* problem, but at least workable. I have serious doubts, however, whether this is still true today, with 46 States, and therefore 46 different jurisdictions and different legal systems, being parties to the Transfer Convention (I am excluding of course the Principality of Monaco, which is the only member State of the CoE not party to it or to the Protocol).

But there are also implied or assumed features of the Transfer Convention – features which, one assumes, are necessary for its proper functioning. I would pinpoint three such features, in ascending order of importance: time, proper information and good faith. When a prisoner consents to a transfer or, indeed, takes the initiative in expressing his wish to be transferred, his decision is very often motivated by the circumstances prevailing at the time of the said consent or at the time of the expression of interest. If a request for transfer takes too long to be processed, those circumstances may change, even drastically, with the result that the consent may be withdrawn. Of course that person may also qualify for transfer under the Protocol, where only the consent of the two States is required. If I may take the example of the Maltese man who wanted to continue serving his sentence in Malta rather than in Sweden, it would appear that the primary reason for the request was his desire to see his girlfriend during normal visiting hours – if the request had taken too long to process and his girlfriend had had a change of mind, it is highly unlikely that he would have swapped the relative luxury of a Swedish open prison for the drabness of a Victorian panopticon-style prison in Malta. The decision on whether to transfer or not a prisoner is, of course, neither the determination of a civil right or obligation nor the determination of a criminal charge – like extradition and removal proceedings they are neither fish nor fowl, and therefore cannot run foul of Article 6 of the ECHR because of the unreasonable time taken to arrive to a decision. But there is, of course, always an element of unfairness when such decisions take too long.

For a prisoner to consent to the transfer, he needs to know what the transfer entails in practical terms, particularly as regards the conditions in the administering state. In large jurisdictions, conditions may vary from prison to prison, and a prisoner may well end up in a prison where conditions of detention fall short of the standards set by Article 3 of the ECHR. Since it is now acknowledged that even prisoners have a "private" life within a prison set up, Article 8 of the ECHR may also come into play. After the judgment in the case *Vinter and Others v. the United Kingdom*, decided by the Grand Chamber on the 9th of July of this year⁷, and which in effect has ruled that life imprisonment without the possibility of reduction or parole is a breach of Art. 3 of the ECHR, when a transfer is to be effected of a prisoner serving an indeterminate sentence, it would be vital for him to know exactly how the administering state is going to proceed in his regard. It is true that Article 4(1) of the Transfer Convention says that prisoners shall, to begin with, be informed by the sentencing State of the "substance" of the convention, while later (Art. 7(1)), it must also ensure that his consent to the transfer is given by him "with full knowledge of the legal consequences thereof"; but, as can be seen from Article 11(2), the full legal consequences can in some cases become apparent only *after* the transfer has taken place. And here, there is also an interesting moot point: when, to what extent, and up to which point in time may a consent given be revoked, if at all?

International treaties, like contracts, must be executed and applied in good faith. That is not saying much, of course. But when a treaty allows a wide margin of discretion to one party or another, as the Transfer Convention does with Article 12, than I think it is imperative that that convention be construed, like insurance contracts, as requiring not just good faith but utmost good faith – *uberrimae fidei*. When in 1988 I was examining the Transfer Convention with a view to advising my Government, Articles 12 and 13 were the only two provisions at which I balked for a time. Article 12 in particular

⁷ Nos. 66069/09, 130/10 and 3896/10.

does not distinguish between general pardons or amnesties and those which are made simply *ad hominem*. I would imagine, and hope, that when an administering State sees the need for an *ad hominem* pardon, it will be able to fully justify it on the basis of the underlying purpose of the Transfer Convention, which is to secure the *continued enforcement* of a sentence of incarceration and not simply to obtain the *release* of a national in an indirect way.

The case law of the ECHR which directly ropes in the Transfer Convention is, as I have already hinted, not a copious one. However, in the few judgments which I shall be referring to, certain underlying principles emerge which are applicable also to cases of extradition and removal. I will be taking them in chronological order. Some of you, perhaps many of you, will be familiar with them, so I will only highlight what I believe is the important or interesting legal principle in each one of them. If for some of you this is just repetition, I apologise, but as my professor of philosophy used to say, *repetita iuvant*.

The first case – *Drozd and Janousek v. France and Spain* – decided by the Plenary of the old Court on 26 June 1992⁸, involved the Transfer Convention only indirectly. The applicants had been sentenced in Andorra (which was then not even a party to the Council of Europe) to terms of imprisonment and, according to the customary law then applicable in the Principality, they had to choose whether to serve their sentence in Spain or in France. They chose France. Both France and Spain were, by that time, bound by the Transfer Convention. They complained both under Article 6 and under Article 5 of the ECHR. Their complaint under Article 6 was that they had not received a fair trial in Andorra because of the then quaint penal system obtaining in the Principality.

The Court, however, upheld the pleas of both the Spanish and the French Governments to the effect that the trial had not taken place on French or Spanish soil or at the hands of French or Spanish agents: the courts in Andorra were totally independent of the French and Spanish systems, even though the Co-Princes of Andorra appointed the judges to the courts there. The applicants also claimed a violation of Art. 5(1)(a) of the Convention on Human Rights: they basically claimed that their detention was not a lawful one in France because the French courts had not carried out a review of the judgments of the Andorran court whose composition and procedure had not complied with the requirements of Art. 6. In fact, as Judge Matscher pointed out in his concurring opinion, the applicants were in reality invoking the indirect effect of certain provisions of the ECHR: even though a contracting State is not responsible for civil or criminal proceedings which take place in another country, it may incur responsibility under Article 5 by reason of assisting in the enforcement of a foreign judgment, whether originating from a contracting or non-contracting State, which has been obtained in conditions which constitute a *flagrant* breach of Article 6 in the originating state.

But it must be a “*flagrant* breach”, and therefore not any breach. As the Court noted in the majority judgment – and by the way, it was a close shave, 12 votes against 11, the Plenary at the time being composed of 23 judges and not 17 as the Grand Chamber today – “...the Convention does not require the contracting parties to impose its standards on third States or territories [and therefore] France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Art. 6... To require such a review of the manner in which a court, not bound by the Convention, had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.” The issue of the flagrancy of the denial of justice in a foreign state leading to a violation of the ECHR in a state party to it is a thread in the case law of the Strasbourg court which can be seen right up to the judgment in the case of *Othman (Abu Qatada) v. the United Kingdom*, a Chamber judgment of 17 January of last year⁹. This principle, as applied in *Drozd and Janousek* is important because, while it can be assumed that the parties to the ECHR have in place a system of criminal proceedings which is fully compliant with the requirements of Article 6 of the Convention on Human Rights, this may not be necessarily so with respect to States who are not parties to the Human Rights Convention but are parties to ETS 112.

For the first case here in Strasbourg which dealt directly with the Convention on the Transfer of Sentenced Persons one had to wait another thirteen years. On 15 March 2005 the Court, in *Veermäe v. Finland*¹⁰, declared inadmissible as being manifestly ill-founded an application by an Estonian

⁸ No. 12747/87.

⁹ No. 8139/09.

¹⁰ No. 38704/03.

national who was sentenced in Finland, and whose transfer to Estonia was being arranged by the two Governments under the Protocol. He had several complaints, one of which was that if he were transferred to Estonia his detention there would be in violation of Article 5 of the Convention on Human Rights because under Estonian law it would take longer for him to benefit from parole than it would take under Finnish law, and therefore that “additional” time he would spend confined in a prison would be in violation of Art. 5. The Court began by observing that the Transfer Convention may, in principle, result in a person spending a longer time in prison in the administering State than in the sentencing State before being released on parole – this would only mean that his release would be postponed, but there was no question of his sentence being increased as a matter of law. It also noted that for a detention to be lawful under Article 5(1)(a) of the HRC there must be a causal link to a conviction, but the said Art 5(1)(a) did not require that the sentence be served in any particular country. As the sentence to be served in Estonia would be based on a conviction in Finland, the necessary causal connection between that conviction and the deprivation of liberty in Estonia would still exist. The Court also examined whether there was, or was likely to be, any form of arbitrariness in the way the system of parole operated in Estonia, and its conclusion that there was not, nor was there likely to be, any such arbitrariness. In view of all this, the Court noted that the possibility of a longer period of imprisonment in the administering State did not of itself render the deprivation of liberty arbitrary so long as the sentence to be served did not exceed the sentence imposed in the criminal proceedings in Finland. It is to be noted, however, that the Court put in, as it were, a safety valve in the judgment. It said – and I quote – *“The Court does not exclude the possibility that a flagrantly longer de facto sentence in the administering State could give rise to an issue under Article 5, and hence engage the responsibility of the sentencing State under that Article. For this to be the case, however, substantial grounds would have to be shown to exist for believing that the time to be served in the administering State would be flagrantly disproportionate to the time which would have had to be served in the sentencing State.”*

On 27 June 2006 the Court delivered two other inadmissibility decisions in respect of Sweden – *Szabó v Sweden*¹¹ and *Csoszánszki v. Sweden*¹². The two applicants were transferred to Hungary under the Protocol to serve their sentences there. When the Swedish judgment was “converted” under Article 11 of the Transfer Convention, it resulted that both applicants would serve the sentence in Hungary in a “higher security” prison than they would have done had they remained in Sweden, with the consequence also that parole would also be delayed. The Court reiterated that the possibility of a longer period of imprisonment in the administering State does not of itself render the deprivation of liberty arbitrary as long as the sentence to be served did not exceed the sentence imposed in the original criminal proceedings. It also underscored the fact that Art. 5 of the Human Rights Convention did not as such confer a right of release on parole, or a right to serve a prison sentence in accordance with a particular regime. Nor did it require that parole decisions be taken by a court. The fact that the crimes in question had been committed at a time when the Protocol had not as yet been ratified by Sweden did not engage Article 7 of the Human Rights Convention: the penalty imposed in Sweden on both applicants was the ten year prison sentence, and the fact that release on parole would come later in Hungary than it would have come in Sweden did not mean that that penalty was being in some way “retroactively” imposed in breach of the said Article 7. Finally, the additional period of sixteen months that the applicants would have to spend in the Hungarian jails (because of the delayed parole) was not so disproportionate that it would involve a breach of Article 5.

The judgment of 18 February 2010 in the case *Garkavy v. Ukraine*¹³ is notable for the unnecessary complications and confusion created by both the Czech and the Ukrainian courts in their attempt to have a Ukrainian national, who had been convicted and sentenced *in absentia* in the Czech Republic, sent back to the latter State so as to serve the prison sentence there. Again, the main issue (as far as the Convention on the Transfer of Sentenced Persons was concerned), was whether the applicant’s detention in the Ukraine was in breach of Art. 5 of the Human Rights Convention. The Court in Strasbourg found that there was a violation of Article 5 – the Kiev Court of Appeal had ‘reclassified’ the request of the Czech authorities for the transfer of criminal proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters into a request for enforcement of the Prague City Court judgment under the Transfer Convention and its Protocol thereto, although no request under the Transfer Convention had been made and, moreover, the Protocol was not applicable to persons tried *in absentia*. The applicant was awarded 10,000 Euros in compensation.

¹¹ No. 28578/03.

¹² No. 22318/02.

¹³ No. 25978/07.

The next set of two judgments – both decided on 1 April 2010 and in both of which the ECHR found a violation of Article 6(1) (in so far as there was a denial of the right of access to a court) – *Smith v. Germany*¹⁴ and *Buijen v. Germany*¹⁵ – have their origin criminal proceedings undertaken against the applicants in the beautiful Hanseatic League City of Lübeck. The Lübeck Public Prosecutor had made statements which were understood by the applicants to be assurances that the prosecution service would institute proceedings under Article 11 of the Transfer Convention so that they would eventually serve their sentences back home in The Netherlands. As a result, both applicants made a full confession. They were convicted and sentenced on the basis of their confession. But the German Ministry of Justice refused to make a formal application for transfer with The Netherlands. The applicants complained that the proceedings concerning their transfer request violated their right to a fair hearing as guaranteed by Art. 6(1) of the Human Rights Convention. The Court was of the view that, in the specific circumstances of both cases, Article 6(1) was applicable to the proceedings concerning their transfer request. The Court in these cases seems to have argued – I say “seems to have”, because quite frankly I fail to follow the logic – that part of the transfer decision was based on public law considerations, and the fact that these considerations were not amenable to judicial review did not give rise to a breach of Art. 6. However, the rest of the transfer request, that is the part which did not concern considerations of public policy, amounted somehow to the determination of a civil right or obligation, and the domestic courts’ refusal even to consider their request for judicial review of the Ministry of Justice’s decision amounted to a violation of Art. 6. In effect what I think the Court did here was to meet out justice in a sense not *contra legem* but rather *praeter legem*. What seems to have tipped the scales was the Public Prosecutor’s ‘assurances’. In fact in *Smith*, at para. 42 of the judgment, after the Court referred to previous case law to the effect that transfer proceedings involved neither the determination of civil rights or obligations nor the determination of a criminal charge, when on to say this – and I quote – “*However in those cases the Transfer Convention was not prospectively influencing the course of the trial and the fixing of the sentence, because no assurance was given by the public prosecution before or during the criminal proceedings.*” Bottom line – prosecutors should keep their mouths shut and not make similar promises or say anything which could be understood to be assurances of the kind in question here!

Müller v the Czech Republic was decided on 6 September 2011¹⁶. The application was declared inadmissible *ratione materiae*. The case involved a transfer under Art. 3 of the Additional Protocol from Germany to the Czech Republic. The Court in this case reaffirmed the case law to the effect that Article 7 of the HR Convention was not engaged simply because at the time of the commission of the offence the Protocol had not yet come into force, nor because of the difference in prison regime or the different application of the parole regime. It is to be noted that in this case, where the punishment was life imprisonment, the Court quoted with approval from the *Kafkaris* Grand Chamber judgment of 2008¹⁷, but as has already been mentioned, the last word on life sentences without the possibility of reduction or parole is now *Vinter and Others v. United Kingdom*.

