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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field
(PC-OC)

Convention on the Transfer of Sentenced Persons
Additional Protocol to the Convention on the Transfer of Sentenced Persons

EXPLANATORY NOTES

This document was prepared and is published under the responsibility of the Secretariat. It is based on the discussions that the PC-OC has entertained about difficulties that have arisen or may arise in respect of the practical application of the two above-mentioned treaties, as well as the recommendations adopted by the Committee of Ministers concerning their practical application. This document should be read in conjunction with the Explanatory Reports to the treaties.

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NB: The word "Meet" followed by a number means that the text that follows was reproduced from the report of the corresponding PC-OC meeting.

PART A
TEXT OF THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

The member States of the Council of Europe and the other States, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

Considering that this aim can best be achieved by having them transferred to their own countries,

Have agreed as follows:

Article 1 – Definitions

For the purposes of this Convention:

a "sentence" means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence;

b "judgment" means a decision or order of a court imposing a sentence;

c "sentencing State" means the State in which the sentence was imposed on the person who may be, or has been, transferred;

d "administering State" means the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

Article 2 – General principles

1 The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

2 A person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

3 Transfer may be requested by either the sentencing State or the administering State.

Article 3 – Conditions for transfer

1 A sentenced person may be transferred under this Convention only on the following conditions:

a if that person is a national of the administering State;

b if the judgment is final;

c if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;

d if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;

e if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and

f if the sentencing and administering States agree to the transfer.

2 In exceptional cases, Parties may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1.c.

3 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9.1.a and b in its relations with other Parties.

4 Any State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" for the purposes of this Convention.

Article 4 – Obligation to furnish information

1 Any sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.

2 If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final.

3 The information shall include:

a the name, date and place of birth of the sentenced person;

b his address, if any, in the administering State;

c a statement of the facts upon which the sentence was based;

d the nature, duration and date of commencement of the sentence.

4 If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to the State the information referred to in paragraph 3 above.

5 The sentenced person shall be informed, in writing, of any action taken by the sentencing State or by the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer.

Article 5 – Requests and replies

1 Requests for transfer and replies shall be made in writing.

2 Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.

3 Any Party may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.

4 The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.

Article 6 – Supporting documents

1 The administering State, if requested by the sentencing State, shall furnish it with:

a a document or statement indicating that the sentenced person is a national of that State;

b a copy of the relevant law of the administering State which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State, or would constitute a criminal offence if committed on its territory;

c a statement containing the information mentioned in Article 9.2.

2 If a transfer is requested, the sentencing State shall provide the following documents to the administering State, unless either State has already indicated that it will not agree to the transfer:

a a certified copy of the judgment and the law on which it is based;

b a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;

c a declaration containing the consent to the transfer as referred to in Article 3.1.d; and

d whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State, and any recommendation for his further treatment in the administering State.

3 Either State may ask to be provided with any of the documents or statements referred to in paragraphs 1 or 2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Article 7 – Consent and its verification

1 The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3.1.d does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.

2 The sentencing State shall afford an opportunity to the administering State to verify through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above.

Article 8 – Effect of transfer for sentencing State

1 The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in the sentencing State.

2 The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed.

Article 9 – Effect of transfer for administering State

1 The competent authorities of the administering State shall:

a continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

b convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

2 The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.

3 The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.

4 Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

Article 10 – Continued enforcement

1 In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

2 If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Article 11 – Conversion of sentence

1 In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

a shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;

b may not convert a sanction involving deprivation of liberty to a pecuniary sanction;

c shall deduct the full period of deprivation of liberty served by the sentenced person; and

d shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

2 If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure.

Article 12 – Pardon, amnesty, commutation

Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Article 13 – Review of judgment

The sentencing State alone shall have the right to decide on any application for review of the judgment.

Article 14 – Termination of enforcement

The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 15 – Information on enforcement

The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

a when it considers enforcement of the sentence to have been completed;

b if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or

c if the sentencing State requests a special report.

Article 16 – Transit

1 A Party shall, in accordance with its law, grant a request for transit of a sentenced person through its territory if such a request is made by another Party and that State has agreed with another Party or with a third State to the transfer of that person to or from its territory.

2 A Party may refuse to grant transit:

a if the sentenced person is one of its nationals, or

b if the offence for which the sentence was imposed is not an offence under its own law.

3 Requests for transit and replies shall be communicated through the channels referred to in the provisions of Article 5.2 and 3.

4 A Party may grant a request for transit of a sentenced person through its territory made by a third State if that State has agreed with another Party to the transfer to or from its territory.

5 The Party requested to grant transit may hold the sentenced person in custody only for such time as transit through its territory requires.

6 The Party requested to grant transit may be asked to give an assurance that the sentenced person will not be prosecuted, or, except as provided in the preceding paragraph, detained, or otherwise subjected to any restriction on his liberty in the territory of the transit State for any offence committed or sentence imposed prior to his departure from the territory of the sentencing State.

7 No request for transit shall be required if transport is by air over the territory of a Party and no landing there is scheduled. However, each State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory.

Article 17 – Language and costs

1 Information under Article 4, paragraphs 2 to 4, shall be furnished in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

2 Subject to paragraph 3 below, no translation of requests for transfer or of supporting documents shall be required.

3 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, require that requests for transfer and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language in addition to the official language or languages of the Council of Europe.

4 Except as provided in Article 6.2.a, documents transmitted in application of this Convention need not be certified.

5 Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.

Article 18 – Signature and entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

3 In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 19 – Accession by non-member States

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting States, may invite any State not a member of the Council and not mentioned in Article 18.1 to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 20 – Territorial application

1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21 – Temporal application

This Convention shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 22 – Relationship to other Conventions and Agreements

1 This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.

2 If two or more Parties have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.

3 The present Convention does not affect the right of States party to the European Convention on the International Validity of Criminal Judgments to conclude bilateral or multilateral agreements with one another on matters dealt with in that Convention in order to supplement its provisions or facilitate the application of the principles embodied in it.

4 If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.

Article 23 – Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application.

Article 24 – Denunciation

1 Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

3 The present Convention shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 25 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention and any State which has acceded to this Convention of:

a any signature;

b the deposit of any instrument of ratification, acceptance, approval or accession;

c any date of entry into force of this Convention in accordance with Articles 18.2 and 3, 19.2 and 20.2 and 3;

d any other act, declaration, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 21st day of March 1983, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

PART B
TEXT OF THE ADDITIONAL PROTOCOL TO THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

Preamble

The member States of the Council of Europe, and the other States signatory to this Protocol,

Desirous of facilitating the application of the Convention on the Transfer of Sentenced Persons opened for signature at Strasbourg on 21 March 1983 (hereinafter referred to as "the Convention") and, in particular, pursuing its acknowledged aims of furthering the ends of justice and the social rehabilitation of sentenced persons;

Aware that many States cannot extradite their own nationals;

Considering it desirable to supplement the Convention in certain respects,

Have agreed as follows:

Article 1 – General provisions

1 The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention.

2 The provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Protocol.

Article 2 – Persons having fled from the sentencing State

1 Where a national of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence.

2 At the request of the sentencing State, the administering State may, prior to the arrival of the documents supporting the request, or prior to the decision on that request, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory, pending a decision on the request. Requests for provisional measures shall include the information mentioned in paragraph 3 of Article 4 of the Convention. The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reason of this paragraph.

3 The consent of the sentenced person shall not be required to the transfer of the execution of the sentence.

Article 3 – Sentenced persons subject to an expulsion or deportation order

1 Upon being requested by the sentencing State, the administering State may, subject to the provisions of this Article, agree to the transfer of a sentenced person without the consent of that person, where the sentence passed on the latter, or an administrative decision consequential to that sentence, includes an expulsion or deportation order or any other measure as the 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.

2 The administering State shall not give its agreement for the purposes of paragraph 1 before having taken into consideration the opinion of the sentenced person.

3 For the purposes of the application of this Article, the sentencing State shall furnish the administering State with :

a a declaration containing the opinion of the sentenced person as to his or her proposed transfer, and

b a copy of the expulsion or deportation order or any other order having the effect that the sentenced person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

4 Any person transferred under the provisions of this Article shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, for any offence committed prior to his or her transfer other than that for which the sentence to be enforced was imposed, nor shall he or she for any other reason be restricted in his or her personal freedom, except in the following cases:

a when the sentencing State so authorises: a request for authorisation shall be submitted, accompanied by all relevant documents and a legal record of any statement made by the convicted person; authorisation shall be given when the offence for which it is requested would itself be subject to extradition under the law of the sentencing State or when extradition would be excluded only by reason of the amount of punishment;

b when the sentenced person, having had an opportunity to leave the territory of the administering State, has not done so within 45 days of his or her final discharge, or if he or she has returned to that territory after leaving it.

5 Notwithstanding the provisions of paragraph 4, the administering State may take any measures necessary under its law, including proceedings *in absentia*, to prevent any legal effects of lapse of time.

6 Any contracting State may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate that it will not take over the execution of sentences under the circumstances described in this Article.

Article 4 – Signature and entry into force

1 This Protocol shall be open for signature by the member States of the Council of Europe and the other States signatory to the Convention. It shall be subject to ratification, acceptance or approval. A Signatory may not ratify, accept or approve this Protocol unless it has previously or simultaneously ratified, accepted or approved the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.

3 In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.

Article 5 – Accession

1 Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.

2 In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 6 – Territorial application

1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2 Any Contracting State may, at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 7 – Temporal application

This Protocol shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 8 – Denunciation

1 Any Contracting State may at any time denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

3 This Protocol shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of both the Convention and this Protocol before the date on which such denunciation takes effect.

4 Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 9 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any Signatory, any Party and any other State which has been invited to accede to the Convention of:

a any signature;

b the deposit of any instrument of ratification, acceptance, approval or accession;

c any date of entry into force of this Protocol in accordance with Articles 4 or 5;

d any other act, declaration, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this eighteenth day of December 1997, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the

Council of Europe, to the other States signatory to the Convention and to any State invited to accede to the Convention.

PART C
EXPLANATORY NOTES TO THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

CONTENTS:

I. General difficulties met when working with the Convention
II. Ad hoc inter-State arrangements for the application of the Convention
III. Guiding principles embodied in the Preamble
IV. Notes concerning given articles

I. General difficulties met when working with the Convention

Meet 28

The expert from Germany raised the issue that some Parties to the Convention on the Transfer of Sentenced Persons, in varying ways and for different reasons, take a longer than reasonable time to go through the procedures provided for in the Convention. The longer it takes, the less likely it becomes for the Convention to be largely used in the future.

Several experts underlined the advantages of using the form appended to the Recommendation (92) 18 which, it was recalled, is a text prepared by the Committee. By using the form, the sending authority will i.a. quickly get to know in whose hands the file is in the receiving end.

It was also pointed out by many that often all the information that is necessary in order to carry on speedily with the procedures is not promptly made available. That can be the cause of many avoidable delays. In particular, the "penal" situation of the person concerned (duration of remand in custody, how long he has served the sentence, any credit of time due to some special reason, etc) is not clearly spelt out in the documents. Another document which is perceived as essential and often does not meet the requirements is the document certifying the consent of the person concerned.

Meet 30

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

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

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

- difficulties in receiving the right information necessary for acceding to transfer requests;

- difficulties in obtaining precise information on the rules pertaining to the implementation of custodial sentences in the administering State;
- difficulties in obtaining precise information on the penal situation of the sentenced person.

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

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

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

Meet 43

The Committee held an overall discussion on these matters to conclude as follows:

- it should be possible in humanitarian cases for the authorities in both countries concerned to cut corners in the procedure and very quickly proceed to the transfer of the person;
- as soon as they enter the prison gates, even at pre-trial stage, inmates should be informed of their present or future right to request transfer; this will contribute to requests being filed at an early stage;
- for that purpose the national sheets should be available and updated
- national sheets of foreign countries should be distributed to prisons,
- national sheets of one's country should be distributed to that country's embassies abroad
- the awareness of prison authorities, local authorities and federated States' authorities with transfer possibilities must be increased;
- it should be recommended that the information furnished by the sentencing State to the administering State under Article 4.3 already includes all or part of the documents listed in Article 6.2
- also translations should be provided at an early stage
- moreover, part of the information required by the administering State should be made available by the Secretariat in the web site of the CoE
- the list of officials responsible should also be available at any time, preferably in a website, if the protection of the personal data of such officials is respected;
- standard forms for acknowledgment of receipt of in-coming requests must be put into practice
- avoid delays in carrying out the transfer once the decisions have been taken
- dealing with the problem of the withdrawal of consent by the person concerned
- fax transmission of requests and supporting documents should be provided for

II. Ad hoc inter-State arrangements for the application of the Convention

Meet 39

The expert from Italy recalled that in the spring of 1998 his government had requested the CDPC to seek to facilitate a friendly settlement, in accordance with Article 23 of the Convention, of difficulties which had arisen out of the application of the Convention between Italy and the USA. Having discussed the matter at its 47th plenary session in 1998, the CDPC

approved observations (Appendix VII to doc. CDPC (98) 23) and requested the Secretary General to forward them to the governments of Italy and the United States.

The expert from Italy reiterated his country's appreciation of the role played by the Council of Europe in this matter. Such a role had indeed been instrumental in assisting the two countries involved in reaching an agreement, as had been the case recently.

In fact, the person in question was already transferred from the USA to Italy, under such conditions as to ensure that she will remain in prison until a given date in 2008. Should she be released from prison before that date, Italy shall at the request of the USA transfer her back.

The person concerned consented to her transfer under the conditions laid down in the agreement. In a judgement dated 7 July 1999, the Court of Appeal of Rome found that the terms of the agreement were consistent with the Convention, ratified the agreement and thus conferred upon it an executing effect. That judgement, translated into English, will appear in document PC-OC / INF 35.

The expert from Italy went on to say that in his view the Convention was too rigid and in that way inadequate to cope with present-day needs. The Convention was not flexible in the sense that requests were either to be totally granted or totally rejected. The Convention did not provide a mechanism for ad hoc arrangements that took care of the particularities of each case.

He invited the Committee to consider the advantages of introducing such a mechanism.

The expert from the USA supported the views expressed by the expert from Italy. He stressed that the Convention did not preclude ad hoc arrangements.

It was said by others that the Convention should not be used as an instrument under which ad hoc arrangements were agreed upon, according to which the States involved would follow a course of action opposite to that which is foreseen under the Convention. Indeed the case under the USA/Italy agreement seems to be that it nullifies the provision of Article 9.3 of the Convention.

It was also questioned whether ad hoc arrangements were consistent with the spirit of the Convention. Was it not one of the purposes of any Convention to close negotiations as to how to deal with a given category of situations? Should it now become routine practice to discuss from scratch the terms under which sentenced persons are transferred, then the Convention would become purposeless.

The Committee noted with satisfaction that difficulties that arose between two States Party to the Convention were settled to their mutual contentment. It further noted that the Council of Europe was instrumental to that effect. In due time, lessons should be withdrawn both from the procedure that led to a certain result and from the result in itself.

III. Guiding principles embodied in the Preamble

Meet 31

At the request of the expert from Italy, the Committee was called upon to discuss priorities afforded by States, when applying Convention ETS 112, between the two objectives stated in the Preamble to that Convention, namely (a) the ends of justice and (b) the social rehabilitation of sentenced persons, in particular if and when such objectives enter into conflict with one another.

The Committee recognised that the ends of justice, including the enforcement of the sentence, are a major aim of the Convention. The latter therefore does not authorise action designed to obviate or by-pass the execution of the sentence. Indeed, upon agreeing to a transfer, administering States undertake to execute the sentence, either by way of continuing enforcement, or by way of conversion.

Difficulties may arise where there is great discrepancy between the actual length of the prison term that the transferee, should he not be transferred, would have to serve in the sentencing State and the actual length of the prison term that the transferee, should he be transferred, would have to serve in the administering State.

Where there is great discrepancy, some States tend to consider that, should the person be transferred under such conditions, the ends of justice are not served.

The Committee also recognised that the social rehabilitation of sentenced persons is equally a major aim of the Convention. This aim can better be served by allowing sentenced foreign persons to serve their sentence within their own society, i.e. by transferring them.

The two aforementioned aims of the Convention are placed on the same footing in the Preamble. In technical terms, there is no gradation of importance or priority between them. It follows that both objectives must be pursued compatibly with one another.

However, whilst the ends of justice may be achieved regardless of the Convention, rehabilitation of foreign detainees can better be achieved through the Convention. The Committee thus considered that the objective of rehabilitation is the "raison d'être" of the Convention.

Furthermore, the Committee shared the view that the Convention has a humanitarian dimension. Indeed, bringing foreign detainees back home amounts to reducing their hardship to the same level as that of national detainees, by way of giving them the same chance that the latter already have, i.e. "to serve their sentences within their own society".

In principle, the objective of rehabilitation is served in all cases of transfer; the objective relating to the aims of justice might, in the view of some States, not be entirely served in all cases. Hence, the situation where States may have to ponder between either (a) serving rehabilitation while not entirely fulfilling the ends of justice, or (b) not serving rehabilitation while ensuring the fulfilment of the ends of justice.

Whilst recognising that the balance between the two terms is not even, the Committee however accepted that there is no straightforward answer to the dilemma. Only on a case by case basis, depending on the particular circumstances of each case, will it be possible to decide one way or the other.

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

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

In **Recommendation No. R (99) 20** concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field, the Committee of Ministers recognises "*that through such Conventions it pursues the goals notably of:*

- *upholding the rule of law;*
- *promoting human rights;*
- *fighting for democratic stability in Europe;*
- *strengthening European legal co-operation in criminal matters;*
- *supporting victims and redressing their rights;*
- *pursuing the ends of justice by bringing before a court of law those who are accused of having committed a crime;*
- *promoting the social rehabilitation of offenders*."

IV. Notes concerning given articles

ARTICLE 1

Meet 30
Canada would like a wider interpretation of the term "deprivation of liberty".

Meet 33
The Committee discussed the following hypothetical case: where (a) a sentenced person is transferred from one State to another for the purpose of serving the sentence, and (b) new facts made surface that lead the sentencing State to initiate procedures for a review of the sentence, how can the presence of the sentenced person in the sentencing State be obtained (?).

Extradition would not apply. Even if some experts expressed the view that Article 11 of the European Convention on Extradition could be used in this context, most experts thought otherwise. It is clear that the Convention on the Transfer of Sentenced Persons does not cover this situation.