The last two cases on my list are *Piotr Ciok v. Poland*, decided on the 23 October 2012¹⁸, and *Willcox and Hurford v United Kingdom* decided on the 8 January 2013¹⁹. In the former the problem was again the different ways in which parole operates in the sentencing state (Belgium in this case) and in the administering state (Poland). Referring to almost all the cases I have already mentioned, the Court rejected the complaints under Articles 5, 6 and 7 as either manifestly ill-founded or incompatible *ratione materiae*. The *Willcox and Hurford* case is more interesting. Both applicants were sentenced, separately, in Thailand for drug related offences. They were eventually transferred to one of Her Majesty’s Prisons in the UK under a Prisoner Transfer Agreement between the United Kingdom and Thailand of 1990 which came into effect in February 1991. Both complained under Article 3 of the HR Convention that their sentences were grossly disproportionate to the offences committed; they also complained that their detention in the UK was arbitrary and therefore in violation of Art. 5(1) of the HR Convention, as by pleading guilty in Thailand they were effectively required to serve a longer period in custody than they would have had if they pleaded not guilty. Finally, the first applicant argued that as a result of an “irrebuttable presumption” applied by Thai Law, his trial was flagrantly unfair and that

¹⁴ No. 27801/05.

¹⁵ No. 27804/05.

¹⁶ No. 48058/09.

¹⁷ No. 21906/04.

¹⁸ No. 498/10.

¹⁹ Nos. 43759/10 and 43771/12.

therefore his continued detention in the UK was arbitrary and unlawful under the abovementioned Article 5(1). All these complaints were rejected as manifestly ill-founded, in line with previous case law.

To conclude, the Convention on the Transfer of Sentenced Persons and its Protocol is, at least in my view as a former prosecutor, a most useful tool to enable persons sentenced away from their country of origin to serve their sentence, as it were, back home. It has, as we have seen, given rise to some problems connected with Human Rights, but then not all that many, considering the total number of transfers effected under the Convention and the Protocol since they came into force. The case-law – bar the two German cases I have mentioned – seems to be pretty straight forward. On the other hand practical problems no doubt remain to be solved, particularly the question of the time frame for decisions on transfers. I hope that this overview I have given has been useful and that your further deliberations at this special session will help to stimulate ideas so as to better fine-tune the implementation of these transfers.

The Convention on the Transfer of sentenced persons in practice, experiences and proposals for improvement

by Ms Barbara GOETH-FLEMMICH, Austria

The Convention is an extremely successful legal instrument of the CoE, in terms of ratifications. 64 States have acceded, 46 MS CoE except Monaco and 18 States worldwide (Australia, Bahamas, Bolivia, Chile, Costa Rica, Ecuador, Honduras, Israel, Japan, Kanada, Korea, Mauritius, Mexiko, Panama, Tonga, Trinidad and Tobago, Venezuela, US). The Convention is also very successful in terms of relevance in practice.

The Additional Protocol of 1997, which provides for a transfer of sentenced persons also when they do not consent to their transfer if there is final expulsion or deportation order preventing the person concerned to stay in the sentencing State once he or she is released from prison or if the person concerned seeks to avoid the execution of his/her sentence by fleeing from the territory of the sentencing State, has been acceded only by 36 States.

In order to prepare the discussion during the special session on transfer a questionnaire has been prepared by the PC-OC and sent out to all States parties to the Convention. 31 States have replied to it. The indicated figures show that every year hundreds of requests for transfer are based on the Convention. However the successrate of such requests shows that in average only half of the requests or even a smaller number will lead to an effective transfer.

This relatively low successrate is linked to (time-consuming) problems which MS have identified in applying the Convention, such as:

- length of proceedings and time needed to arrange practical aspects of the transfer
- incomplete or unnecessary documentation
- communication problems between competent authorities of Parties concerned
- withdrawal of the consent
- informing the person concerned (about the consequences of his transfer, detention conditions, early release policies, etc.)
- obstacles due to differences in procedures
- lack of information on follow up after transfer
- interpretation of the 6 months prison sentence to be served and exceptions (Art. 3.1.c and 3.2)
- dealing with transfers of mentally ill offenders
- how to deal with sentences including payment of fines
- overcrowded prisons which prevent to accept further prisoners.

As most of these problems have been dealt with already in different recommendations of the Committee of Ministers, these recommendations should be recalled and maybe transformed in one single comprehensive new recommendation.

- Recommendation No. R (84) 11 of the Committee of Ministers to Member States concerning information about the Convention on the transfer of sentenced persons
- Recommendation No. R (88) 13 concerning the practical application of the Convention on the transfer of sentenced persons
- Recommendation No. R (92) 18 concerning the practical application of the Convention on the transfer of sentenced persons
- Recommendation (2012)12 concerning foreign prisoners.

Comprehensive useful information on the application of the Convention and its Protocol can be found at the Website of the PC-OC (CoE standards, country information, tools for implementation, summary of the jurisdiction of the ECtHR).

1. Social rehabilitation (Convention/Additional Protocol):

The Convention serves in principle two goals: to further the ends of justice and to provide social rehabilitation. According to the Explanatory Report to the Convention 30 years ago penal policy has come to lay greater emphasis upon the social rehabilitation of offenders. The Convention's underlying philosophy is that it is desirable to enforce sentences in the home country of the person concerned for reasons of cultural, religious, family and other social ties. According to the preamble to the Additional Protocol the same is valid for the Protocol. However some States Parties to the Protocol refuse transfer arguing that the person concerned did not consent to his/her transfer, though the Protocol has been elaborated to allow also a transfer if the person concerned does not consent.

From this background a discussion should be held in order to clarify under which conditions the transfer of a sentenced person even without his/her consent serves his/her social rehabilitation? Is social rehabilitation possible in the sentencing State even if a expulsion or deportation order has been issued against this person as a result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison? If yes, under which circumstances?

2. Length of transfer proceedings:

The Convention was conceived to provide a simple, speedy and flexible mechanism for the repatriation of prisoners. Different provisions of the Convention demonstrate this intention: e.g. Articles 4.2., 5.4, 3.1.c.

As the Convention provides in principle for a minimum sentence of 6 months to be served at the time of receipt of the request (Article 3.1.c) it has to be assumed that the length of transfer proceedings should stay clear below this threshold. However there are States that require a minimum sentence to be served after transfer in the administering State in order to ensure the aims of social rehabilitation in the prison system.

Rec (88) 13 concerning the practical application of the Convention: 3.b. *"that they deal with transfer requests and take decisions on whether or not to agree to a transfer as expeditiously as possible, and to that effect, consider introducing target dates for the processing of cases; where a request raises particular difficulties likely to cause delay, the other Party and the sentenced person should be so informed".*

Recommendation No. R (92) 18 concerning the practical application of the Convention: 1.b. *"to proceed diligently and urgently in processing requests for transfer in such a way, that Article 5.4 is entirely complied with".*

What initiatives should be taken in order to speed up transfer proceedings? Should the introduction of time-limits be considered?

2.1 Arrangement of the effective transfer

As some States pointed out, sometimes a relatively long period passes by after the final consent of the Parties to the transfer until the effective surrender/transfer of the person.

Rec (88) 13 concerning the practical application of the Convention: 5.a. *"to effect agreed transfer as soon as possible after the sentenced person has given his consent".*

The arrangement of the effective transfer proves to be another very time-consuming element of the transfer proceedings in practice. The Convention is silent on that point. Whereas the Extradition Convention provides in Article 18.3. that the requested State shall inform the requesting State of the

place and date of surrender, the Convention does not indicate, if it is the sentencing or the administering State that proposes date and time of transfer.

The Convention however indicates, who shall bear the costs incurred in the application of the Convention. According to Article 17.5. *Any costs incurred in the application of the Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.*

From there stems a distinction between surrender by airplane and surrender overland between neighboring countries. Whereas in the last case time and date of surrender can also be proposed by the sentencing State, it is normally the administering State, which indicates time and place of a surrender by plane, as the administering State is sending police officers to accompany the person concerned to the administering State.

The coordination of the effective transfer is made often via Interpol channels especially in cases of transfer by airplane. However in some States the NCB pretends not to be competent for the coordination of the effective transfer, which causes major problems, as proposed dates for transfer are not communicated (in time) to the competent judicial authorities/ prison administration and as a consequence the person concerned is not brought to the airport or any other place of surrender. The officers of the administering State have to return to their home country without the sentenced persons. This sort of communication problems occur in practice quite often, causing considerable delays in transfer proceedings and causing considerable unnecessary costs. From this background it should be considered to provide at the PC-OC website not only contact details of the competent contact points in the MoJ, but also contact details of the Police or Penitentiary Police in charge for the effective transfer.

From this background an amendment to the Convention in order to clarify responsibilities for the coordination of the effective transfer and taking into account possible assistance by Interpol should be considered. Also the country information on transfer of sentenced persons at the PC-OC's website could be completed by adding contact details of the authority(ies) responsible for the effective surrender.

2.2 Documentation:

The replies to the questionnaire indicate that often the information provided together with a request for transfer is incomplete, unclear, too long, etc. Some States request additional information which is not foreseen in Article 6 (such as "*what type of treatment is provided to sentenced persons in addition to work?*", "*are there any mandatory activities for inmates?*").

From the background of a widely varying approach of States Parties the issue should be discussed:

Which information is really necessary for a specific transfer case and must therefore be provided? Is a translation of all documents, judgments necessary? Which information is necessary for transfer, but not linked to a specific case, such as information on conditional release provisions in the administering State, information on the prison system, etc. and could therefore be provided irrespective of a specific case by including more information in the country information on transfer f.e.? Is it necessary to provide a certified copy of the judgment even if the request and documents are sent via the Central authorities and thus the authenticity of the documents can be presumed?

3. Communication problems:

How can communication problems between the competent authorities of the States Parties be solved?

Several proposals received have already been executed:

- Central register of contact details (AUS, DK, Korea), create a website with relevant information (Costa Rica) (s. website transfer of sentenced persons - country information) s. also Rec (92) 18 Art. 1.i "*direct contacts*" and 2.a. "*Secretary General of CoE keep an updated list of contact points*".

- Establish an effective way or communication system between central authorities, regular meetings of persons in charge (Korea), (s. regular meetings PC-OC, phone, mail contacts, collaborative space- secure virtual discussion forum (Ecuador; AUS).

In which way modern electronic communication means should be used to enhance communication between authorities in charge? In which way a steady flow of information on new developments, discussions with regard to transfer of sentenced persons should be maintained with all States Parties to the Convention?

4. Revocation of the consent

According to the Convention the consent of the person concerned is not irrevocable and there is also no time-limit for a possible revocation of consent of the person concerned. The revocation of the consent, which can be effected at very late stages of the transfer proceedings, e.g. when the person concerned enters the aircraft for effective transfer, creates major problems and delays in practice. From this background it should be considered to make a) the consent irrevocable or b) provide time-limits for a possible revocation of the consent?

5. Problems in handling requests for transfer due to lack of information

5.1. Relevant information for the sentenced persons:

Article 4.1. of the Convention obliges a sentencing State to inform any sentenced person to whom the Convention may apply of the substance of the Convention. In order to provide the persons concerned this relevant information a standard text has been elaborated. Recommendation No R (84)11 of the Committee of Ministers concerning information about the Convention on the Transfer of Sentenced Persons Contracting Parties were asked to provide translations of this standard text in their official languages in order to distribute copies of the translations to each of the Contracting States for use by their prison authorities.

This standard text informs prisoners on the possibility of a transfer. Information is given on conditions to be met, such as who has to consent to the transfer, who may benefit from transfer, what sentence would need to be served following transfer, information on pardon, amnesty, commutation, on a possible review of the sentence, on the transfer procedure. The standard text contains also the information that the rule of speciality does not apply to transfer proceedings and information on the termination of enforcement.

The standard text is a great model. However, 30 years of experience in the application of the Convention have passed since and therefore it could be useful to have a close look to the model, if it is up to date or if it would need some refreshment or additions, e.g. with regard to conditional release.

Also Recommendation No R (92)18 provides in Art 1.h. "*as far as possible, to make available to their nationals – before the latter have given their consent to a transfer – precise and easily comprehensible information on the rules that will be applied to them with respect to determining the length of the sentence to be served as well as the terms and conditions of enforcement of the sentence in the event of them being transferred*" and Art. 1.j "*to enlarge and improve on the standard text provided for in Rec R (84) 11 in order to make its content easily comprehensible to all and ensure that the person concerned is advised that the conditions of being eligible for parole, early release, in the administering State will differ from those applicable in the sentencing State*".

In any case it has to be stated that a comparable standard text of information on the Additional Protocol is missing so far. To elaborate such an information seems to be highly recommendable in order to provide prisoners with relevant information on the transfer conditions under the Additional Protocol.

Which information has to be provided to the person concerned in order to obtain her/his informed consent?

5.2. Lack of information which is not related to a specific case and could/ should therefore be provided on a general basis and made available at the website (e.g. on early release policies/ detention conditions/ fines imposed, sentencing regimes, which procedures under Article 9.1. [continuation of the enforcement of the sentence or conversion of the sentence] will be applied).

5.3. Lack of information with regard to the further enforcement of the sentence after transfer and with regard to the termination of enforcement

Some countries stated also that updated information with regard to Article 6.2.b. (“*how much of the sentence was already served, including any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence*”) is difficult to obtain from the sentencing State. Rec R (92)18 Article 1.g “*When handing over the transferred person, to give the administering State an updated statement in conformity with Article 6.2.b*”).

5.4. Lack of information on follow up after transfer (Art 15)

Many countries deplore also the fact, that administering States do not comply with their obligations under Article 15 to provide information on enforcement, a) when they consider enforcement of the sentence to have been completed or b) if the sentenced person has escaped from custody before enforcement of the sentence has been completed. In most cases information on enforcement is only provided c) if the sentencing State requests a special report.

Points for discussion and proposals with regard to both instruments:

- 1) Which additional information should be provided at the PC-OC’s website (early release policies, detention conditions, fines, transfer of measures imposed, contact details of authorities responsible for the effective transfer, etc.)?
- 2) Best ways to enhance communication with all States Parties to the Convention?
- 3) Possibilities to recall and structure the available information, guidelines, recommendations on transfer? Elaboration of one single comprehensive new recommendation?
- 4) Which documents/information have/has to be provided together with a request for transfer? Possibilities to reduce translations/ certifications?
- 5) How to interpret the 6 months period still to be served in Article 3.1.c.? Whether there should be 6 months still to be served in the sentencing or in the administering State (after transfer)? Does the assumption of the time to be served relate to the overall sentence imposed without taking into account a potential early release involving a suspension of the sentence on probation?

Points for discussion and proposals with regard to the Convention:

- 1) Review of the standard text providing information to the sentenced person (Rec No R [84]11) in order to obtain his/her informed consent?
- 2) Does the Convention apply in cases where the sentenced person is already (legally staying) in the administering State? Some States decline this possibility arguing that in such cases no transfer of a sentence person, but only a transfer of the sentence takes place. However, the enforcement of the foreign sentence in the country of origin serves best the interest of the person concerned. Should State Parties decide that the Convention is not applicable in such cases, an amendment of the Convention should be considered.
- 3) Is rehabilitation precluded, when the sentenced person has already been sentenced repeatedly, is a recidivist, and is therefore transfer not possible under the Convention?
- 4) Should the concept of the Convention be changed, where it requires (Article 3.1.a) that the sentenced person is a national of the administering State? Article 3.4. provides that States may, by declaration, define the term “national” for the purpose of the Convention. (Rec [88])

- 13 concerning the practical application of the Convention: 2. consider availing themselves of the possibility under Article 3.4 to define the terms “national” in a wide sense, having regard to any close ties the persons concerned have with the administering State).
- 5) Should the consent be made irrevocable or should time-limits be provided for a possible revocation of the consent?
 - 6) Human rights issues may be relevant (should the authorities in the sentencing State deciding on the transfer take into account poor prison conditions in the administering State?).
 - 7) How to improve a transfer of mentally ill offenders? Enforcement of measures
 - 8) Should time-limits be introduced in order to speed up proceedings?
 - 9) Should competences for the factual transfer be clarified (taking into account also Interpol’s role)?

Points for discussion and proposals with regard to the Additional Protocol:

- 1) Elaboration of a standard text providing information to the person concerned (s. standard text for transfer under the Convention)
- 2) Should the Additional Protocol be applicable also in situations where the return of the person concerned to his/her State of nationality cannot be considered as “having fled from the sentencing State”?
- 3) Some States decline a request for transfer if the request is based on an expulsion or deportation order which is not consequential to the sentence imposed (s. the wording in Article 3 para 1 of the additional Protocol). If the competent authority of the sentencing State has however already issued an expulsion or deportation order, which prevents the sentenced person to reenter the territory of the sentencing States for a long period of time (10 years or an unlimited period of time) it seems to be redundant to issue after each new conviction a new deportation or expulsion order stating more or less the same which was already stated in the first expulsion or deportation order. According to the legislation in some States it is therefore not foreseen to issue a new expulsion or deportation order consequential to a new conviction. In such cases a transfer is impossible, even though an expulsion or deportation order for an unlimited period of time exists.
- 4) Some States also decline requests for transfer based on Article 3 of the Additional Protocol arguing that the person concerned has not consented to his/her transfer and therefore rehabilitation in the administering State seems impossible.
In this context some questions should be discussed: is there a real chance of rehabilitation in the sentencing State if there is an expulsion or deportation order for an unlimited period of time issued against the prisoner and he/she will have to return to the administering State as soon as he/she will be released from prison in the sentencing State? Is the situation different if intense family or social ties exist in the sentencing State? etc.

**The future of the Convention on the Transfer of Sentenced Persons: options for improvement
(second additional Protocol, recommendation, practical guidelines)**

by Ms Joana GOMES FERREIRA, Portugal

Introduction

I'm most thankful to the Committee to have started a reflection on this well-known Council of Europe instrument.

The questionnaire that has been sent to the delegations and their answers enlighten some unexpected aspects of the application of an instrument whose popularity is not under debate and make us see clearer its result. To understand and to discuss those problems it's our job for today.

Back in 1978, in Copenhagen, during their 11th Conference, the Ministers of Justice of the Council of Europe welcomed 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.

The word simple appears as a moto or a constant inspiration to the instrument that was about to be created then.

Its explanatory report opens by stating that 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. And it continues by explaining that the new instrument seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners. Finally the explanatory report explains that 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.

If, like medieval warriors, we would have liked the idea of choosing special words to define this instrument they would very likely be simplicity, fastness and flexibility.

The Convention on Transfer of Sentenced Persons

ETS 112 was drafted according with these major ideas that could, in fact, change substantially the result of cooperation.

First it is based on the consent, primarily, of the person concerned. Like special forms of simplified extradition, where the consent of the person concerned eases the procedure and facilitates the intervention of the States, the fact that the convicted person, that is the main target of this form of cooperation, consents, introduces a factor of speediness in the whole procedure, that will face no resistance and no opposition and, hopefully, will be terminated sooner than a normal procedure where the right to disagree will have its procedural expression.

Also the fact that, according with article 2 paragraph 3, the transfer might be requested by either the sentencing or the administering State innovated the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home country may have in his repatriation for reasons of cultural, religious, family and other social ties.

Secondly, the Convention encourages States to but does not impose on them an obligation to cooperate. For that reason, it was not necessary to list any grounds for refusal, or to require the requested State to give reasons for its refusal to agree to a requested transfer.

Thirdly, it allows States, when they are in the position of executing States, to choose one of two procedures to enforce the decision taken in the sentencing State, to continue to enforce or to convert

it, therefore enabling them to be as in line with their national procedural rules to recognize and enforce foreign decisions as possible.

Finally it allowed for a double language regime. For information provided for in article 4 translation, into the language of the administering State or one of the official languages of the Council of Europe, is mandatory. Supporting documents may remain in the language of the administering State; however declarations requiring for translation are accepted and were made.

ETS 112 does not carry the word “European” in its title. This reflects the draftsmen’s opinion that the instrument should be open also to like-minded States outside Europe.

The success of this instrument is shown by the multiplicity of State Parties – 64 States ratified this Convention among which 19 States as exotic as Tonga, as far as Australia.

Also, this guide towards simplicity and flexibility inspired other multilateral instruments, like the Convention on Transfer of Sentenced Persons between the CPLP State Parties, which follows very closely the standards of ETS 112.

The Additional Protocol

In the middle of the 90s Council of Europe States identified certain difficulties encountered when operating the Convention on the Transfer of Sentenced Persons. It also identified situations bordering the area covered by ETS 112, yet not included within the scope of the Convention.

The purpose of the Additional Protocol was to provide rules applicable to the transfer of the execution of sentences in two different cases, namely when 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; this situation was somehow approached by articles 68^o and 69^o of the Schengen Agreement. Also the additional Protocol brings a solution to situations where the sentenced person is subject to expulsion or deportation as a consequence of the sentence.

In both cases the consent of the person is not required. The explanatory report explains that when the person has deliberately sought to frustrate the judicial process by fleeing from justice, he or she has thereby taken him or herself outside the ambit of the Convention. For that reason the Committee considered that under such circumstances the need for his consent was no longer appropriate.

However the applicable system in what concerns the (absence) of consent of the persons is different.

In the first situation it is simply not previewed to hear the person that escaped; in the second situation the executing State must take into account the opinion of the person whose expulsion has been decided in the sentencing State that, anyway, will be protected by specialty rule upon his or her arrival in the executing State.

The number of ratifications of this Protocol comes down to 36 and does not include any of the States that are not members of the Council of Europe and, yet, ratified the Mother Convention.

A new cycle

Thirty years passed since the moment when, on March 21st, here in Strasbourg, the Convention on Transfer of Sentenced Persons has been opened for signatures and ratifications.

What are the practical results of its application? What does our daily experience show us when it comes to transfer of sentenced persons, under the modalities established by the 1983 Convention or the 1997 Additional Protocol?

The Committee of Ministers, through several Recommendations, showed its interest in this issue and urged States to consider a proper application of the Convention, first, and then a fair treatment of

foreign prisoners, in 1984 (Rec. (84)11), 1988 (Rec. (88)13), 1992 (Rec. (92) 18) and 2012 (Rec. (2012)12).

This interest must encounter equal concern and efficiency from the side of practitioners.

In good time did the PC-OC decide to group its members in smaller workshops to really feel cooperation flowing under the rules fixed by these two important instruments, as a complement to information already provided while answering the questionnaire.

It would be for me convenient to have a crystal ball and be able to anticipate the debates and conclusions of the workshops that will precede my presentation. I'll try to summarize them, then, as well as I can. However and due to our daily experience, we can anticipate some practical situations that are preventing this instrument to be as efficient and as wide as it could be.

In fact the basic strong ideas of simple, fast and flexible are many times confronted with the reality of a cumbersome and long procedure that frequently is not finished in the remaining 6 months mentioned by article 3°c) of the ETS 112. States almost unanimously were able to identify many problems, many of them practical ones others not so much.

My role is to follow the work of the Secretariat and of the comments presented in the morning session and to identify which type of intervention would be preferable or necessary for some problems to be solved.

Should we think of modernizing a little bit more this form of cooperation?

Let's consider the main problems that affect it:

1) Procedures take too much time.

This is typically a situation common to all forms of cooperation that might be avoided or limited by the introduction of delays. In fact, this is one of the factors introduced by the FWD of the EAW that substantially changed the quality of cooperation related with the arrest and surrender of persons in the European Union. Such a result could only be obtained through a binding instrument that would complement the existing ones. However, such a mandatory solution is it compatible with a procedure that is mostly voluntary, with no obligation, for the States, to reach a specific result? And will this solution be realistic when other problems, such as the translation of documents, remain unsolved? Or should it be partial, for instance introducing delays only in what concerns the effective date for the transfer of the person, one of the solutions adopted by the FWD 2008/909/JHA?

In connection with this issue the particularity of article 3 n°1 c) deserves some reflection. A minimum time to be served in the executing State is to be assured, otherwise social rehabilitation is lost. However Brazil has been insisting on applying the Convention CPLP for cases where, due to Brazilian early release rules, there is no remaining punishment to serve in prison.

Suggestion:

To consider drafting a mandatory instrument:

- a) To introduce time limits for the whole procedure to be terminated (Switzerland/maximum 3 months; Norway).
- b) To fix a final time limit for the removal to take place (Austria/FWD) in line with what was already recommended R (88) in September 1988.
- c) To amend the Convention in order to link the delay fixed by article 3 n°1 c) with the concrete moment where the transfer is possible, all formalities having been concluded (Sweden).

2) Translation of the requests and supporting documents is too costly, in terms of money and time.

While reading article 17^o of ETS 112 the distinction between *mandatory translation*, to be provided to information mentioned in article 4 (identification of the person concerned, information on his or her whereabouts in the executing State, statement of facts upon which the sentence was based and nature, duration and commencement of the sentence) and *optional translation*, left to the discretion of States, revealed by declarations, more or less generous, made to article 6^o specially n°2 (among which a certified copy of the judgment, that includes, frequently one or two degrees of appeal) is clear. Having consulted the declarations and reservations made by State Parties we can conclude that only Croatia, France, Ireland, Mauritius and Slovakia did not make declarations to article 17^o n°3. This state of play leads, frequently, to large and, frequently, double translations (it's the case of Portugal that declared that the supporting documents should be addressed in Portuguese or French; in this case, a second translation will be done, in Portugal, in order to submit the case to the national Court) that are not only costly in time and money but also dangerous, in terms of misinterpretation of the original text. Also means for transmission should be modernized as it has been already recommended R (88).

Suggestion:

To consider drafting a non-binding instrument:

To *recommend* States to consider accepting the translation of only the information mentioned in article 4^o and to work, if necessary, on basis of bilateral agreements (Russian Federation/declaration to art.17^o n°3; Portugal and the Netherlands and France are doing the same).

3) No time limits for the taking off of the consent of the person convicted.

The most important aspect of the Convention ETS 112 is the fact that it is based on the consent of the person that has been convicted and wants to be returned. For some States the fact that this consent can be revoked at any time, sometimes in a very late stage of the proceedings, has created major problems due to the fact that all costs made, in time and money, will be vain. However, for other States this issue could be strongly linked with Human Rights and therefore the right to change one's mind until the very end should be respected.

Suggestion:

To consider drafting a mandatory instrument:

To introduce a time-limit until which the consent may be revoked (Austria). States could, however, reserve the right not to use such a disposition (Sweden).

4) Impacts of early release in the procedures of transfers.

This question that is also linked with the reading and interpretation of article 3 n°1 c) of the ETS 112 seems to affect the good cooperation since it seems pointless to initiate a transfer procedure when early release will be decided before its end, sometimes even before the delay of 6 months is expired, in the administering or in the sentencing State (Lithuania). Article 6 n° 1 b) and n°2 a) does not impose an obligation to give information on the legal system for early release for any of the States. Also late impacts of the difference between early release systems that were already envisaged by Recommendation n° R (88) 13 n°4 have been underlined (Italy).

Suggestion to the first problem, since the second seems to have been already properly addressed, could have a mandatory character.

To amend the Convention in order to include information on early release in article 6 n°1 b) and n° 2 b), as an obligation for both States.