> NB: Following this discussion, Article 14 was introduced in the 2nd Additional Protocol to the European Convention on Mutual Assistanvce in Criminal Matters (cf. § 112 of the Explanatory Rteport thereto, that reads as follows: « *This article aims at fulfilling a gap in the Convention on the Transfer of Sentenced Persons. It is in no way related to extradition. The purpose of this article is to put States in a situation where they can meet the legitimate expectations of transferred prisoners not to jeopardise, on account of their absence, the review of their judgement, if and where such a review takes place.* »
> Cf.also meet 34, §§ 14-31.

Meet 36 (re-transfer to a third State)
Document PC-OC (98) misc 2 led the Committee to discuss this matter.

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

Most speakers appeared to agree on the following:

- the Convention must not be used as if it were a travel agency;
- however, it is the primary purpose of the Convention to facilitate the rehabilitation of the sentenced person and, thus, re-transfer must not be ruled out;

- re-transfer should require the agreement of (1) the person concerned, (2) the sentencing State, (3) the first (or intermediate) administering State and (4) the second (or final) administering State;
- the question of who may take the initiative is irrelevant in practical terms.

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

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

Meet 43

The ER to the Convention on the Transfer of Sentenced Persons states in paragraph 13 that the Convention applies "[..] regardless of whether the person concerned is already serving his sentence or not."

A case occurred where an offender had been sentenced in State A, but moved home to State B before having served his sentence. Because the sentenced person wanted to be able to go back to State A for visits without fearing imprisonment, he applied for the sentence to be served in State B. The authorities of State A applied to the authorities of State B for a transfer of the execution of the sentence, and referred to paragraph 13 of the ER.

The authorities of State B replied that the Transfer Convention did not apply under the circumstances and suggested using the European Convention on the International Validity of Criminal Judgements.

It appears from the discussion that the above-mentioned phrase from the Convention's ER does not find support in practice and thus indeed the Transfer Convention would usually be considered not to be applicable under the circumstances described.

Meet 43

The Committee appeared to endorse the idea that the Convention provides a procedural framework for carrying out a sentence imposed on a person by a court of any Party in the process of legitimate exercise of its criminal jurisdiction. Thus, where a Party would exercise criminal jurisdiction that is not authorised by, or permitted under, or in conformity with general international law, the Convention would not apply.

The Committee also appeared to endorse the idea that the Convention does not preclude the possibility of transferring a person who has been sentenced by a Party on a territory other than its own, where that Party is exercising criminal jurisdiction recognised by a treaty.

ARTICLE 2

Meet 28

The expert from Turkey raised the following issue. The implementation of the Convention on the Transfer of Sentenced Persons raises some difficulties, amongst which the fact that most Contracting States refuse requests for transfers to Turkey. In so doing, they rely on different reasons that seem to be conflicting with the objectives of the Convention. In other terms, the Convention does not function at all with respect to sentenced persons of Turkish nationality.

Several experts said that the Turkish practice concerning early release of transferred prisoners could preclude other Parties to the Convention from agreeing to transfers to that country. The expert from Turkey explained that in fact the Turkish Law No. 3713 of 8 April 1991 on terrorist offences provides for the conditional release of prisoners convicted for offences committed prior to that date who have a good record of their behaviour in prison, after having served one fifth of their term. That law applies also to persons transferred to Turkey under the Convention. However, it does not apply to offences committed after that date. He added that conditional release does not amount to final discharge.

One expert stated that the Turkish authorities, in assessing the qualification of transferred sentenced persons for early release, presume their good behaviour in the sentencing State. In replying to this, the expert from Turkey said that his authorities always take into consideration any reports on the transferred person's conduct in prison that the sentencing State cares to forward to Turkey.

Meet 34 (choice between extradition and transfer)

If :
- a national of State A was sentenced and serves a sentence in State B;
- proceedings are pending in State A against the same person for an offence other than the offence for which he was sentenced in State B;
- State A seeks the presence of the person on its territory for investigation and trial.

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

Some experts considered that, under the above-mentioned circumstances, State A does not have an option between extradition and transfer since the only legally appropriate procedure in order to achieve its aim is extradition; to obtain the transfer of the person under the Transfer Convention in order to obtain a result that cannot be subsumed under the aims of the Convention would amount to abusing the transfer procedure and to achieve a disguised extradition.

It is a general principle of international law that treaties must be executed in good faith. It follows that the application of a treaty for purposes other than the purposes recognised by the treaty itself is contrary to international law. And it may be challenged unless all the parties concerned explicitly or implicitly consent. Thus, the transfer procedure can only be legitimately used in order to try the person if all the interested parties are well aware of what is going on and consent to it. This also applies to the person concerned because his consent is a conventional requirement for the operation of the Convention.

The same conclusion can be drawn from another ground. Indeed, the Convention requires that, in giving his consent to his transfer, the person must have "full knowledge of the legal consequences thereof". It follows that, should the administering State abstain from revealing to

the person certain legal consequences, the person's consent will not have been fully knowledgeable.

Some experts, however, followed a pragmatic approach according to which:
- transfer procedures, because they are quicker and less burdensome than extradition procedures, may be used instead of the latter;
- it is legitimate to do so because the person concerned is necessarily aware of its past behaviour in the administering State and, when he consents to transfer, he implicitly consents to proceedings and trial for past behaviour, regardless of whether proceedings have already been initiated or will be initiated in the future;
- the requirement in Article 7 of the Convention concerns "legal" consequences only, present and future, meaning consequences resulting from the law, abstract as it is, not concrete consequences.

ARTICLE 3

Meet 40

A question was raised (by the expert from Norway - cf. docs PC-OC (2000) 7), as follows. In one case, a Norwegian citizen applied to be transferred to Norway to serve a sentence imposed on him in another Party. He claimed that he had been provoked by the police into performing the illegal act for which he was sentenced. Such provocative methods by the police are accepted and legal in the sentencing Party; however, they may not substantiate a conviction in Norway. Thus, the Director of Public Prosecution concluded that, had the act been committed in Norway, no punishment could have been imposed. The Norwegian authorities thus rejected the application for transfer. On appeal, according to the Norwegian Public Administration Act, it was found that the conditions in Article 3(1)(e) had been met and, therefore, transfer was finally granted.

In reaching conclusions in the appeal, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2, as well as the opinion of Mr. Michal Plachta stated in the book «Transfer of Prisoners under International Instruments and Domestic Legislation» (1993) page 315.

Once transferred, the person now claims that he is illegally detained in Norway because the act for which the sentence was imposed, does not constitute a criminal offence in Norway.

The Ministry of Justice asked for the Committee's opinion on the following questions:

i. Should the expression «the law» be interpreted only as the written law, i.e. the Penal Code, or can it also include the interpretation of «the law» as in «the whole body of such customs or practices», i.e. also case law etc.?

ii. Is the expression «double criminality» to be interpreted as double criminality *in concreto* or double criminality *in abstracto*? There seems to be a difference in opinion between the «Explanatory Report» and Mr. Plachta as the latter finds it sufficient with double criminality *in abstracto* while the report indicates the opposite.

The Committee thought that the word "law" in Article 3 of the Convention should be interpreted to include all sources of law (statute, common law, customary law, …), in the meaning usually given to the word that figures in the French version of the Convention, namely the word "*droit*" (as opposed to "loi").

Many experts talked in favour of dual criminality being assessed in concreto, as is proposed in the explanatory report. In abbreviated terms, dual criminality means (a) looking at the "law" of both countries, as it applies, or as it would apply, to the concrete circumstances of the case, and (b) assessing whether there is sufficient overlap in view of the effect sought.

Recalling the provisions of the Convention that require that the person's consent must be informed, many said that such a consent carried with it the acceptance of the effects of transfer in the administering Party. In other words, the possibility should not be considered of giving transferred persons the right to challenge the effects of transfer in the administering State.

Moreover, it would be circumventing the provisions of Article 13 to give transferred persons the right to apply to the administering State for a direct or indirect review of the judgment

It was also said that the legitimate interest of the sentencing State in that the sentence be fully served cannot be frustrated by allowing for the sentence to be challenged in the administering State.

It can always happen that it is not before the actual transfer of the person that it becomes apparent or that it is found that the dual criminality requirement was no met. In such circumstances, the remedy could not be to free the person, but rather to annul the transfer and return the person.

Cf. **Recommendation (88) 13**

ARTICLE 4

Recommendation (84) 11 reads as follows (excerpt):
"*The Committee of Ministers …*
… desirous of assisting Contracting States to fulfill their obligation, under Article 4.1 of the convention, to furnish sentenced persons to whom the convention may apply with information on its substance; …
… recommends the governments of member states to provide an authoritative translation of the standard text annexed to this recommendation into their official language or languages, taking into account any reservations or declarations to the convention of which the potential transferees would need to be aware, and deposit the translation with the Secretary General …"

NB: The translations mentioned are available in the net; they are regularly circulated by the Secretariat to prison administrations in member States.

ARTICLE 5

Cf. **Recommendation (88) 13**

ARTICLE 6

Meet 28
The expert from Germany raised the following question. Article 6.2.(a) of the Convention on the Transfer of Sentenced Persons provides that the sentencing State shall provide the administering State i.a. with a certified copy of the judgment. However, in some cases the full facts on which the sentence is based are not apparent from the text of judgement. That is the case e.g. with judgements on appeal.

A comprehensive statement of the facts is necessary for the administering State to ascertain double criminality. And indeed Article 4.3.(c) requires the sentencing State to forward to the administering State a statement of the facts upon which the sentence was based.

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

On a related issue, the Committee agreed that, where a translation of the judgment is required by the administering State, and the original sentence is long and/or complicated, as a general rule translation of select extracts of the judgment, or a summary thereof, should suffice. Where and when the administering State deems necessary to have more information than that contained in the translated extracts of the judgment, it may of course so request from the sentencing State.

Meet 41

The Convention provides for exchange of information and/or documents on three different sets of circumstances, namely:

(a) at a preliminary stage where the person has expressed an interest in being transferred (Article 4, paragraphs 2 to 4);
(b) requests for transfer, replies and supporting documents (Article 5 and Article 6, paragraphs 1 and 2);
(c) information and documents asked by either State before any request for transfer was made (Article 6.3).

Article 17 deals with the question of languages to be used. It distinguishes between the situations described above under (a) and (b) and makes provision for languages to be used in one case as in the other. However, it remains mute with regard to the situation described under (c).

No other article of the Convention makes provision for languages to be used in the situation described under (c).

Hence the question: which languages may be used for the purposes of applying Article 6.3 of the Convention, i.e. when a State provides information and/or documents asked for by another State before any of them having requested the transfer of a sentenced person.

Firstly it should be recalled that several articles of the Convention clearly indicate that the latter applies even before a request for transfer is made. Thus the reply to the question above should be found within the Convention.

There appears to be no reason for considering that declarations made under Article 17.3 – which in fact have the purpose of derogating from the rule laid down in Article 17.2 – should apply to any information and/or documents other than "requests for transfer and supporting documents".

Which leaves us with the rule under Article 17.1 and the rule under Article 17.2. The first applies to information under Article 4, paragraphs 2 to 4; the second applies to requests for transfer and supporting documents. None apply to “information and/or documents asked by either State before any request for transfer was made”.

One might be led to investigate, for the purposes of the Convention and bearing in mind its operation, which of the two situations (i.e. (a) above and (b) above) is closest to "information and/or documents asked by either State before any request for transfer was made".

Article 4 bears the title "obligation to furnish information". That has to do with an obligation imposed on both States to seek and furnish such information as may be required so that each and all the three actors are in a position where they may decide either to agree or not with the transfer.

If one reads the part of the explanatory report to the Convention that covers Article 4, one cannot but be realise that it could have been written having in mind information and/or documents asked by either State before any request for transfer was made. The following illustrates that:

> *"30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that state to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.*
> *"31. If the sentenced person has expressed his interest in a transfer not to the sentencing state, but to the state of which he is a national, paragraph 4 applies: in that case, the sentencing state provides the information referred to in paragraph 3 only upon the express request of the state of which the person is a national."*

Conversely, no clear argument appears that would allow to bring closer together "information and/or documents asked by either State before any request for transfer is made" and "requests for transfer , replies and supporting documents".

The conclusion therefore could be that information and/or documents asked, under the provisions of Article 6, paragraph 3 of the Convention, by either State, before any request for transfer is made, should be transmitted in the language of the Party to which it is addressed or in one of the official languages of the Council of Europe.

The Committee decided not to close the discussion on this matter and to come back to it in due time.

Cf. **Recommendation (92) 18**

ARTICLE 7

Cf. **Recommendation (88) 13**

ARTICLE 9

Meet 36 (mentally disturbed offenders)

The question was raised of mentally disturbed persons sentenced in a country which is not theirs. In this respect, the point was made and acknowledged by all that it is most important and urgent to transfer such persons to their countries of origin.

This matter is covered by Article 9.4 of the Convention that reads as follows: "Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another Party on persons who for

reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases."

It should be noted that only Greece, Iceland, Ireland, Malta, Norway, Sweden and Israel made declarations under Article 9.4. No one of them declared that it "cannot ... enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence". In other terms, all the Parties to the Convention appear to be in a position both to transfer out and transfer in mentally disturbed offenders.

This conclusion however should be confirmed by the Secretariat by way of a written question circulated to the members of the Committee.

The Committee will come back to this matter at its next meeting, on the basis of both the replies to the above letter and a paper that will be prepared and submitted by the experts from the Netherlands.

Meet 43 (article 9.1)
It was brought to the attention of the Committee that certain sentencing States require from the administering State *specifically* continued enforcement under Art. 10 of the Convention, even where the administering State as a rule applies the conversion of the sentence under Article 11.

Article 9 has been understood to provide an alternative to the administering State, not to the sentencing State. The question therefore is whether the sentencing State must accept the choice of the administering State in applying either continued enforcement or the conversion of a sentence.

It was said that there are advantages for States to be ready to use one system or the other depending on what is required by the sentencing State. While there in no obligation to do it, there might be a practical advantage in so doing because otherwise certain transfers will just not be possible.

It was noted that the ability to use the conversion system was particularly useful where extradition (of nationals) coupled with transfer was used.

Meet 43 (mentally disturbed offenders)
The issue: Where an offender who has not been convicted but who is being detained in a mental hospital absconds and flees to another jurisdiction, what can or should be done by the authorities in the two jurisdictions?

The legislative background: Under Irish law at present a special verdict of “guilty but insane” may be returned (proposed new legislation will provide that henceforth this will be called “not guilty by reason of insanity”); such a verdict is one of acquittal but the relevant statute requires that the former accused be detained until such time as the authorities are satisfied that it is safe to release the person. The new legislation will also introduce a new plea of “guilty with diminished responsibility” in case of murder. The introduction of the new partial defence of diminished responsibility is likely to result in a decrease in the number of pleas of insanity, the expectation being that accused persons will prefer to plead diminished responsibility. However, the difficulty which has arisen in the case described below could continue to arise. We would like to explore with other delegations what might be done to avoid a repetition of what happened in this case.

The case: In July 1989 a jury in the Central Criminal Court returned a verdict of "guilty but insane" against a person charged with two counts of murder and the Court ordered that the person be detained in the Central Mental Hospital (which caters specifically for such people). Beginning in 1991 the person's detention was reviewed on six occasions by independent advisory committees each consisting of a senior counsel, consultant psychiatrist and a general medical practitioner.

Following such a review in May 1999 a revised parole programme incorporating a phased increase in work parole, group outings and both accompanied and unaccompanied outings was put in place. The programme was designed to provide objective evidence as to whether or not the person concerned continued to be a risk by reason of his continued mental disorder.

In July 2000 the person failed to return to the hospital from a period of temporary release granted as part of the programme of phased releases as recommended by the advisory committee. The person was deemed to be unlawfully at large and the Garda Síochána (police) were requested to search for and return him to the hospital. They, in turn, sought the assistance of the police authorities in other jurisdictions, including the United Kingdom, where he was apprehended shortly afterwards. However, the person was subsequently released by the UK authorities following an examination by UK psychiatrists who found that he did not suffer from a psychiatric condition warranting his detention under English law.

The person could not be returned compulsorily to Ireland as the relevant extradition legislation allows only for warrants for the extradition of accused or convicted persons and the person concerned did not fall into either category. In failing to return from temporary release the person did commit an offence, an offence of being unlawfully at large. However, this is a summary offence only and the relevant legislation allows the extradition procedure for a summary offence to proceed only where a summons has been served personally on the defendant at least 14 days before the Court hearing; this is not a practical proposition where a person is intent on fleeing from the authorities.

The Committee appeared to agree that a solution could not to be found in the existing arrangements for the transfer of sentenced persons. As mentioned above, arrangements for the transfer of persons under mental health provisions do not meet present needs.

However, certain experts thought that the EU extradition treaty would apply under the circumstances described. It was less clear whether the European Convention on Extradition would apply or not.

ARTICLE 11

Meet 34 (transfer of recidivists)

If:

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

Question:

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

The Committee considered that the court in State B is bound by the findings of the court in State A, including its findings with respect to the criminal record of the sentenced person. It may not, for example, based on the fact that the person has a clean criminal record in State B, find that the person is not a recidivist and thus disregard the findings of the court in State A. However, it does not follow that the court in State B is bound to draw any legal consequences from the finding that the person is a recidivist.

ARTICLE 15

Cf. **Recommendation (92) 18**

ARTICLE 17

Meet 28

The expert from Turkey wished to know how other contracting States read and applied the wording in the explanatory report (paragraph 77) to the Convention stating, with respect to Article 17, that "the administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person".

To this question, many experts replied that as a general rule they do not attempt to recover costs from the person transferred. One expert said that his authorities would usually seek to recover the costs of the air fare without however allowing the issue of recovering costs to bar or disincentive transfer.

Meet 39

The question was raised (by the expert from the Slovak Republic) of whether the costs of transfer that the Convention allots to the administering State (the receiving end) may be, or ever are in practice, devolved to the person concerned. Thus, the following concerns only the administering State.

Different answers were given to this question, as follows:

- the USA require persons who wish to be transferred to sign a “promissory note” with respect to costs, then the government bears the costs and then the government endeavours to execute the promissory in order to recover the costs. Thus the question of the actual transfer of the person is separated from the question of the financial implications of the transfer;
- the person concerned is not required to pay the costs of transfer. However it is known that, should the person wish to pay, the pace of the procedure will significantly speed up (TK);
- the costs of transfer are borne by the State (N, P, CY, ROM, ISL);
- the costs of transfer can be billed to the person concerned although in practice they are borne by the State (ISL);
- the costs of transfer are either borne by the State or devolved to the person, depending on a case by case appraisal (MLT).