Suggestion: it could also be less intruding by recommending States to give information, at an early stage of the procedure, on probable dates for early release.

5) Both the Convention and the Additional Protocol exclude from their field of application the situation when a person is legally in the executing State (Hungary), for instance because the execution of a sentence has been suspended, but was, later on, revoked.

Differently from the situation solved by the Additional Protocol, when leaving the territory of the sentencing State the person was not yet fleeing from the execution of the sentence. However, that person, when going back to the State of his or her nationality, is very probably and voluntarily putting him or herself in a position of not satisfying the duties or injunctions that usually condition the suspension of sentences. That will imply the revocation of the suspension of the sentence. This situation will hardly be solved through existent instruments: in fact, as it was already stated in the explanatory report of the Additional Protocol “the mother Convention is of no use (...) 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. Also, the European Convention on the International Validity of Criminal Judgments (ETS 070) might provide a solution to the problem by allowing for the transfer of the sentence from State B to State A for execution. However, only a few States have ratified that Convention that is commonly considered as very comprehensive and detailed”.

Suggestion:

To make the field of application of the ETS 112 wider and by a mandatory instrument rule the transfer of the sentence, whose execution has been suspended and afterwards revoked, from the Administering State to the Executing State. However a previous clarification of the real need or impact of such an instrument should be considered.

6) Practical problems related with the final surrender of the person.

Besides problems related with delays, that have been already mentioned, some States underline that it's difficult to identify the appropriate counterparts, during the formal procedure of transfer and, especially when it reaches the final stage. The first situation should not be a problem due to the Country information available in the site of PC-OC, provided that it remains accurate and updated. However the final stage of the removal is often taken care by the Police or the Penitentiary forces. Recently the central authority, in Portugal, has been asked to confirm a date for the transfer of French prisoners. This intervention, that was extremely urgent, just a few days before the date that was scheduled for the removal, was justified since the French authorities were not identifying the services that are responsible, in Portugal for the removal.

Suggestion:

To update the country information to include several recent State Parties to the ETS 112.
To amend the country information to describe the procedures of final removal and to identify, with the appropriate coordinates, the services which are responsible to coordinate them.
To find ways to gather and describe good practices in the coordination of the later stage of the transfer procedure (concentration; delays; exchange of prisoners).

7) Several situations that were an obstacle to a concrete transfer based on the application of the Additional Protocol were spotted.

Some States informed that, in procedures based on the Additional Protocol, transfers were refused due to the absence of consent or due to the fact that the expulsion decision was not consequential to the sentence imposed. If the first situation seems to be contrary to the spirit and the text of the Protocol the second would justify further debates due to the very clear wording of article 3 of the Protocol.

Suggestion:

Further debates should take place in order to identify the impact and reasoning of these situations that, in the second case, could only be solved through a mandatory instrument that would amend article 3 n ° 1 of the Additional Protocol.

8) Finally obstacles related with payment of fines, costs of transfer and final removal or mentally ill prisoners were brought to the discussion.

The Committee had already some reflections that are gathered in the tools for implementation of this instrument, to be consulted in our part of the COE site. Since very few States considered these situations as obstacles to cooperation it would be wiser to debate them further on to conclude on its real impact and to identify the appropriate solution.

9) Open item to link with the conclusions of the workshops.

Portugal is a State Party of the ETS 112 but did not ratify yet ETS 176.

During 2012 Portugal transferred 70 prisoners abroad out of 121 procedures started. During the same year 15 Portuguese prisoners were transferred to Portugal out of 54 requests received. That corresponds to a 57% and 27%.

To try to understand the system I monitored a procedure of transfer, from Portugal to Brazil where one of the major factors for delay does not appear, since we speak the same language. What I found out is that a procedure that started on June 2011 was only terminated, with the effective removal of the prisoner, in December 2012, in a total of 18 months. The major factors for such a delay were the fact that there were no vacancies in the Estate Prison where the prisoner should be removed to and a final delay of 7 months that elapsed before the person was removed. No legal, no procedural obstacles, practical clear problems.

I monitored another one, with France, State with whom we are currently translating only the information provided by article 4º nº3 of the ETS 112. The procedure was ready to start in November 2012 and it was finished in June 2013 when the prisoner was removed in a total of 7 months that would not fit the limit established by article 3 nº1 c) ETS 112. Hopefully the sentence was much larger than that.

The two instruments under analysis are models for other instruments, involving the same and other States. This is, for instance, the case of the Convention on the transfer of sentenced persons between the State Parties of the CPLP. To facilitate the enforcement of this instrument Portugal drafted a handbook on the practical aspects of the application of the Convention that was presented to the Committee of the Ministers of Justice of CPLP (May 2013). It was recommended to replicate the handbook in order to support the application of the Convention by all the Member States, especially for African countries that are, in fact, starting to cooperate in this field.

The scenario in the Council of Europe is completely different and would not justify such an exercise. However, at a bilateral level, a common approach to this form of cooperation that would include information on the legal system, a simple description of the several phases of the national procedure and the identification of the actors involved and of practical problems in view of a common solution, could be encouraged.

The popularity of the Convention on Transfer of Sentenced Persons pays a good tribute to those who negotiated and drafted it, looking for an instrument that could offer simple, flexible and speedy solutions to the situation of foreign prisoners. Real life shows, however, that some practical aspects harm that efficiency and prevent the instrument(s) to go as fast as they were conceived to go. Our birthday gift to the Convention could be, by one or several interventions, different in substance and impact, to ease and improve its enforcement.

Type of intervention	Substance of intervention
Legal instrument (Prot. Amend.)	Time limit for the procedure to terminate
Legal instrument (Prot. Amend.)	Time limit for removal
Legal instrument (Prot. Amend.)	Interpret. and possible amend.to art. 3 n°1 c)
Recommendation	Translation reduced
Legal instrument (Prot. Amend.)	Time limit for revocation of consent
Recommendation/amend.	Give information on early release
Legal instrument (Prot. Amend.)	Revocation of suspended sentences
Information/guide lines	Actors and measures related with physical transfer
Further debates	Interpretation of Ad. Prot. Social rehabilitation
Further debates	Mentally ill, fines, others...

**Report on the discussions held in workshop 1:
“The Convention in practice”**

by Ms Imbi MARKUS, Estonia

We discussed:

Judgment

The whole judgment or just a summary – do we need in all cases the whole judgment? Maybe it would be possible to create “a list” of basic points from judgments.

Is there a need to present (and translate) judgments of all (in some cases three) court instances? Will some kind of “summary” be enough? Some countries mentioned that a summary made by administrative bodies (the Ministries of Justice) is not efficient. Partial translation of the judgment should be sufficient.

And what does it means – judgment – it is not the same understanding in all countries.

Consent of the person concerned

When the consent should be taken/given? And if the country gave its consent, is it final or there is a possibility to revoke that consent?

In some countries the “final consent” has to be given by the end of the whole transfer procedure in the court. We found out, that guidelines could be a solution or a deadline for the consent be a solution?

Time-limits

Is there are need to insert the time-limits? In general it could be a good idea but to do it among all 64 countries parties to this Convention – will it be possible?

Certified copy or an original judgement

We reached the common understanding that “certified” means stamp and signature under the judgment and does not create any problems. But we also find out, that the solution is totally different in South-American countries. In transfer cases with above mentioned countries we have to solve all problems in case-by-case basis.

Forwarding requests and documents

In our days all means of communication must be acceptable (post, faxes and e-mails). INTERPOL channels be also used (by the opinion of Interpol representative) and in general electronic transfer of documents should be promoted.

Costs of actual transfer

Some countries ask the reimbursement of costs from the transferred person (Estonia and Georgia); some countries opposed that kind of policy (Italy and Portugal). But there is no need to make any recommendations on this issue.

And finally we discussed about one interesting proposal – maybe it would be wise first to contact the administering state and send the official request in a later stage.

**Report on the discussions held in workshop 2:
“The Additional Protocol in practice”**

by Mr Stéphane DUPRAZ, France

A. Issues discussed

A. Regarding the implementation of Article 2 of the Additional Protocol

- Definition of flight:

The participants in the workshop wondered if States should adopt a restrictive or more flexible approach to the notion of « flight » in particular in situations where the person has legally left the sentencing State but refuses to return when summoned to prison.

- Interpretation of paragraph 11 of Explanatory Memorandum:

Paragraph 11 of the Explanatory Memorandum states that “[Article 2] does not cover the situations where (a) a national of State A is tried and sentenced in absentia in State B, or (b) a national of State A is sentenced in State B, the execution of the sentence being suspended, and subsequently the suspension is revoked after the person has voluntarily moved to State A”.

The participants discussed the extent to which it could be envisaged to transfer in absentia sentences.

The issue was also raised of what types of decisions fall under the concept of “suspended sentences” and the possibility to include revoked suspended sentences within the scope of the Additional Protocol.

B. Regarding the implementation of Article 3 of the Additional Protocol

- Relation between transfer and the legal status of the person to be transferred:

The participants first noted that there was a wide variety of removal decisions States could issue and enforce. It was noted that, in some States, removal can be ordered either by an administrative authority or by a judicial authority.

The participants agreed they should first discuss the scope of Article 3 of the Additional Protocol in order to (i) clearly identify the situations covered by that provision and (ii) try to reach a common understanding as to the requirement that the removal order should be “consequential” to the conviction.

The participants identified 4 different situations in which both a conviction and a removal decision could coexist:

- In the first situation, the Court hands down a single decision convicting the person and ordering his/her removal;
- In the second situation, the administrative removal of the person is decided after he/she has been convicted by a Court;
- In the third situation, an illegal alien is convicted after an administrative removal order has been issued (but not yet enforced);
- In the last situation, the person has been convicted on several occasions for different offenses and a removal order is issued based on only one of these convictions.

Some participants also raised an issue regarding the relevance of the requirement that there should be a “consequential” link between the sentence and the removal order, especially when a person has no prospects of rehabilitation in the sentencing State because of a removal order issued before he/she was sentenced. The discussions on this issue revealed that some States have refused transfer in those situations because the removal order was issued before the conviction was handed down.

- Consideration to be given to the absence of consent of the sentenced person in Art. 3 transfer situations:

The discussions in the workshop revealed that States interpreted the provisions of Article 3 of the Additional Protocol regarding the possibility to transfer a person without his/her consent in different ways.

It appeared that these diverging interpretations may be the result of the Explanatory Report to the Protocol. Paragraph 29 of the Explanatory Report states that *“the procedure laid down is not one of automatic transfer upon the consent of both Parties involved. It requires, in addition to the States' consent to transfer, their agreement to dispense with the consent of the sentenced person”*.

Some participants confirmed that they, acting as sentencing State, sometimes refused to transfer a sentenced person in the framework of Article 3 because he/she had not consented to the transfer. They explained that in many of those cases, the refusal was the consequence of a Court decision.

- How should States deal with situations where the sentenced person refuses to provide his/her opinion on transfer?

The discussions in the workshop revealed that, in some cases, the sentencing State is not in a position to provide the sentenced person's opinion because he/she has refused to give his views on transfer.

B. Proposals

1. Regarding the implementation of Article 2:

Participants suggested that the definition of flight should be broadened in order to encompass the situation of sentenced persons who have not fled but who were allowed to return to their country of origin and did not return to the sentencing State to serve the sentence imposed on them.

They also concluded that the use of Article 2 should be used as an alternative to extradition, especially where extradition is not possible because of the nationality of the person.

Lastly, with regards to the transfer of suspended sentences, it was suggested that States should consider the use of the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (parts 3 or 4) or the 1970 European Convention on the International Validity of Criminal Judgments as an alternative to transfer. Alternatively, another solution could be not to exclude revoked suspended sentences from the scope of Article 2.

2. Regarding the implementation of Article 3:

Participants agreed that clarification is needed with regards to the requirement of a “consequential” link between the conviction(s) and the removal order. It was agreed that discussions should be

continued within the PC-OC as to how this clarification should be made (binding vs. non-binding instrument).

Alternatively, some participants suggested that States could, at the national level, develop mechanisms - such as an explanatory note - in order to establish the missing "consequential" link between the sentence(s) and the removal order when the latter has been issued prior to the former.

It was also suggested that States which have ratified the Additional Protocol should ensure that their legislation or practical national guidelines allow for the effective implementation of transfers based on Article 3. In particular, participants noted that States should have provisions ensuring that refusals to transfer in the framework of Article 3 may be reviewed/appealed in the administering State when such refusals result from a Court's decision and are exclusively based on the absence of consent of the sentenced person.

Lastly, it was considered that when the sentenced person refused to give his/her opinion on transfer, such refusal should be interpreted as a refusal to consent and the sentencing State should provide a document explaining why it was impossible to submit the person's opinion along with the transfer documentation.

**La Convention sur le transfèrement des personnes condamnées: application pratique,
expériences et propositions d'amélioration**

par Mme Barbara GOETH-FLEMMICH, Autriche

La convention est un instrument juridique du Conseil de l'Europe qui a rencontré un grand succès en termes de ratifications. En effet, 64 Etats y ont adhéré, dont 46 Etats membres du Conseil de l'Europe (soit leur totalité sauf Monaco) et 18 Etats à travers le monde (Australie, Bahamas, Bolivie, Chili, Costa Rica, Equateur, Honduras, Israël, Japon, Canada, Corée du Sud, Maurice, Mexique, Panama, Tonga, Trinité-et-Tobago, Venezuela, Etats-Unis). Elle est également remarquable par sa pertinence dans la pratique.

Le protocole additionnel de 1997, qui prévoit le transfèrement sans leur consentement des personnes condamnées lorsqu'une décision définitive d'expulsion ou de reconduite à la frontière a été rendue et empêche la personne concernée de rester sur le territoire de l'Etat de condamnation une fois remise en liberté, ou lorsque la personne concernée cherche à se soustraire à l'exécution de sa condamnation en s'échappant du territoire de l'Etat de condamnation, n'a reçu l'adhésion que de 36 Etats.