The Committee agreed that where transfer is made subject to the person paying the costs, that will prevent many persons from being transferred and thus constitutes an obstacle to the

application of the Convention. Moreover it is a discriminatory practice.

It was suggested that it might often be in the financial interest of the sentencing State to bear the costs of transfer. The provisions of Article 17 of the Convention do not prevent States from making arrangements to that effect in between them.

Meet 41
Cf.above re Article 6

ARTICLE 23

Meet 28
In a letter of 1 February 1993 from the Permanent Representative of Turkey to the Director of Legal Affairs, the following is stated (extract):

" ....

Pursuant to the instructions I have just received from my government, I have the honour to ask you to include in the agenda for the meeting of the Bureau of the European Committee on Crime Problems, to be held on 12 February 1993 the question of the nature, validity and enforceability of the declarations made by Germany when it ratified the Convention on the Transfer of Sentenced Persons on 31 October 1991.

I would point out that this request is made under the terms of Article 23 of the Convention, entitled "Friendly settlement".

.... "

7. At its meeting on 12 February 1993, the Bureau of the CDPC examined the request and considered that neither it nor the CDPC was competent to decide on "the nature, validity and enforceability of declarations" made by States when they ratified conventions. However, with regard to the Convention on the Transfer of Sentenced Persons (ETS 112) and in as much as the declarations and reservations made by one of the Parties could give rise to difficulties for one or more other Parties, the Bureau considered that the PC-OC Committee could discuss the matter, as it had done on several other occasions in the past.

Indeed, the PC-OC Committee was the body given permanent responsibility by the CDPC for facilitating the friendly settlement - where necessary - of any difficulty of application of the various Council of Europe conventions in the penal field.

The Bureau decided, subject to CDPC approval, to instruct the PC-OC Committee to include in the agenda for its next meeting concerned with the "operation of conventions" the examination of possible difficulties arising from the declarations and reservations made by Germany with respect to Convention ETS No. 112.

8. At its 42nd plenary session (June 1993), the CDPC endorsed its Bureau's decision.

The Committee PC-OC was therefore called upon to examine this question.

9. The declarations under review are contained in a letter from the Permanent Representative of Germany handed over at the time of deposit of the instrument of ratification on 31 October 1991 and read as follows:

"Re the Convention as a whole:

In conformity with the preamble of the Convention, the Federal Republic of Germany understands that the application of the Convention should further not only the social rehabilitation of sentenced persons, but also the ends of justice. Accordingly, it will take the decision on the transfer of sentenced persons in each individual case on the basis of all punitive purposes underlying its criminal law."

"Re Article 3.1:

The Federal Republic of Germany will take charge of enforcing sentences in accordance with the Convention only on condition that

a) the sentence was imposed in a trial conforming to the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and its supplementary protocols where these are in force for the Federal Republic of Germany,

b) no judgment or decision having similar legal effects has been passed against the person prosecuted for the same offence in the Federal Republic of Germany,

c) enforcement of the sentence is not barred under the law applicable in the Federal Republic of Germany due to lapse of time or would not be so barred after analogous conversion of the facts.

The Federal Republic of Germany will transfer enforcement of judgments in accordance with the Convention to other member States only if it is guaranteed that

a) the sentenced person is prosecuted, sentenced, detained for the enforcement of a penalty or detention order or subjected to any other restriction of his personal liberty in respect of an offence other than that underlying the transfer and committed before the surrender only in the following cases:

aa) if the Federal Republic of Germany consents or

bb) if the transferred person has not left the territory of the administering State within 45 days of his final discharge despite having had the opportunity to do so or if, having left such territory, has returned there,

and

b) the administering State will not prosecute again or enforce a new sentence in respect of the offence underlying the judgment."

"Re Article 12:

In view of the federal structure of the Federal Republic of Germany and the fact that the Länder have competence in respect of decisions regarding pardons, the Federal Republic of Germany reserves the right to transfer the enforcement of judgments to another member State in accordance with the Convention only on condition that, on the basis of a general or case-to-case declaration by the administering State, pardon will be

granted in the administering State only in agreement with the German pardoning authority."

10. The expert from Turkey made a declaration along the following lines:

The German declarations concerning Articles 3.1 and 12 of the Convention on the Transfer of Sentenced Persons raise difficulties owing to the system of that Convention.

According to Article 19 of the Vienna Convention on the Law of Treaties, if a State, at the time of signature or ratification of a treaty, declares that it accepts one of the articles therein only if interpreted in a certain sense, excluding all other interpretations, and its declaration is therefore meant to exclude the legal effect of some provisions of the treaty, that declaration is to be legally qualified as a reservation.

A State which formulates a reservation recognises that the treaty had a certain force, but it wishes to change, restrict or extend one or several provisions of the treaty in so far as the reserving State itself is concerned.

On the other hand, a State making an interpretative declaration declares that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attaches an objective and general value to that interpretation. In other words, it considers itself bound by the treaty and wishes, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.

If a State recognised a general interpretation and afterwards gives a subjective one, valid for that State only, it is in effect formulating a reservation.

However, where a treaty is silent on the question of reservations, reservations may only be made provided that they are compatible with the object and purpose of the treaty.

Concerning the second paragraph of the German declaration relating to Article 3.1., it should be noted that the provision enumerates six conditions that must be fulfilled if a transfer is to be effected under the terms of the Convention. In fact, the wording of the said paragraph frames the rules explicitely with a limitation.

The second paragraph of the German declaration concerning Article 3.1 of the Convention aims to broaden the scope of the clause and include the rule of speciality among the conditions for transfer. If we take a look at paragraph 40 of the Explanatory Report to the Convention, published by the Council of Europe, we will easily see that the authors of the Convention intentionally deleted the rule of speciality from the text. They acknowledged that since the person being transferred was being moved at his own request, it was not considered necessary to lay down the rule of speciality. The legal position of the transferee is completely different from a person surrendered under duress. The choice that the convicted person faces is either to request transfer to his home country where he may be prosecuted and punished for other offences, or to waive the benefits of serving his term at home in exchange for avoiding further charges in the enforcing State. That is why in the Appendix to Recommendation R (84) 11 of the Committee of Ministers concerning information about the Convention, there is a phrase under the heading "Prosecution for other offences" where the persons are warned that the transferees can be prosecuted, sentenced or detained for any offence other than that subject to the transfer.

So, Germany proposes to change the essential content of the Convention by a so-called interpretative declaration which is closely resembling a reservation. And such a reservation is incompatible with the object and purpose of the Convention.

The second contradiction emanates from the German declarations concerning Article 12.

Article 12 of the Convention lays down the general principle that the administering State is solely responsible for the enforcement of the sentence, including any decisions related to it. Pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administrating State, in accordance with its Constitution or other laws. The German declaration provides for the agreement of the German authorities, as an essential condition for applying this rule. If we make a compatibility test whether such a condition can be regarded as a declaration or rather as a reservation, we may easily see that it is a reservation because of its nature. Such a reservation is also in contradiction with the object and purpose of the Convention since the authors left the execution of sentence, after transfer, in the hands of the authorities of the administering States.

Through the provisions of the Convention, the sentencing State expressly relinquishes its right to execute on its territory a sanction imposed by its courts. Since the receiving country assumes enforcement of the judgment, the execution of the sanction must be governed by the provisions which would have been applicable if the sanction had been imposed in that State. If my memory is good, a similar provision to the same effect exists in the German IRG (International Mutual Assistance Law), Section 57/5. As it stands, the German declaration purports to change the effect of Article 12 of the Convention and therefore constitutes a reservation. This is not compatible with the object and purpose of the Convention.

11. The Secretariat reminded the Committee that the purpose of the exercise was to examine possible difficulties arising from the declarations and reservations made by Germany with respect to Convention ETS No. 112 and report back to the CDPC.

On a point of clarification, it further declared that the sole purpose of the text appended to Recommendation R (84) 11 was to provide a model information sheet to be available in as many national languages as those of the Parties to the Convention, in order to inform sentenced persons of foreign nationality in their own language of the avenues that the Convention opens to them. That text cannot therefore be used as an argument in interpreting the Convention.

12. Several experts expressed the view that whilst the German declarations raised legal issues, these have so far not been put to test in practical terms. They did not wish to consider the issues in abstract terms.

13. Moreover, the following opinions i.a. were expressed:

- The Convention provides no more than procedures within a given framework and it is up to the domestic law of each Party to lay down the rules under which it will operate within that frame. Therefore the German declarations do not raise any problem.

- Since the Convention does not embody any obligation for States to transfer sentenced persons, the German declarations should not be perceived as reservations and are not in conflict with the Convention.

- For the same reason, the German declaration concerning Article 3.1 is superfluous; its declaration concerning Article 12 however should be interpreted as a reservation and therefore is not in conformity with the Convention. The German declarations should be seen as not having any practical effect.

- For constitutional or legal reasons some States cannot comply with the German requirement concerning Article 12.

- The German declarations have the effect of creating a conditional transfer that is not provided for under the Convention.

14. The expert from Germany deemed that the declarations under review should be read as a statement of the internal guidelines that the German authorities intend to follow when exercising their discretionary powers to accept or to refuse to apply the Convention. They serve the purpose of providing the other Parties to the Convention with advance notice of the circumstances under which they may expect Germany's co-operation within the framework of the Convention.