Afin de préparer les discussions qui auront lieu au cours de la session spéciale sur le transfèrement, un questionnaire a été élaboré par le PC-OC et distribué à tous les Etats parties à la convention. Trente-et-une réponses ont été reçues. Les chiffres ainsi obtenus montrent que des centaines de demandes de transfèrement sont émises chaque année dans le cadre de la convention. Le taux de succès de ces demandes révèle toutefois qu'en moyenne, seule la moitié d'entre elles, voire moins, aboutissent à la réalisation du transfèrement.

Ce taux de succès relativement bas est lié à des difficultés (chronophages) que les Etats membres ont identifiées dans l'application de la convention. Ils déplorent par exemple:

- la durée de la procédure et le temps nécessaire à l'organisation des aspects pratiques du transfèrement;
- la documentation incomplète ou inutile;
- les difficultés de communication entre les autorités compétentes des Parties concernées;
- le retrait du consentement;
- les difficultés pour informer la personne concernée (au sujet des conséquences de son transfèrement, de ses conditions de détention, des politiques de libération anticipée, etc.);
- les obstacles liés aux différences de procédures;
- le manque d'informations sur le suivi après le transfèrement;
- le problème de l'interprétation de la durée de six mois de la peine d'emprisonnement restant à purger et des dérogations (article 3.1 et 3.2);
- les difficultés rencontrées dans le transfèrement des personnes présentant des troubles mentaux;
- le problème du mode de traitement des condamnations incluant le paiement d'une amende;
- la surpopulation carcérale qui empêche d'accueillir de nouveaux prisonniers.

Dans la mesure où ces problèmes ont déjà été examinés dans diverses recommandations du Comité des Ministres, il serait souhaitable que ces dernières soient renommées et éventuellement réunies au sein d'une unique recommandation globale:

- Recommandation n° R (84) 11 du Comité des Ministres aux Etats membres concernant l'information relative à la Convention sur le transfèrement des personnes condamnées;
- Recommandation n° R (88) 13 concernant l'application pratique de la Convention sur le transfèrement des personnes condamnées;
- Recommandation n° R (92) 18 concernant l'application pratique de la Convention sur le transfèrement des personnes condamnées;

- Recommandation CM/Rec(2012)12 relative aux détenus étrangers.

Des informations utiles complètes sur l'application de la convention et de son protocole sont disponibles sur le site web du PC-OC (normes du Conseil de l'Europe, informations par pays, outils de mise en œuvre, synthèse de la jurisprudence de la Cour européenne des droits de l'homme).

1. Réinsertion sociale (Convention/Protocole additionnel)

La convention a en principe deux objectifs: servir les intérêts de la justice et permettre la réinsertion sociale. D'après le Rapport explicatif sur la convention, la politique pénale insistait davantage il y a 30 ans sur la réinsertion sociale des délinquants. La philosophie sous-jacente à la convention est qu'il est souhaitable que les personnes condamnées purgent leur condamnation dans leur pays d'origine en raison de liens culturels, religieux, familiaux et sociaux. Le préambule du protocole additionnel énonce que ce dernier partage les mêmes objectifs. Toutefois, certains Etats parties au protocole refusent le transfèrement au motif que la personne concernée n'y a pas consenti, et ce bien que ce texte ait été élaboré pour permettre également le transfèrement en cas d'absence de consentement.

Dans ce contexte, une discussion devrait être organisée pour clarifier *dans quelles conditions le transfèrement d'une personne condamnée, même sans son consentement, facilite-t-il sa réinsertion sociale? Celle-ci est-elle possible dans l'Etat de condamnation même si la personne est frappée d'une mesure d'expulsion ou de reconduite à la frontière en vertu de laquelle elle ne sera plus admise à séjourner sur le territoire de l'Etat de condamnation une fois remise en liberté? Si oui, dans quelles circonstances?*

2. Durée de la procédure de transfèrement

La convention a été élaborée pour fournir un mécanisme simple, rapide et souple pour le rapatriement des prisonniers. Diverses dispositions du texte en sont la preuve, comme les articles 4.2, 5.4, et 3.1.c.

Dans la mesure où la convention prévoit en principe une durée minimale de six mois d'emprisonnement restant à purger à la date de réception de la demande (article 3.1.c), on doit en conclure que la durée de la procédure de transfèrement devrait rester bien en deçà de ce seuil. Certains Etats exigent pourtant une durée minimale d'emprisonnement à purger après le transfèrement dans l'Etat d'exécution pour garantir que les objectifs de réinsertion sociale dans le système carcéral sont respectés.

L'article 3.b de la Recommandation n° R (88) 13 concernant l'application pratique de la convention est énoncé comme suit: "*de traiter les demandes de transfèrement et de prendre les décisions sur l'acceptation ou le refus du transfèrement le plus rapidement possible, et à cet effet d'envisager l'établissement de délais pour le traitement des affaires; lorsqu'une demande soulève des difficultés particulières de nature à entraîner un retard, l'autre Partie et la personne condamnée devraient en être informées*".

L'article 1.b de la Recommandation n° R (92) 18 concernant l'application pratique de la convention est quant à lui rédigé en ces termes: "*de procéder avec diligence et urgence à l'examen des demandes de transfèrement de telle sorte que les dispositions de l'article 5, paragraphe 4, de la convention puissent être pleinement respectées*".

Quelles sont les initiatives à prendre pour accélérer la procédure de transfèrement ? Devrait-on envisager l'instauration de délais?

2.1 Modalités de réalisation du transfèrement

Comme certains Etats l'ont fait remarquer, il arrive qu'une période relativement longue s'écoule entre l'accord définitif des Parties sur le transfèrement et la réalisation de la remise ou du transfèrement de la personne.

L'article 5.a de la Recommandation n° (88) 13 concernant l'application pratique de la convention est énoncé comme suit: “*de procéder au transfèrement le plus tôt possible après que la personne condamnée ait donné son consentement*”.

Les modalités de réalisation du transfèrement se révèlent être un autre élément de la procédure de transfèrement qui exige un temps considérable dans la pratique. La convention ne contient aucune disposition sur ce point. Tandis que la Convention européenne d'extradition prévoit dans son article 18.3 que l'Etat requis informera l'Etat requérant du lieu et de la date de remise, la convention sur le transfèrement ne précise pas si cette initiative revient à l'Etat de condamnation ou à l'Etat d'exécution dans le cas d'un transfèrement.

La convention prévoit en revanche quel Etat doit assumer les frais occasionnés par l'application de la convention dans son article 17.5: “*Les frais occasionnés en appliquant la présente convention sont à la charge de l'Etat d'exécution, à l'exception des frais occasionnés exclusivement sur le territoire de l'Etat de condamnation*”.

Il en découle une distinction entre la remise par voie aérienne et la remise par voie terrestre entre pays limitrophes. Alors que dans le second cas la date et l'heure du transfèrement peuvent aussi être proposées par l'Etat de condamnation, c'est normalement à l'Etat d'exécution de les déterminer lorsque la remise se fait par avion, car celui-ci doit envoyer des agents de police pour accompagner la personne concernée jusqu'à son territoire.

La coordination de la réalisation du transfèrement est souvent réalisée par l'intermédiaire d'Interpol, en particulier dans les cas de transfèrement par voie aérienne. Cependant, dans certains Etats, le bureau central national se prétend incomptént pour coordonner la réalisation du transfèrement, ce qui crée des problèmes importants, car les dates proposées ne sont pas communiquées (à temps) aux autorités judiciaires ou à l'administration pénitentiaire compétentes et la personne concernée n'est pas conséquent pas amenée à l'aéroport ou sur les lieux prévus pour sa remise. Les agents envoyés par l'Etat d'exécution doivent alors rentrer dans leur pays sans la personne condamnée. Ce genre de problème de communication est assez fréquent dans la pratique et engendre des retards dans la procédure de transfèrement ainsi que des frais considérables et injustifiés. Dans ce contexte, il faudrait envisager de publier sur le site web du PC-OC non seulement les coordonnées des points de contact compétents au sein des ministères de la Justice, mais également les coordonnées de la police ou de la police pénitentiaire responsable de la réalisation du transfèrement.

Dès lors, il faudrait envisager un amendement à la convention pour définir à quelle Partie incombe la responsabilité de coordonner la réalisation du transfèrement et pour prendre en compte l'éventuelle aide que pourrait apporter Interpol. Les informations par pays relatives au transfèrement des personnes condamnées disponibles sur le site web du PC-OC devraient aussi être complétées par l'ajout des coordonnées des autorités responsables de la réalisation du transfèrement.

2.2 Documentation

Les réponses au questionnaire indiquent que les informations accompagnant les demandes de transfèrement sont souvent incomplètes, peu claires, trop longues, etc. Certains Etats demandent des renseignements complémentaires qui ne sont pas prévus à l'article 6, par exemple “*quel type de traitement les personnes condamnées doivent-elles recevoir en plus du travail?*” ou “*des activités obligatoires doivent-elles être imposées aux détenus?*”.

Dans un contexte d'approches très diverses de la part des Etats parties, il faudrait discuter de cette question: quelles informations sont réellement nécessaires pour un transfèrement particulier et doivent donc être fournies? La traduction de tous les documents et de la décision judiciaire est-elle indispensable? Quelles informations sont nécessaires pour le transfèrement mais ne concernent pas directement un cas particulier, comme la documentation au sujet des règles de libération conditionnelle de l'Etat d'exécution, au sujet du système carcéral, etc.? Par conséquent, serait-il possible de les fournir indépendamment d'un cas particulier en apportant davantage de renseignements dans les informations par pays par exemple? Est-il nécessaire de fournir une copie certifiée conforme du jugement même si la demande et les pièces à l'appui sont transmises par l'intermédiaire des autorités centrales et que les documents peuvent ainsi être présumés authentiques?

3. Difficultés de communication

Comment peut-on résoudre les problèmes de communication entre les autorités compétentes des Etats parties?

Plusieurs propositions reçues ont déjà été mises en œuvre:

- Création d'un répertoire central des coordonnées (Australie, Danemark, Corée du Sud) et d'un site web contenant les informations utiles (Costa Rica) (voir site web sur le transfèrement des personnes condamnées – informations par pays); voir aussi la Recommandation n° (92) 18, article 1.i "*rapports directs*" et article 2.a "*le Secrétaire Général du Conseil de l'Europe de tenir à jour une liste*" des points de contact.
- Mise en place d'un moyen ou d'un système de communication efficace entre les pouvoirs centraux ; organisation de réunions régulières des responsables en la matière (Corée du Sud) ; réunions régulières du PC-OC, contacts par téléphone et par courriel, espace collaboratif – enceinte de discussion virtuelle sécurisée (Equateur, Australie).

De quelle façon devrait-on utiliser les moyens électroniques modernes de communication pour améliorer la communication entre les autorités responsables? Comment peut-on entretenir avec tous les Etats parties à la convention un flux continu d'information sur les événements récents et les dernières discussions concernant le transfèrement des personnes condamnées?

4. Révocation du consentement

D'après la convention, le consentement de la personne concernée n'est pas irrévocabile et il n'existe pas de délai pour son éventuelle révocation. Cette dernière, qui peut intervenir à un stade très avancé de la procédure de transfèrement, par exemple au moment de monter dans l'avion pour la réalisation du transfèrement de la personne concernée, cause des problèmes et des retards importants dans la pratique.

Dans ce contexte, faudrait-il envisager de a) rendre le consentement irrévocabile ou b) définir des délais au-delà desquels toute révocation est impossible?

5. Difficultés à traiter les demandes de transfèrement à cause d'un manque d'informations

5.1. Informations nécessaires aux personnes condamnées

L'article 4.1 de la convention oblige l'Etat de condamnation à informer tout condamné auquel elle peut s'appliquer de la teneur de la convention. Un texte type a été élaboré afin de fournir aux personnes concernées les informations nécessaires. La Recommandation n° R (84) 11 du Comité des Ministres concernant l'information relative à la Convention sur le transfèrement des personnes condamnées demandait aux Parties contractantes de fournir une traduction du texte type dans leur(s) langue(s) officielle(s) afin d'en transmettre des exemplaires à chaque Etat contractant à l'intention de ses administrations pénitentiaires.

Ce texte type informe le prisonnier de la possibilité d'un transfèrement. Des renseignements sont également donnés concernant les conditions à remplir, comme qui doit consentir au transfèrement, qui peut en bénéficier, quelle sera la peine à purger après le transfèrement, ainsi que des informations sur la grâce, l'amnistie et la commutation, sur l'éventuelle révision du jugement initial ou sur la procédure de transfèrement. Le texte type précise aussi que la règle de spécialité ne s'applique pas aux procédures de transfèrement, et présente les modalités de cessation de l'exécution.

Le texte type est un très bon modèle. Toutefois, après 30 ans de mise en œuvre de la convention depuis la rédaction de celui-ci, il pourrait être utile d'examiner de près ce modèle et de déterminer s'il est à jour et s'il aurait besoin d'être ajusté ou enrichi, par exemple en ce qui concerne la libération conditionnelle.

En outre, l'article 1.h de la Recommandation n° R (92) 18 demande aux Etats membres “*dans la mesure du possible, de mettre à la disposition de leurs ressortissants, avant qu'ils n'aient donné leur consentement à un transfèrement, une information précise et facilement compréhensible portant sur les règles qui leur seront appliquées en matière de détermination de la durée de la peine, ainsi qu'en matière de modalités d'exécution de la peine, au cas où ils seraient transférés*”, l'article 1.j, quant à lui, demande “*d'améliorer et d'élargir le “texte type (...) prévu dans la Recommandation n° R (84) 11, de telle sorte que, d'une part, son contenu puisse être plus facilement compréhensible et que, d'autre part, la personne concernée soit avisée du fait que les conditions de remise de peine, de libération conditionnelle, etc., applicables dans l'Etat d'exécution diffèrent de celles qui sont applicables dans l'Etat de condamnation*”.