Qualifying as a declaration or as a reservation a given statement made by a State in respect of a treaty, depends on whether that statement concerns rights and/or obligations embodied in that treaty or not.

He further pointed out that the declaration concerning Article 12 is not of a general nature. It applies only on a case-by-case basis.

Moreover, the German declarations do not raise difficulties with respect to the practical application of the Convention and therefore are not covered by the provisions of Article 23.

15. In reply, the expert from Turkey raised what he thought was a practical issue. Where a sentenced person has been transferred under the Convention from Germany to State A and it is later discovered that that person had previously committed an offence in State A: (a) will the latter prosecute that person, as it is entlited to under Article 3 of the Convention? Or, (b) will it seek Germnan authorisation prior to prosecution thus abiding by the terms of the German declaration?

16. Several experts expressed the view that, as the Convention had clearly left aside the rule of speciality, that rule could not be reintroduced in the procedure by way of a unilateral declaration.

17. The Chairman concluded the discussion by acknowledging that the German declarations under consideration raised legal issues, but that those were not matched by problems of practical application. If and when practical difficulties arose in bilateral relations with Germany such difficulties might be resolved at bilateral level, unless there was a common understanding on the use of the procedure provided for in Article 23 of the Convention.

Recommendation (99) 20 concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field, in its Appendix, offers procedural guidelines for the friendly settlement of difficulties.

PART D
EXPLANATORY NOTES TO THE ADDITIONAL PROTOCOL TO THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

ARTICLE 2

Meet 40 (provisional arrest)
Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS 167) concerns persons having fled from the sentencing State. Under that Article, upon a request from the sentencing State, the administering State may, pending the arrival of documents supporting the request, arrest the person concerned on a provisional basis.

A question was raised (by the expert from Italy - cf. doc PC-OC (2000)9) concerning the maximum length of time for the provisional arrest of the person concerned. There is no provision in the Protocol, nor is there any indication in the explanatory memorandum.

It was pointed out that in normal circumstances, there should be no great danger that the person might abscond, because in any other third State the person is no longer protected against extradition.

The explanatory report indicates that the documents supporting the request should be transmitted as soon as practicable. That may be seen as an indication of the sense of urgency that the situation carries. Such a sense of urgency is of course inherent to any situation where a person is arrested on a provisional basis.

However, under the circumstances described above, one might rightly suggest that the person cannot benefit from a presumption of innocence, but rather, on the contrary, that there is a presumption – based upon the declaration of a competent authority of the sentencing State – that the person concerned is a sentenced person whose sentence has not yet been entirely served.

It follows that the sense of urgency inherent to any situation where a person is arrested on a provisional basis is less pressing in the instant case that in other cases. In particular, it is less pressing that in a situation where extradition is requested.

One might therefore conclude that where a limit is established for provisional arrest under Article 2 of ETS 167, that limit may go beyond the limit of 40 days provided in Article 16 of the European Convention on Extradition.

The Committee decided that the updated version of the Guide to Procedures on the transfer of sentenced persons should contain information in respect of national provisions concerning maximum length of provisional arrest as mentioned above.

Meet 45
The central authority for transfer of sentenced persons of State A received a request form State B asking, under the Additional Protocol to the Convention on the Transfer of Sentenced Persons to take over the execution of a sentence imposed by a court of State B.

The person concerned is a national of State A and was in the territory of State A at the time of the request. The judgment was passed *in absentia*. From the records, it is clear, that he was

informed about the courts hearings in State B. Moreover, his counsel had submitted an appeal to the higher instance court in State B, but the appellate court upheld the previous judgement.

Paragraph 11 of the Explanatory Report to the Additional Protocol is very clear where it states that Article 2 does not cover the situation where a national of State A is tried and sentenced *in absentia* in State B. Moreover, the national legislation of State A does not allow for trials in absentia, except in case of genocide. The judgement passed in the State B is in this way contrary to the legal order of State A.

If the person concerned was not present in State B, neither at the time of the trial, nor afterwards, it is clear, having in mind para 11 of the Explanatory Report, that the Additional Protocol to the Convention on the Transfer of Sentenced Persons does not apply.

If, however:

(a) the absentia situation has been "corrected" by the fact that the person concerned lodged an appeal, and

(b) the person has been present in State B after the judgment and then left that State, thus *seeking to avoid the execution of the sentence in State B by fleeing to State A before having served the sentence*,

then, one might wish to consider that the Additional Protocol to the Convention on the Transfer of Sentenced Persons applies.

An important issue that this case raises is the one to know how to avoid a situation where a person accused/sentenced of serious crimes may go unpunished because of the failure of the present system of international criminal law to ensure that justice is made. The "New Start" report indicates ways of working in the future to solve such problems.

ARTICLE 3

Meet 43

Switzerland has recently signed Protocol ETS 167. With a view to its ratification, the question was raised in respect of Article 3 (sentenced persons subject to an expulsion or deportation order) whether or not the sentenced person should be granted a right of appeal against the decision "forcefully" to transfer him to his country of origin.

The same question may be raised in respect of Article 2 (persons having fled from the sentencing State).

It appears that many States that have ratified the Protocol, or are in the process of so doing so, recognise the right of the sentenced person to appeal against (or otherwise oppose) the transfer decision.

PART E
OPINION OF THE PC-OC
ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 1527 (2001)
ON THE OPERATION OF THE COUNCIL OF EUROPE CONVENTION
ON THE TRANSFER OF SENTENCED PERSONS

NB: This opinion sheds instructive light on the PC-OC's perception of the Convention.

Introduction

On the basis of a Report (doc. 9117) adopted by its Committee on Legal Affairs and Human Rights, as well as an Opinion (doc. 9137) on that Report, adopted by its Social, Health and Family Affairs Committee, the Parliamentary Assembly of the Council of Europe adopted, on 27 June 2001, Recommendation 1527 (2001) on the Operation of the Council of Europe Convention on the Transfer of Sentenced Persons.

The Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) carefully examined the above mentioned papers. Having discussed the issues at its 43rd (24 – 26 September 2001) and 44th (25 – 27 February 2002) meetings, it adopted the following opinion that it submits to the Committee of Ministers through the European Committee on Crime Problems (CDPC).

General considerations

The Committee welcomes the Assembly's recommendations.

The Committee points out that it had already identified and examined most of the points raised by the Assembly. Indeed, it devotes considerable time and energy to finding solutions to the difficulties encountered with the application of the Convention on the Transfer of Sentenced Persons. On the basis of its work, the following instruments have been adopted by the Committee of Ministers:

- Rec. R (84) 11 concerning information about the Convention on the Transfer of Sentenced Persons;
- Rec. R (88) 13 concerning the practical application of the Convention on the transfer of sentenced persons;
- Rec. R (92) 18 concerning the practical application of the Convention on the transfer of sentenced persons;
- ETS 167 - Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997)

Moreover, the Committee has collected a considerable amount of information concerning the practical application of the Convention, that is regularly updated and published. This includes a major document that appears under the title "A guide to procedures on the transfer of sentenced persons in States Party to ETS 112". It is expected that the impact of these materials on the effectiveness of the Convention will augment considerably as soon as it becomes possible to make them available on the Internet.

Finally, the records of the Committee meetings clearly show how often it discusses practical difficulties in the operation of the Convention that are brought to its notice by its members.

Although such discussions are not brought to public attention, their effect is nevertheless considerable in opening the way to a softer, speedier and altogether more effective application of the Convention.

The Committee deems that the flexibility of the Convention is one of its major advantages. Any steps taken in order to meet difficulties encountered with its application must take into account the present advantages of flexibility and in particular the present possibility of applying the Convention on a case by case basis.

Considerations pertaining to the individual points in the Recommendation:

Point 9 i : *the Assembly recommends that the Committee of Ministers invite those member states which have not yet done so to ratify as soon as possible the Convention on the Transfer of Sentenced Persons;*

The Committee supports this recommendation.

Point 9 ii: *the Assembly recommends that the Committee of Ministers actively encourage those non-member states which have not yet done so, particularly those in which prison conditions are recognised as poor, to accede to the convention;*

The Committee held a thorough discussion on this issue that indeed conceals different facets. The starting point is that States represented in the Committee all share a very clear interest in transferring back their nationals imprisoned abroad. That interest is all the more accute where the the foreign State at stake is one in which prison conditions are poor. Hence the interest in encouraging accession of such States to the Convention. However, accepting the accession of a third State implies under international law that there is a bona fide readiness from all Parties fully to co-operate with that State under the Convention. This means inter alia that Parties are ready to transfer persons to such States. Here lie the difficulties because indeed, even if transfers must be consented to by the persons concerned, Parties are not always prepared to transfer persons under their jurisdiction to just any State, certainly not to a State where the prison conditions are poor beyond tolerable limits. Parties obligations' under the ECHR must be taken into account.

Bearing the above considerations in mind, the Committee follows the view that non-member States that are not a Party to the Convention should be encouraged to accede to it.

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

The Committee thinks that three different avenues should be given consideration when examining responses to the difficulties raised by the Assembly.

The first consists in clarifying even further the conditions under which each Party interprets and applies the Convention and ensuring the dissemination of information in that respect. The Committee privileges this approach and requests from the Committee of Ministers the means to pursue its work in this way, in particular, the means to create and feed a web site of its own.

The second consists indeed in addressing recommendations to States on the interpretation and application of the Convention. The Committee supports that avenue, subject to the considerations ahead on the specific points raised by the Assembly.