Dans tous les cas, force est de constater qu'un texte type d'information similaire relatif au Protocole additionnel fait toujours défaut. L'élaboration d'un tel document semble particulièrement souhaitable pour fournir aux prisonniers les informations utiles sur les conditions de transfèrement définies par le protocole additionnel.

Quelles informations doivent être fournies à la personne concernée pour obtenir son consentement éclairé ?

5.2. Manque d'informations sans lien avec un cas particulier qui Pourraient / devraient donc être fournies de manière générale et publiées sur le site web, par exemple au sujet de la politique de libération anticipée, des conditions de détention, des amendes infligées, du régime de peine ou du choix de la procédure appliquée en vertu de l'article 9.1 (poursuite de l'exécution de la condamnation ou conversion de celle-ci).

5.3. Manque d'informations au sujet de la poursuite de l'exécution de la condamnation après le transfèrement et de la cessation de l'exécution.

Certains pays ont aussi déclaré qu'il était difficile d'obtenir de l'Etat de condamnation des informations à jour au regard de l'article 6.2.b (“*la durée de la condamnation déjà subie, y compris des renseignements sur toute détention provisoire, remise de peine ou autre acte concernant l'exécution de la condamnation*”). L'article 1.g de la Recommandation n° R (92) 18 demande “*lors de la remise de la personne transférée, de remettre à l'Etat d'exécution une déclaration à jour faite en conformité avec l'article 6, paragraphe 2.b*”.

5.4. Manque d'informations sur le suivi après le transfèrement (article 15)

De nombreux pays déplorent aussi le fait que les Etats d'exécution ne remplissent pas leurs obligations au regard de l'article 15 à fournir des informations concernant l'exécution de la condamnation, a) lorsqu'ils considèrent terminée l'exécution de la condamnation ou b) si le condamné s'est évadé avant que l'exécution de la condamnation ne soit terminée. Dans la plupart des cas, des informations ne sont apportées que c) si l'Etat de condamnation demande un rapport spécial.

Points de discussion et propositions concernant les deux instruments:

- 1) Quelles informations complémentaires faudrait-il publier sur le site web du PC-OC (politiques de libération anticipée, conditions de détention, amendes, transfert des mesures imposées, coordonnées des autorités responsables de la réalisation du transfèrement, etc.)?
- 2) Quelles sont les meilleures façons d'améliorer la communication avec tous les Etats parties à la convention?
- 3) Quelles sont les solutions pour énumérer et organiser toutes les informations, les lignes directrices et les recommandations disponibles sur le transfèrement? L'élaboration d'une unique recommandation globale?
- 4) Quels documents/rencseignements doivent accompagner une demande de transfèrement? Quelles sont les solutions permettant de diminuer le nombre de traductions/certifications?

- 5) Comment interpréter la durée de six mois de peine restant à purger selon l'article 3.1.c? Les six mois restants doivent-ils être purgés dans l'Etat de condamnation ou d'exécution (après le transfèrement)? L'estimation de la durée de condamnation restant à subir doit-elle se fonder sur la durée globale de la peine sans tenir compte d'une éventuelle libération anticipée impliquant une suspension de la condamnation pendant une période de probation?

Points de discussion et propositions concernant la convention:

- 1) Examen du texte type fournissant des informations aux personnes condamnées (Recommandation n° R (84) 11) pour pouvoir obtenir leur consentement éclairé.
- 2) La convention s'applique-t-elle dans le cas où la personne condamnée se trouve déjà (séjourne légalement) dans l'Etat d'exécution? Certains Etats rejettent cette éventualité au motif que dans ce cas il ne s'agit pas d'un transfèrement de personne condamnée, mais uniquement d'un transfert de sa condamnation. Cependant, l'exécution dans son pays d'origine de la condamnation imposée à l'étranger bénéficie au mieux à la personne concernée. Si les Etats parties décidaient que la convention n'est pas applicable dans ce cas, il faudrait envisager un amendement à la convention.
- 3) La réinsertion est-elle exclue lorsque la personne a déjà été condamnée à plusieurs reprises, sa récidive empêchant donc son transfèrement dans le cadre de la convention?
- 4) Faudrait-il modifier le principe de la convention qui prévoit que la personne condamnée doit être un ressortissant de l'Etat d'exécution (article 3.1.a)? L'article 3.4 dispose que tout Etat peut par une déclaration, "*définir (...) le terme "ressortissant" aux fins de la (...) Convention*", et l'article 2 de la Recommandation n° R (88) 13 concernant l'application pratique de la convention prévoit "*d'examiner la possibilité prévue à l'article 3.4 de définir le terme de "ressortissant" de manière large, en tenant compte des liens étroits que les personnes concernées ont avec l'Etat d'exécution*".
- 5) Faudrait-il rendre le consentement irrévocable ou imposer des délais pour une éventuelle révocation?
- 6) Les questions de droits de l'homme peuvent être pertinentes (les autorités de l'Etat de condamnation devraient-elles statuer sur le transfèrement en tenant compte des mauvaises conditions de détention dans l'Etat d'exécution?).
- 7) Comment améliorer le transfèrement des délinquants présentant des troubles mentaux? Mise en œuvre de mesures en la matière.
- 8) Faudrait-il instaurer des délais pour accélérer la procédure?
- 9) Les compétences concernant les aspects concrets du transfèrement devraient-elles être clarifiées (en prenant également en compte le rôle d'Interpol)?

Points de discussion et propositions concernant le protocole additionnel:

- 1) Elaboration d'un texte type fournissant des informations à la personne concernée (voir le texte type sur le transfèrement dans le cadre de la convention).
- 2) Le protocole additionnel devrait-il être applicable dans les situations où le retour des personnes concernées dans les Etats dont elles sont ressortissantes ne peut être considéré comme un cas de "*personnes évadées de l'Etat de condamnation*"?
- 3) Certains Etats rejettent des demandes de transfèrement si celles-ci se fondent sur une mesure d'expulsion ou de reconduite à la frontière n'ayant pas été "*prise à la suite de cette condamnation*" (voir les termes de l'article 3, paragraphe 1 du protocole additionnel). Cependant, si l'autorité compétente de l'Etat de condamnation a déjà prononcé une mesure d'expulsion ou de reconduite à la frontière qui interdit à la personne condamnée de pénétrer de nouveau sur le territoire de cet Etat pour une longue période (10 ans ou une durée indéterminée), il semble redondant de prononcer à l'issue de chaque nouvelle condamnation une nouvelle mesure d'expulsion ou de reconduite à la frontière dont le contenu serait plus ou

moins identique à la première mesure prononcée. La législation de certains Etats ne prévoit donc pas que soit prononcée une nouvelle mesure de ce type à l'issue d'une nouvelle condamnation. Dans ce cas, le transfèrement est alors impossible, bien qu'il existe une mesure d'expulsion ou de reconduite à la frontière valable pour une durée indéterminée.

- 4) Certains Etats rejettent également les demandes de transfèrement émises au titre de l'article 3 du protocole additionnel au motif que la personne concernée n'a pas consenti à son transfèrement et que sa réinsertion dans l'Etat d'exécution semble donc impossible. Dans ce contexte, il conviendrait de discuter de certains points: existe-t-il une réelle chance de réinsertion dans l'Etat de condamnation si le détenu est frappé d'une mesure d'expulsion ou de reconduite à la frontière pour une durée indéterminée et qu'il devra donc retourner dans l'Etat d'exécution dès sa remise en liberté dans l'Etat de condamnation? La situation est-elle différente si le détenu a de solides liens familiaux ou sociaux dans l'Etat de condamnation? etc.

L'avenir de la Convention sur le transfèrement des personnes condamnées: options d'amélioration (deuxième Protocole additionnel, recommandation, lignes directrices pratiques)

par Mme Joana GOMES FERREIRA, Portugal

Introduction

Je remercie vivement le Comité d'avoir engagé une réflexion sur cet instrument bien connu du Conseil de l'Europe.

Le questionnaire qui a été envoyé aux délégations et leurs réponses mettent en lumière certains aspects insoupçonnés de l'application d'un instrument dont la popularité ne saurait être remise en question et nous permettent de voir plus clairement son effet. Notre mission aujourd'hui est de comprendre et d'examiner les problèmes mentionnés.

Dès 1978, à Copenhague, lors de leur 11^e Conférence, les ministres de la Justice du Conseil de l'Europe ont accueilli avec satisfaction un accord type prévoyant une procédure simple de transfert des détenus que les Etats membres pourraient utiliser dans leurs relations mutuelles ou dans leurs relations avec des Etats non membres.

Le mot simple apparaît comme une devise ou une source d'inspiration constante pour l'instrument qui allait alors être créé.

Son rapport explicatif affirme d'emblée que la Convention a pour objet de faciliter le transfèrement des détenus étrangers vers leur pays d'origine en créant une procédure simple et rapide. Il explique ensuite que le nouvel instrument vise à fournir un mécanisme simple, rapide et souple pour le rapatriement des prisonniers. Le rapport explicatif indique enfin que pour faciliter un transfert rapide des détenus étrangers, la Convention prévoit une procédure simplifiée qui, dans son application pratique, est susceptible d'être moins lourde que celle prévue par la Convention européenne sur la valeur internationale des jugements répressifs.

Si, tels des guerriers médiévaux, nous aurions aimé choisir des mots spéciaux pour définir cet instrument, ils auraient certainement été simplicité, rapidité et flexibilité.

La Convention sur le transfèrement des personnes condamnées

La Convention STE n° 112 a été élaborée selon ces idées fortes qui pouvaient effectivement changer de manière substantielle le résultat de la coopération.

Premièrement, elle est basée sur le consentement, principalement, de la personne concernée. Comme les formes spéciales d'extradition simplifiée, dans lesquelles le consentement de la personne concernée allège la procédure et facilite l'intervention des Etats, le fait que la personne condamnée, qui est le principal objet de cette forme de coopération, consente, introduit un facteur de rapidité dans la procédure dans son ensemble, qui ne rencontrera aucune résistance ni opposition et, normalement, se terminera plus rapidement qu'une procédure normale dans laquelle le droit de ne pas être d'accord sera reflété dans la procédure.

En outre, le fait que conformément à l'article 2, paragraphe 3, les transfèresments puissent être demandés soit par l'Etat de condamnation, soit par l'Etat d'exécution, a fait évoluer la règle de la Convention européenne sur la valeur internationale des jugements répressifs autorisant le seul Etat de condamnation à demander le transfèrement. Cette disposition reconnaît l'intérêt que peut représenter, pour le pays d'origine, le rapatriement du détenu en raison de liens culturels, religieux, familiaux et sociaux.

Deuxièmement, la Convention encourage les Etats à coopérer mais ne leur en impose pas l'obligation. C'est pourquoi il n'était pas nécessaire d'indiquer des motifs de refus, ni de demander à l'Etat requis de motiver son refus d'autoriser un transfèrement demandé.

Troisièmement, elle offre à l'Etat qui demande le transfèrement, lorsqu'il est l'Etat d'exécution, de choisir l'une des deux procédures d'exécution de la décision prise dans l'Etat de condamnation, de poursuivre son exécution ou de la convertir, lui permettant donc d'aller autant que possible dans le même sens que ses règles de procédure nationales visant à reconnaître et à exécuter les décisions étrangères.

Enfin, elle a permis un régime linguistique double. En ce qui concerne les informations prévues à l'article 4, la traduction, dans la langue de l'Etat d'exécution ou l'une des langues officielles du Conseil de l'Europe, est obligatoire. Les pièces à l'appui peuvent rester dans la langue de l'Etat de condamnation; toutefois, les déclarations exigeant une traduction sont acceptées et ont été produites.

Le titre de la Convention STE n° 112 ne comporte pas l'adjectif "européen". Cela reflète l'avis des rédacteurs selon lequel l'instrument devrait être ouvert aussi aux Etats non européens animés du même esprit.

Le succès de cet instrument est démontré par la multiplicité des Etats qui y sont Parties – 64 Etats ont ratifié cette Convention parmi lesquels 19 Etats aussi "exotiques" que le Tonga, aussi éloignés que l'Australie.

Par ailleurs, ce guide en faveur de la simplicité et la flexibilité a inspiré d'autres instruments multilatéraux, comme la Convention sur le transfèrement des personnes condamnées entre les Etats parties à la CPLP, qui suit de près les normes de la STE n° 112.

Le Protocole additionnel

Au milieu des années 1990, les Etats du Conseil de l'Europe ont repéré certaines difficultés rencontrées dans le fonctionnement de la Convention sur le transfèrement des personnes condamnées. Ils ont également identifié des situations qui se trouvent à la limite du domaine couvert par la Convention STE n° 112 et qui sont donc encore extérieures au champ d'application de celle-ci.

Le Protocole additionnel a pour objet de définir les règles applicables au transfert de l'exécution des peines dans deux cas distincts, celui où la personne condamnée s'est évadée de l'Etat de condamnation pour regagner l'Etat dont elle est ressortissante, ce qui dans la plupart des cas rend impossible au premier l'exécution de la peine; cette situation a été en quelque sorte abordée par les articles 68 et 69 de l'Accord de Schengen. Le protocole additionnel apporte aussi une solution dans les situations où la personne condamnée fait l'objet d'une mesure d'expulsion ou de reconduite à la frontière en raison de sa condamnation.

Dans les deux cas, le consentement de la personne n'est pas requis. Le rapport explicatif indique que dès lors que la personne a délibérément essayé de détourner le cours de la justice en s'en échappant, elle s'est par là même exclue du champ d'application de la Convention. Par conséquent, le Comité a estimé que dans ces circonstances le consentement de la personne n'était plus requis. Cependant, le système applicable en ce qui concerne le consentement des personnes (ou son absence) est différent. Dans le premier cas, il n'est tout simplement pas prévu d'entendre la personne qui s'est échappée; dans le deuxième, l'Etat d'exécution doit prendre en considération l'avis de la personne dont l'expulsion a été décidée dans l'Etat de condamnation et qui, dans tous les cas, sera protégée par le principe de spécialité à son arrivée dans l'Etat d'exécution.

Ce Protocole a été ratifié par 36 Etats dont aucun des Etats non membres du Conseil de l'Europe ayant pourtant ratifié la Convention.

Un nouveau cycle

Trente années se sont écoulées depuis le moment où, ici à Strasbourg, le 21 mars, la Convention sur le transfèrement des personnes condamnées a été ouverte à la signature et à la ratification.

Quels sont les résultats concrets de son application? Que nous révèle notre expérience quotidienne en ce qui concerne le transfèrement des personnes condamnées, selon les modalités établies par la Convention de 1983 ou le Protocole additionnel de 1997?

Le Comité des Ministres, par le biais de plusieurs recommandations, a montré son intérêt en la matière et exhorté les Etats à envisager tout d'abord une application correcte de la Convention et ensuite un traitement équitable des détenus étrangers, en 1984 (R (84) 11), 1988 (R (88) 13), 1992 (R (92) 18) et 2012 (R (2012) 12).

Cet intérêt doit susciter la même préoccupation et la même efficacité de la part des agents d'exécution.

En temps utile, le PC-OC a décidé de regrouper ses membres en plus petits ateliers afin d'explorer véritablement la coopération découlant des règles fixées par ces deux instruments importants, comme complément des informations déjà fournies en répondant au questionnaire.

Il serait pratique d'avoir une boule de cristal: je pourrais anticiper les débats et conclusions des ateliers qui précèderont mon intervention. J'essaierais alors de les résumer, dans la mesure du possible. Néanmoins, et grâce à notre expérience quotidienne, nous pouvons anticiper certaines situations pratiques qui empêchent cet instrument d'être aussi efficace et aussi large qu'il le pourrait.

En effet, les idées fondamentales d'un instrument simple, rapide et souple se heurtent fréquemment à la réalité d'une procédure longue et fastidieuse qui n'est souvent pas achevée au cours des six mois restants mentionnés par l'article 3, paragraphe c de la Convention STE n° 112. Les Etats ont presque tous été en mesure d'identifier de nombreux problèmes, beaucoup d'ordre pratique et d'autres moins pragmatiques.

Je suis chargée de suivre les travaux du Secrétariat et les observations présentées lors de la session du matin, ainsi que d'identifier quel type d'intervention serait préférable ou nécessaire pour résoudre certains problèmes.

Devrions-nous envisager de moderniser un peu plus cette forme de coopération?

Examinons les principaux problèmes qui ont des répercussions sur cette dernière:

1) Les procédures prennent trop de temps.

Il s'agit en règle générale d'une situation commune à tous les formes de coopération qui pourrait être évitée ou limitée par l'introduction de délais. En effet, il s'agit de l'un des facteurs introduits par la Décision cadre relative au mandat d'arrêt européen qui a considérablement changé la qualité de la coopération liée à l'arrestation et à la remise de personnes dans l'Union européenne. Un tel résultat ne pourrait être obtenu que par le biais d'un instrument contraignant qui compléterait les instruments existants. Toutefois, une solution contraignante de ce type est-elle compatible avec une procédure qui est principalement volontaire, sans obligation, pour les Etats, de parvenir à un résultat spécifique? Et cette solution est-elle réaliste quand d'autres problèmes, tels que la traduction des documents, ne sont pas encore résolus? Ou devrait-elle être partielle, par exemple en introduisant des délais uniquement en ce qui concerne la date effective de transfèrement de la personne, l'une des solutions adoptées par la DC 2008/909/JHA?

A ce sujet, la particularité de l'article 3, paragraphe 1, sous-paragraphe c) mérite réflexion. Une durée minimale de condamnation à purger dans l'Etat d'exécution doit être assurée, sans quoi il n'est pas possible de bénéficier de la réinsertion sociale. Toutefois, le Brésil a insisté pour appliquer la Convention CPLP dans les cas où, du fait des règles brésiliennes sur la libération anticipée, il ne reste pas de peine d'emprisonnement à purger.

Suggestion:

- a) Réfléchir à l'élaboration d'un instrument contraignant:

- b) Introduire des délais pour la clôture de la procédure dans son ensemble (Suisse/3 mois maximum; Norvège).
- c) Fixer un délai définitif pour le transfèrement (Autriche/DC) conformément à ce qui a déjà été recommandé dans la R (88) 13 en septembre 1988.
- d) Modifier la Convention afin d'associer le délai fixé par l'article 3, paragraphe 1, sous-paragraphe c) au moment concret où le transfèrement est possible, dans la mesure où l'ensemble des formalités ont été accomplies (Suède).

2) La traduction des demandes et des documents à l'appui est trop coûteuse, en termes d'argent et de temps.

A la lecture de l'article 17 de la Convention STE n° 112, la distinction entre *traduction obligatoire*, à fournir des informations mentionnées à l'article 4 (identification de la personne concernée, informations sur ses coordonnées dans l'Etat d'exécution, exposé des faits ayant entraîné la condamnation, nature, durée et date du début de la condamnation) et *traduction facultative*, laissée à la discrétion des Etats, révélée par les déclarations, plus ou moins généreuses, faites à l'article 6, spécialement au paragraphe 2 (parmi lesquelles une copie certifiée conforme du jugement, qui comprend, fréquemment, un ou deux degrés de recours) est claire. Après consultation des déclarations et des réserves formulées par les Etats parties, nous pouvons conclure que seules la Croatie, la France, l'Irlande, Maurice et la Slovaquie n'ont pas fait de déclarations sur l'article 17, paragraphe 3. Cet état de la situation aboutit fréquemment à des traductions longues et souvent doubles (c'est le cas du Portugal qui a déclaré que les documents à l'appui devraient être adressés en portugais ou en français ; dans ce dernier cas, une deuxième traduction sera effectuée, au Portugal, afin de soumettre l'affaire à la juridiction nationale) qui ne sont pas seulement coûteuses en temps et en argent, mais aussi dangereuses, en termes d'erreur d'interprétation du texte original. De plus, il convient de moderniser les moyens de transmission, ainsi qu'il a déjà été recommandé dans la R (88) 13.

Suggestion:

Réfléchir à l'élaboration d'un instrument non contraignant:

Recommander aux Etats d'envisager d'accepter uniquement la traduction des informations mentionnées à l'article 4 et de travailler, si nécessaire, sur la base d'accords bilatéraux (Fédération de Russie/déclaration concernant l'article 17, paragraphe 3; le Portugal, les Pays-Bas et la France font de même).

3) Pas de délai pour le retrait du consentement de la personne condamnée.

La caractéristique la plus importante de la Convention STE n°112 est qu'elle est basée sur le consentement de la personne qui a été condamnée et veut être renvoyée. Pour certains Etats, le fait que ce consentement puisse être retiré à tout moment, parfois à un stade très avancé de la procédure, a créé des problèmes majeurs car tous les coûts engagés, en termes de temps et d'argent, seront vains. Toutefois, pour d'autres Etats, cette question pourrait être fortement liée aux droits de l'homme et par conséquent, le droit de changer d'avis jusqu'à la fin de la procédure devrait être respecté.

Suggestion:

Envisager d'élaborer un instrument contraignant:

Introduire un délai au terme duquel le consentement ne peut être retiré (Autriche). Les Etats pourraient néanmoins se réservent le droit de ne pas avoir recours à ce type de disposition (Suède).

4) Conséquences de la libération anticipée dans les procédures de transfèrement.

Cette question, qui est aussi liée à la lecture et l'interprétation de l'article 3, paragraphe 1, sous-paragraphe c) de la Convention STE n°112, pourrait avoir une influence sur la bonne coopération puisqu'il semble exclu d'engager une procédure de transfèrement lorsque la libération anticipée sera accordée avant son terme, parfois avant même l'expiration du délai de six mois, dans l'Etat

d'exécution ou de condamnation (Lituanie). L'article 6, paragraphe 1, sous-paragraphe b) et paragraphe 2, sous-paragraphe a) n'impose aucune obligation de fournir aux Etats des informations sur le régime juridique de libération anticipée. Par ailleurs, les conséquences ultérieures de la différence entre les systèmes de libération anticipée qui ont déjà été envisagées par la Recommandation R (88) 13 ont été soulignées (Italie).

La suggestion pour le premier problème, puisque le deuxième semble avoir été correctement traité, pourrait avoir un caractère contraignant.

Modifier la Convention dans le but de contraindre les deux Etats à inclure des informations sur la libération anticipée dans l'article 6, paragraphe 1, sous-paragraphe b) et paragraphe 2, sous-paragraphe b).

Suggestion: pour une intervention moindre, il convient de recommander aux Etats de fournir des informations, à un stade précoce de la procédure, sur les dates probables de la libération anticipée.

5) La Convention et le Protocole additionnel excluent de leur champ d'application le cas où une personne se trouve en situation régulière dans l'Etat d'exécution (Hongrie), par exemple car l'exécution d'une peine a été suspendue, mais a été révoquée par la suite.

A la différence de la situation résolue par le Protocole additionnel, lorsqu'elle a quitté le territoire de l'Etat de condamnation, la personne ne fuyait pas l'exécution de la peine. Toutefois, cette personne, lorsqu'elle revient dans l'Etat dont elle est ressortissante, se trouve, très probablement et volontairement, dans une situation de non-respect des obligations et des ordonnances qui déterminent généralement la suspension des peines. Cela implique la révocation de la suspension de la peine. Cette situation sera difficilement résolue par le biais des instruments existants: en effet, comme il a déjà été indiqué dans le rapport explicatif du Protocole additionnel, "la Convention sur le transfèrement des personnes condamnées n'est pas applicable [...], parce que la personne condamnée ne se trouve pas sur le territoire de l'Etat de condamnation et n'est donc pas susceptible d'être transférée. Dans la pratique, le problème ne peut pas non plus être réglé par les instruments existants de coopération internationale. Par exemple, l'extradition, qui est la méthode normale employée pour renvoyer dans un pays une personne qui y est poursuivie, n'est pas possible le plus souvent parce que la plupart des Etats n'extradent pas leurs ressortissants". De plus, "la Convention européenne sur la valeur internationale des jugements répressifs (STE 70) pourrait donner une solution au problème dans la mesure où elle permet le transfèrement de l'exécution de la condamnation de l'Etat B à l'Etat A. Toutefois, cet instrument [généralement considéré comme très complet et détaillé] n'a été ratifié que par un petit nombre d'Etats".

Suggestion:

Etendre le champ d'application de la Convention STE n° 112 et, par le biais d'un instrument contraignant, gérer le transfert de la condamnation, dont l'exécution a été suspendue et par la suite révoquée, de l'Etat de condamnation à l'Etat d'exécution. Toutefois, il faudrait envisager de préciser au préalable si un tel instrument est réellement nécessaire ou aurait un véritable effet.

6) Des problèmes pratiques liés à la remise définitive de la personne.

Outre les problèmes liés aux délais, qui ont déjà été mentionnés, certains Etats soulignent la difficulté d'identifier les partenaires appropriés, lors de la procédure officielle de transfèrement et spécialement lorsque celle-ci atteint le dernier stade. La première situation ne devrait pas poser de problème du fait des informations par pays consultables sur le site du PC-OC, dans la mesure où elles restent fiables et actualisées. Toutefois, la dernière étape du transfèrement est souvent prise en charge par la police ou les forces pénitentiaires. Il a récemment été demandé à l'autorité centrale, au Portugal, de confirmer une date pour le transfèrement de détenus français. Cette intervention, qui était très urgente, quelques jours seulement avant la date qui était prévue pour le transfèrement, était justifiée car les autorités françaises n'identifiaient pas les services qui sont chargés de l'éloignement au Portugal.

Suggestion:

Actualiser les informations par pays pour y inclure plusieurs Etats devenus récemment Parties à la Convention STE n° 112.

Modifier les informations par pays pour décrire les procédures de remise définitive et identifier, avec les coordonnées appropriées, les services qui sont chargés de les coordonner.

Trouver des moyens de rassembler et décrire de bonnes pratiques en matière de coordination du dernier stade de la procédure de transfèrement (concentration; délais; échange de détenus).

7) Plusieurs situations qui ont constitué un obstacle à un transfèrement concret basé sur l'application du Protocole additionnel ont été repérées.

Certains Etats ont fait savoir que, dans des procédures basées sur le Protocole additionnel, des transfèresments ont été refusés en raison de l'absence de consentement ou parce que la décision d'expulsion n'était pas consécutive à la condamnation. Si la première situation semble contraire à l'esprit et au texte du Protocole, la deuxième justifierait des débats supplémentaires en raison du libellé très clair de l'article 3 du Protocole.

Suggestion:

Des débats supplémentaires devraient avoir lieu afin d'identifier les répercussions et les causes de ces situations qui, dans le deuxième cas, ne pourraient être résolues que par l'adoption d'un instrument contraignant qui modifierait l'article 3, paragraphe 1 du Protocole additionnel.

8) Enfin, des obstacles liés au paiement des amendes, aux coûts du transfèrement et de la remise définitive, ou aux détenus atteints de troubles mentaux ont été abordés.

Le Comité disposait déjà de certaines réflexions qui figurent dans les outils pour la mise en œuvre de cet instrument, à consulter sur le site du Conseil, dans la partie consacrée au Comité. Etant donné que très peu d'Etats ont considéré ces situations comme des obstacles à la coopération, il pourrait être plus sage de les examiner ultérieurement pour déterminer leur effet réel et identifier la solution appropriée.