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

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

(a) to streamline and harmonise the information member states seek when processing a transfer application and to state a maximum time-limit for every request for information;

The Committee follows the understanding that the Convention's role is one of lying down the conceptual as well as the procedural framework within which national laws will apply in order to transfer a sentenced person and in that way achieve the purposes of rehabilitation, sometimes a humanitarian purpose, without defeating the end of justice. The national law, not the Convention, has the prime role. Transparency with regard to national laws and procedure, in particular easy access to information in that respect is the guiding principle to achieve the goal proposed by the Assembly. In this respect, the Committee intends to pursue its work of updating and completing the already abundant information, in particular in the Guide to Procedures. Again it must be stressed that the web is the ideal means to disseminate information in this respect.

Unlike other areas of international co-operation in criminal matters, the ends of justice do not require imposing time-limits in the area of transfer of sentenced persons. However, the Committee agrees that States should be recommended to give priority to critical humanitarian cases.

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

(b) to state clearly that the convention is not designed to be used for the immediate release of prisoners on return to their own country;

The Committee supports the view that the Convention is not primarily intended to be used for the immediate release of prisoners on return to their home countries. This is sufficiently clear to all. Should the need be recognised to re-state this view, then it should be further clarified by adding the following: the decision on the release of the person concerned belongs to the administering State alone. This rule cannot be changed. In particular, one should be aware that certain States use the conversion system provided under Article 11 of the Convention. In such cases, it is not possible to either State to anticipate on the result of the conversion procedure and thus to know *ex ante facto* whether or not the person transferred will be imprisoned or released once his sentence is converted.

The Committee wishes to add that the immediate release of a transferred prisoner is sometimes founded on humanitarian considerations.

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

(c) to urge contracting states not to refuse transfers on the grounds that the prisoner might possibly benefit from earlier release in the administering state;

The Committee can follow this recommendation subject to the proviso that States should have the possibility of refusing transfer on the basis of a set of reasons that may include the circumstance that the prisoner will possibly benefit from such early release in the administering state that the ends of justice are jeopardised.

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

(d) to urge contracting states to interpret the nationality requirement broadly and in line with the convention's rationale;

The Committee agrees with the Assembly that the rationale of the Convention does not include any consideration that would call for a strict interpretation of the concept of nationality. The latter was introduced into the Convention in the form of a self-sustained concept, freely determined by each Party, in order to limit the scope of the convention in terms of the persons concerned. It does not exclude a reference to other ties between a person and a State, such as habitual residence. Many States have in fact entered declarations extending the concept of nationality to include such other links. In particular, the reference to nationality must not prevent the Convention from being applied to persons who are not technically nationals according to the national law of the State concerned. Moreover, the Committee thinks that there should be no question in applying reciprocity in matters pertaining to the Parties liberty to define "national".

The Committee recalls that, in Recommendation (88) 13, the governments of member States are already recommended to "*consider availing themselves of the possibility under Article 3.4 to define the term "national" in a wide sense, having regard to any close ties the persons concerned have with the administering State*". The language of this recommendations could be changed in order to reflect better the ideas above.

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

(e) to specify a minimum threshold for the sentence which must be served (for example, 50%), below which states can legitimately refuse a transfer, but above which states should facilitate a transfer;

The cases in which the Convention is called upon to be applied fall under many different patterns. At the same time, the concrete purposes of each transfer, while obeying to the overall aim of rehabilitation, also vary considerably from one case to another. For these reasons, fixing thresholds would impinge on the flexibility which, as was mentioned above is a recognised value of the Convention. It would moreover preclude case by case solutions. However, the Committee is not disinclined to follow a line of action based on the idea of "a period of time compatible with the ends of justice".

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

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

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

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

(g) to strongly discourage the blocking of transfers because of outstanding fines;

The Committee agrees that this is an area of difficulties. It recalls that, in Recommendation (92) 18, member States already are recommended to "*take steps enabling them not to have to refuse a transfer on the sole grounds that fines imposed on the sentenced person in connection with his sentence remain unsatisfied, or that contrainte par corps has been imposed*". Possibly more work has to be devoted to studying this question, in particular in establishing the differences, if at all relevant, between three situations, namely:

- criminal law fines to which the person was sentenced;
- other fines imposed on the person in connection with his sentence, and
- confiscation orders imposed on the person that remain unsatisfied (e.g. because the money or the goods have not been found).

The Committee does not exclude that, subject to the result of the further study of this problem, a protocol to the Convention might be the proper way to prevent the above situations from jeopardising the application of the Convention.

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

(h) to urge contracting states to give utmost consideration to the family ties and personal relationships of the prisoner when considering a transfer request;

As was mentioned above, the Committee believes on the virtues of a casuistic application of the Convention. While family ties might be an adequate criteria in many cases, it is not necessarily a determining factor in all cases. Indeed the Committee thinks that the habitual residence should be the main criterion.

The Committee refers to its comments above, in respect of point 9 iii d.

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

(i) to urge contracting states to respect the right of consent of prisoners, so as to prevent forced transfers that are contrary to the humanitarian spirit of the convention;

The Committee cannot see how this recommendation can apply to the Convention proper, since there can be no doubt about the consent of the person concerned being a "conditio sine qua non" for its application; should however this recommendation make reference to the Protocol, then it must be recalled that it is the very purpose of the latter to make provision for cases in which transfer may be effected without the consent of the person concerned.

Point 9 iv: *the Assembly recommends that the Committee of Ministers explore the possibility of drawing up a new additional protocol to the convention in which some of the recommendations under sub-paragraph iii above would be included*

Most members of the Committee take the view that a new Protocol to the Convention is not necessary (save probably for the particular purpose of dealing with the transfer of mentally disturbed offenders, perhaps also to deal with the question of fines) since the difficulties highlighted by the Assembly can be dealt with by way of Committee of Ministers recommendations, domestic legislation and a broader use of the organisation and dissemination of information, in particular the Guide to Procedures.

Point 9 v: *the Assembly recommends that the Committee of Ministers organise a series of training seminars at which states parties could present their domestic transfer procedures, exchange information and explore how to improve their systems and make them more transparent*

The Committee recognises the value of internationally organised training activities in this field and therefore supports this recommendation. It points out that there is particular value in organising seminars that involve two or more countries in between which co-operation is particularly intense. It recalls however that a great volume of information on the Convention and its practical application is already made available by it through the Secretariat. Should – as it constantly calls for - that information become available on the net, the effectiveness of the information system would significantly grow, at relatively low cost.

PART F

TEXT OF RECOMMENDATIONS ADDRESSED BY THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PRACTICAL APPLICATION OF THE CONVENTION

RECOMMENDATION No. R (84) 11

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING INFORMATION ABOUT THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

(*Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers Deputies*)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the Convention on the Transfer of Sentenced Persons of 21 March 1983 ;

Desirous of assisting Contracting States to fulfil their obligation, under Article 4.1 of the convention, to furnish sentenced persons to whom the convention may apply with information on its substance ;

Considering it essential that this information is provided in a language which the sentenced person understands ;

Convinced that a standard text to be used for conveying information on the substance of the convention to potential transferees will assist Contracting States in arranging for the necessary translations,

I. Recommends the governments of member states to provide an authoritative translation of the standard text annexed to this recommendation into their official language or languages, taking into account any reservations or declarations to the convention of which the potential transferees would need to be aware, and deposit the translation with the Secretary General of the Council of Europe at the time of ratification, acceptance or approval of the convention ;

II. Instructs the Secretary General of the Council of Europe to forward copies of the translations so received to each of the Contracting States for use by their prison authorities ;

III. Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of the non-member states which have participated in the elaboration of the convention and to the governments of states invited to accede to the convention.

APPENDIX

Standard text providing information about the Convention on the Transfer of Sentenced Persons

The Convention on the Transfer of Sentenced Persons enables, under certain conditions, persons who have received a custodial sentence in a country other than their own to be transferred to their home country to serve the sentence there. A brief explanation of these conditions is given below. This document does not constitute an exhaustive description of the convention. If, therefore, you wish to enquire into the possibility of being transferred to serve your sentence in (administering State), you should ask the prison authority, or the appropriate authority in (administering State), for more detailed information, for example, to arrange for you to receive a copy of the convention and for both States to consider the possibility of your transfer. You may also address any request for information to a consular representative of (administering State).

Who has to agree to the transfer ?

A transfer requires :

a. the consent of the person concerned or, where requisite, that of his legal representative ;

b. the consent of the State where he was sentenced ; and

c. the consent of the State to which transfer is requested.

Who may benefit from a transfer to (administering State) ?

You may be eligible for transfer to (administering State) if the following conditions are fulfilled:

a. if you are considered a national of (administering State) ;

b. if the judgment by which your sentence was imposed is final ;

c. if, as a general rule, at least six months of your sentence remain to be served, though in exceptional circumstances this period may be less ; and

d. if the offence for which you were tried is a criminal offence under the law of (administering State).

What sentence would need to be served following transfer ?