9) Point ouvert pour faire la corrélation avec les conclusions des ateliers.

Le Portugal est Partie à la Convention STE n° 112 mais n'a pas encore ratifié la Convention STE n° 176.

Au cours de l'année 2012, le Portugal a transféré 70 détenus dans un autre Etat sur 121 procédures engagées (soit 57 %). La même année, 15 détenus portugais ont été transférés au Portugal sur 54 demandes reçues (soit 27 %).

Pour tenter de comprendre le système, j'ai suivi une procédure de transfèrement, du Portugal au Brésil, où l'un des principaux facteurs de délai n'apparaît pas, puisque nous parlons la même langue.

J'ai observé qu'une procédure qui a débutée en juin 2011 ne s'est achevée, par le transfèrement définitif du prisonnier, qu'en décembre 2012, au bout de 18 mois. Ce délai était principalement dû à un manque de place disponible dans la prison d'Etat où le détenu devait être envoyé et au fait que 7 mois se sont écoulés avant le transfèrement de la personne condamnée. Aucun obstacle juridique ni problème de procédure mais des problèmes pratiques évidents.

J'ai suivi une autre procédure, avec la France, Etat avec lequel nous ne traduisons actuellement que les informations prévues par l'article 4, paragraphe 3 de la Convention STE n° 112. La procédure était prête à débuter en novembre 2012 et s'est achevée en juin 2013 lorsque le détenu a été transféré au bout de 7 mois, ce qui n'est pas conforme au délai établi par l'article 3, paragraphe 1, sous-paragraphe c) de la Convention STE n° 112. Par chance, la peine était bien plus longue.

Les deux instruments examinés sont des références pour d'autres instruments, qui engagent les mêmes Etats mais aussi d'autres. C'est par exemple le cas de la Convention sur le transfèrement des personnes condamnées des Etats parties à la CPLP. Afin de faciliter l'exécution de cet instrument, le Portugal a élaboré un manuel sur les aspects pratiques de l'application de la Convention qui a été présenté au Comité des ministres de la Justice de la CPLP (mai 2013). Il a été recommandé de reproduire le manuel afin de soutenir l'application de la Convention par tous les Etats membres, spécialement pour les pays africains qui, en fait, ouvrent la coopération dans ce domaine.

Le scénario au Conseil de l'Europe est complètement différent et ne justifierait pas un tel exercice. Toutefois, au niveau bilatéral, une approche commune de cette forme de coopération qui inclurait des informations sur le système juridique, une description simple des différents stades de la procédure nationale et l'identification des acteurs concernés et des problèmes pratiques en vue d'une solution commune, pourrait être encouragée.

La popularité de la Convention sur le transfèrement des personnes condamnées rend hommage à ceux qui l'ont négociée et rédigée, cherchant à élaborer un instrument qui pouvait offrir des solutions simples, flexibles et rapides à la situation des détenus étrangers. La réalité montre cependant que certains aspects pratiques nuisent à cette efficacité et empêchent les instruments d'être aussi rapides que prévu lors de leur élaboration. Pour l'anniversaire de la Convention, nous pourrions lui offrir une ou plusieurs interventions, différentes dans leur nature et leur effet, visant à faciliter et améliorer son application.

Type d'intervention	Nature de l'intervention
Instrument juridique (Modif. Prot.)	Délai pour la clôture de la procédure
Instrument juridique (Modif. Prot.)	Délai pour le transfèrement
Instrument juridique (Modif. Prot.)	Interprétation et modification possible de l'article 3, paragraphe 1, sous-paragraphe c)
Recommandation	Diminution des traductions
Instrument juridique (Modif. Prot.)	Délai pour le retrait du consentement
Recommandation/modification	Fournir des informations sur la libération anticipée
Instrument juridique (Modif. Prot.)	Révocation des peines suspendues
Information/lignes directrices	Acteurs et mesures liés au transfèrement physique
Débats supplémentaires	Interprétation de la partie sur la réinsertion sociale du Protocole additionnel
Débats supplémentaires	Malades mentaux, amendes, autres...

**Compte rendu des discussions de l'atelier 1:
“La Convention mise en pratique”**

par Mme Imbi MARKUS, Estonie

Nos discussions peuvent se résumer comme suit.

Jugement

Le jugement dans son intégralité ou seulement un résumé – avons-nous besoin dans tous les cas de l'intégralité du jugement? Peut-être serait-il possible d'établir “une liste” des points essentiels des jugements.

Est-il nécessaire de présenter (et traduire) les jugements correspondant à toutes les phases du procès (parfois trois instances)? Un “résumé” est-il suffisant? Les représentants de certains pays ont fait remarquer qu'un résumé établi par un organe administratif (ministère de l'Intérieur) n'est pas valable. Une traduction partielle du jugement devrait suffire.

Et que signifie le terme “jugement”? Il n'a pas le même sens dans tous les pays.

Consentement de la personne concernée

Quand le consentement doit-il être recueilli/donné? Et si le pays a donné son consentement, celui-ci est-il définitif ou peut-il être retiré?

Dans certains pays, le “consentement définitif” doit être donné à la fin de l'ensemble de la procédure de transfèrement devant le tribunal. Nous avons constaté que des lignes directrices pourraient être une solution. Ou un délai pour le consentement pourrait-il être une solution?

Délais

Est-il nécessaire de préciser les délais? A priori, cela pourrait être une bonne idée. Mais est-il possible de l'appliquer aux 64 Etats parties à la Convention?

Une copie certifiée conforme du jugement ou l'original

Nous sommes parvenus à nous mettre d'accord sur le sens à donner à “certifiée”: cela signifie qu'un tampon et une signature sont apposés au bas du jugement, ce qui ne pose pas de problèmes. Mais nous avons aussi constaté que la solution est totalement différente dans les pays d'Amérique du Sud. Dans les procédures de transfèrement impliquant ces pays, nous devons donc résoudre tous les problèmes au cas par cas.

Communication des demandes et des pièces à l'appui

De nos jours, tous les moyens de communication doivent pouvoir être utilisés (courrier postal, fax et courrier électronique). Demandes et pièces peuvent aussi être communiquées par l'intermédiaire d'INTERPOL (de l'avis du représentant d'Interpol). De manière générale, il convient de promouvoir la communication des documents par voie électronique.

Frais occasionnés par le transfèrement

Certains pays demandent à la personne transférée de rembourser les frais occasionnés (Estonie et Géorgie); les représentants de certains autres pays se sont déclarés opposés à cette pratique (Italie et Portugal). Mais il n'est pas nécessaire de formuler des recommandations sur cette question.

Enfin, nous avons discuté d'une proposition intéressante: peut-être serait-il sage de commencer par prendre contact avec l'Etat d'exécution et de n'envoyer la demande officielle qu'à un stade ultérieur.

**Rapport sur les questions et propositions examinées dans le cadre de l'atelier 2:
“Le Protocole additionnel en pratique”**

par M. Stéphane DUPRAZ, France

A. Questions examinées

A. Concernant l'application de l'article 2 du Protocole additionnel

- Définition de la notion d' “évasion”:

Les participants à l'atelier se demandent si les Etats ne devraient pas adopter une approche restrictive ou plus souple de la notion d' “évasion”, en particulier dans les cas où la personne a quitté de façon régulière l'Etat de condamnation mais refuse d'y retourner alors qu'elle est condamnée à une peine de prison.

- Interprétation du paragraphe 11 du rapport explicatif:

Le paragraphe 11 du rapport explicatif stipule que “[l'article 2] ne vise ni (a) la situation dans laquelle un ressortissant de l'Etat A est jugé et condamné par défaut dans l'Etat, ni (b) la situation dans laquelle un ressortissant de l'Etat A est condamné dans l'Etat B, que l'exécution de la peine est suspendue, et que cette suspension est par la suite révoquée après le départ volontaire de la personne vers l'Etat A”.

Les participants examinent dans quelle mesure le transfèrement pourrait être envisagé dans les cas de condamnation par défaut.

Sont également évoquées la question de savoir quels types de décisions relèvent des “peines suspendues” et la possibilité d'inclure les “suspensions révoquées” dans le champ d'application du Protocole additionnel.

B. Concernant l'application de l'article 3 du Protocole additionnel

- Relation entre le transfèrement et le statut juridique de la personne à transférer:

Les participants notent tout d'abord qu'il existe un large éventail de mesures d'éloignement que les Etats peuvent prendre et appliquer. Ils relèvent que, dans quelques Etats, la mesure peut être ordonnée soit par une autorité administrative soit par une instance judiciaire.

Les participants conviennent qu'ils doivent d'abord examiner le champ d'application de l'article 3 du Protocole additionnel, afin de (i) clairement identifier les situations couvertes par cette disposition, et (ii) tenter de parvenir à une compréhension commune de l'exigence selon laquelle la mesure d'éloignement doit être une “conséquence” de la condamnation.

Les participants mettent en lumière quatre situations dans lesquelles une condamnation et une décision d'éloignement peuvent coexister:

- Dans la première situation, le tribunal rend une seule décision qui condamne la personne et ordonne son éloignement;
- Dans la deuxième situation, l'éloignement administratif d'une personne est ordonné après sa condamnation par un tribunal;
- Dans la troisième situation, un étranger en situation irrégulière est condamné après qu'une mesure d'éloignement administratif a été prise (mais non appliquée);

- Dans la quatrième situation, la personne a été reconnue coupable à plusieurs reprises pour différentes infractions et une mesure d'éloignement est prise sur la base d'une seule de ces condamnations.

Quelques participants soulèvent également une question sur la pertinence de l'exigence selon laquelle il devrait y avoir une relation de "conséquence" entre la condamnation et la décision d'éloignement, en particulier dans le cas où la personne concernée n'a aucune perspective de réhabilitation dans le pays de condamnation parce qu'une mesure d'éloignement a été prise avant qu'elle ne soit condamnée. Les discussions sur ce point révèlent que quelques Etats ont refusé le transfèrement dans de telles situations, parce que la mesure d'éloignement avait été prise avant que la condamnation ne soit prononcée.

- Prise en considération de l'absence de consentement de la personne condamnée dans les situations de transfert couvertes par l'article 3:

Les discussions entre les participants ont mis en évidence des divergences d'interprétation sur les dispositions de l'article 3 du Protocole additionnel relatives à la possibilité de transférer une personne sans son consentement.

L'explication de ces divergences d'interprétation pourrait se trouver dans le rapport explicatif au Protocole. Le paragraphe 29 du rapport explicatif stipule que "*la procédure prévue ne consiste pas en un transfèrement automatique opéré avec le consentement des deux Parties. Elle exige – en plus du consentement donné au transfèrement par les deux Etats concernés – que ceux-ci soient d'accord pour se passer du consentement de la personne condamnée*".

Quelques participants confirment que, en tant qu'Etats de condamnation, ils ont parfois refusé de transférer une personne condamnée au titre de l'article 3, parce qu'elle n'avait pas donné son consentement au transfèrement. Ils l'expliquent par le fait que, dans la plupart de ces cas, le refus était la conséquence de la décision d'un tribunal.

- Comment les Etats devraient-ils gérer les situations dans lesquelles la personne condamnée refuse de donner son avis sur son transfèrement?

Les discussions ont mis en évidence que, parfois, l'Etat de condamnation n'est pas en mesure de fournir l'avis de la personne condamnée car cette dernière a refusé de le communiquer.

B. Propositions

A. **Concernant l'application de l'article 2:**

Les participants suggèrent qu'il conviendrait d'élargir la définition de la notion d'évasion afin qu'elle englobe la situation des personnes condamnées qui ne se sont pas enfuies, mais ont été autorisées à revenir dans l'Etat dont elles sont ressortissantes et ne sont pas retournées dans l'Etat de condamnation pour y purger la peine infligée.

Ils concluent également que l'application de l'article 2 devrait intervenir en guise d'alternative à l'extradition, notamment lorsque l'extradition n'est pas possible en raison de la nationalité de la personne concernée.

Enfin, concernant le transfert des peines suspendues, il est suggéré que les Etats envisagent l'utilisation de la Convention européenne de 1964 pour la surveillance des personnes condamnées ou libérées sous condition (titres 3 ou 4) ou la Convention européenne de 1970 sur la valeur

internationale des jugements répressifs, en guise d'alternative au transfert. Une autre solution serait de ne pas exclure les suspensions révoquées du champ d'application de l'article 2.

B. Concernant l'application de l'article 3:

Les participants s'accordent sur la nécessité de clarifier l'exigence d'une relation de "conséquence" entre la/les condamnations(s) et la mesure d'éloignement. Ils conviennent qu'il faut poursuivre les discussions au sein du PC-OC sur la façon d'apporter cette clarification (instrument contraignant c. instrument non contraignant).

Quelques participants ont suggéré une autre possibilité, et notamment que les Etats, au niveau national, élaborent des mécanismes – une note explicative, par exemple –, de manière à signifier la relation de "conséquence" manquante entre la/les peine(s) et la mesure d'éloignement, lorsque cette dernière a été prononcée avant la/les peines.

Il est également suggéré que les Etats qui ont ratifié le Protocole additionnel veillent à ce que leur législation ou des orientations pratiques nationales permettent la mise en œuvre effective des transfères sur la base de l'article 3. Les participants précisent que les Etats devraient être dotés de dispositions assurant que les refus de transfèrement dans le cadre de l'article 3 puissent être réexaménés/faire l'objet d'un recours dans l'Etat d'exécution, lorsque ces refus découlent de la décision d'un tribunal et sont basés exclusivement sur l'absence de consentement de la personne condamnée.

Enfin, les participants estiment que, lorsque la personne condamnée refuse de donner son avis sur le transfèrement, ce refus doit être interprété comme un refus de consentement, et l'Etat de condamnation doit joindre à la documentation relative au transfèrement un document expliquant pourquoi il lui a été impossible de fournir l'avis de la personne.