- (States using the “continued enforcement” procedure :)
The maximum sentence to be served following transfer would be the amount of the original sentence which remained after deduction of any remission earned in (sentencing State) up to the date of transfer. If the sentence imposed in (sentencing State) was longer or of a different nature than the sentence which could be imposed for the same offence in

- (States using the “conversion of sentence” procedure :)
It would not be possible to confirm before transfer the precise nature and length of the sentence to be served in (administering State), because the original sentence would need to be converted by (a court) (the competent authorities) in (administering State) following transfer to a sentence which could have been imposed if the offence had been committed in (administering State). You would be given some idea, however, of the nature and length of the

(administering State), it would be adapted to the nearest equivalent sentence which was available under the law of (administering State) without being longer or more severe than the original sentence.

sentence to which the original sentence might be converted in (administering State), to help you to decide whether to seek a transfer. Under the terms of the convention a sentence converted in this way will not be more severe nor longer than the original sentence, will not be subject to any minimum which the law of (administering State) may provide for the offence, and will take account of the full period spent in custody before transfer.

If you are transferred, your sentence will be enforced in accordance with the law and regulations which apply in (administering State).

Prosecution for other offences

Please note that in the event of your transfer the authorities of (administering State) are entitled to prosecute, sentence or detain you for any offence other than that for which your current sentence was imposed.

Pardon, amnesty, commutation

Your transfer would not prevent you from benefiting from any pardon, amnesty or commutation of sentence which might be granted by either (sentencing State) or (administering State).

Review of original judgment

If new information came to light after your transfer which you considered grounds for a review of the original judgment passed in (sentencing State), it would be for (sentencing State) alone to decide on any application for review.

Termination of enforcement

If for any reason whatsoever the sentence originally imposed in (sentencing State) ceased to be enforceable in (sentencing State), the (administering State) authorities, as soon as they were informed of this, would release you from the sentence being served. Similarly, when the sentence being served in (administering State) ceased to be enforceable there, you could no longer be required to serve the original sentence imposed in (sentencing State) if you should return there.

Some information on the procedure

You may express your interest in being transferred to the authorities of either (sentencing State) or (administering State).

If the (sentencing State) authorities are prepared to consider your transfer, they will provide the (administering State) authorities with information about you, about the facts relating to your conviction and sentence and about the nature and length of your sentence. If the (administering State) authorities are prepared to consider your transfer, they will respond by providing (information about the nature and duration of the sentence you would need to serve after transfer)[1], (an indication as to how your sentence might be converted following your transfers)[2], together with information about the arrangements for remission, conditional release, etc. in (administering State).

Provided both States are content to agree to your transfer, you will be asked whether, having received and considered the information provided by (administering State), you consent to being transferred under the convention.

1. Applies to states using the “continued enforcement” procedure.
2. Applies to states using the “conversion of sentence” procedure.

RECOMMENDATION No. R (88) 13

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING THE PRACTICAL APPLICATION OF THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS[1]

(*Adopted by the Committee of Ministers on 22 September 1988 at the 419th meeting of the Ministers' Deputies*)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Desirous of facilitating the practical application of the Convention on the Transfer of Sentenced Persons and of encouraging the widest possible use of the transfer mechanism it provides ;

Having regard to Recommendation No. R (84) 11 concerning information about the Convention on the Transfer of Sentenced Persons,

I. Recommends the governments of member states :

1. *Concerning the choice of enforcement procedure (Article 3.3 of the convention)*

a. that, when considering whether to exclude, by virtue of Article 3.3 of the convention, the application of one of the enforcement procedures provided for in Article 9.I, they take due account of any difficulties which such an exclusion might entail for the application of the convention or the functioning of the transfer mechanism ;

b. that, if they have made the declaration under Article 3.3, they take account of the difficulties which that declaration might entail for the application of the convention or the functioning of the transfer mechanism in relation to other Contracting States, and seek a solution which would enable the transfer of the sentenced person, taking into account in particular his interest in being transferred ;

2. *Concerning the application to "nationals" (Article 3.4 of the convention)*

that they consider availing themselves of the possibility under Article 3.4 to define the term "national" in a wide sense, having regard to any close ties the persons concerned have with the administering state ;

3. *Concerning the processing of transfer requests*

a. that they establish procedures and make organisational arrangements for the effective handling of transfer requests and inform the other Parties thereof, with a view to making them aware of the procedure in all its stages ; this could be effected by addressing explanatory notes or letters to the other Parties or by means of an *aide-mémoire* ;

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 ;

c. that, to expedite the processing of transfer requests, particularly in urgent cases, the competent authorities make the widest possible use of modern means of telecommunication, such as telex and telefax facilities ;

4. *Concerning information to be supplied to the sentenced person*

that, to enable the sentenced person to give his informed consent, the competent authorities of the sentencing state endeavour to provide him with all relevant details of the expected effects of his transfer, including, if possible, information on the conditions for early release ;

5. *Concerning the transfer of the sentenced person*

a. that they effect agreed transfers as soon as possible after the sentenced person has given his consent ;

b. that they ensure that information on any remission earned by the prisoner in the sentencing state and any other factors relevant to the enforcement of the sentence, based on a hypothetical date of transfer, is supplied to the administering state before the transfer is effected ; where this is not possible, the information should be supplied as soon as possible after transfer ;

II. Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of non-member states party to the convention and to the governments of states invited to accede to the convention.

1. When this recommendation was adopted, the Representative of Greece, in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, reserved the right of his Government to comply or not with paragraph 1.2 of the recommendation.

Recommendation no. r (92) 18
of the Committee of Ministers to member States
concerning the practical application of the convention on the transfer of sentenced persons

(Adopted by the Committee of Ministers on 19 October 1992
at the 482nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Having regard to the Convention on the Transfer of Sentenced Persons;

Restating the importance of the social rehabilitation of sentenced persons and to that end the transfer of such persons, where they do not have the nationality of the sentencing state, to the country where their own society is;

Desirous therefore of further facilitating the practical application of the convention within such a lapse of time as may enable the intended aim to be achieved;

Recalling the terms of its Recommendation No. R (88) 13 concerning the practical application of the Convention on the Transfer of Sentenced Persons;

Having in mind its Recommendation No. R (84) 11 concerning information about the Convention on the Transfer of Sentenced Persons,

1. Recommends the governments of member states:

a. to include with other necessary documents the form reproduced in Appendix I hereafter both when making a request for transfer and when acknowledging receipt of such a request;

b. to proceed diligently and urgently in processing requests for transfer in such a way that the provisions of Article 5, paragraph 4, of the convention are entirely complied with;

c. to adopt, in accordance with the principles laid down in Appendix II hereafter, guidelines on the criteria to be met when taking a decision whether or not to agree to transfer requests submitted to them;

d. to communicate the text of such guidelines, as well as any future amendments thereto, to the Secretary General of the Council of Europe;

e. as far as possible and without prejudice to the rules in the convention, to give reasons for all decisions refusing a transfer;

f. to take steps enabling them not to have to refuse a transfer on the sole grounds that fines imposed on the sentenced person in connection with his sentence remain unsatisfied, or that contrainte par corps has been imposed;

g. when handing over the transferred person, to give the administering state an updated statement in conformity with Article 6, paragraph 2.b);

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;

i. to encourage direct contacts between national administrations entrusted with the operation of the convention, in particular through the informal channels of communication that are available to them through the lists mentioned below in item 2.a;

j. to enlarge and improve on the "Standard text providing information about the Convention on the Transfer of Sentenced Persons" provided for in Recommendation No. R (84) 11 in such a way as to make its content easily comprehensible to all and to ensure that the person concerned is advised that the conditions for being eligible for parole, conditional release, etc. in the administering state will differ from those applicable in the sentencing state;

k. unless otherwise provided for through national law, international conventions or bilateral agreements, when the transferred person has escaped custody and left the territory of the administering state, and when that state is unable to obtain custody to enforce completion of the sentence, it shall inform the sentencing state that the enforcement of the sentence cannot be completed, and the sentencing state may then enforce completion of the sentence. This does not obviate the need to inform the sentencing state in accordance with Article 15.b;

2. Instructs the Secretary General of the Council of Europe:

a. to keep an updated list containing precise information on the names and addresses as well as the telephone, telefax and telex numbers of the persons responsible in each Party for the operation of the convention and to transmit a copy of such a list as well as any necessary updates to each of these persons;

b. to transmit to the governments of all the Parties to the convention copies of the national guidelines that will be communicated to him under the terms of Recommendation 1.d above;

c. to transmit this recommendation to the governments of the non-member states which are Parties to the convention as well as to the governments of states invited to accede to the convention.

Appendix I to Recommendation No. R (92) 18

Council of Europe Convention
on the Transfer of Sentenced Persons

Acknowledgement of request for information about prisoner repatriation

Name of prisoner :

Prisoner number* :

Location*:

Signature: Name: Date :

Note: The original of this acknowledgement should be signed and returned to sender in the requesting state within five working days of receipt. The copy should be retained by the requested state.

* if known.

#

Requesting state:

Name :

Position :

Address :

No. Tel.: No. Fax:

Date request made :

Originator's reference:

Officer responsible for further action in the requested state (if not addessee):

Name:

Position:

Address:

No. Tel.:

No. Fax:

Summary of action now being taken:

Date by which next response may be expected:

Reference to be quoted in correspondence:

Requested state:

Name :

Position :

Address :

No. Tel.: No. Fax:

Date request received :

Recipient's reference:

Appendix II to Recommendation No. R (92) 18

Principles applicable to national guidelines concerning the criteria to be met when taking a decision whether to accept or to refuse a request for transfer

1. The guidelines should indicate:

a. whether the Party applies continued enforcement under Article 10 of the convention or converts the sentence under Article 11 of the convention;

b. any deviation consented upon from the provisions of Article 6 of the convention or to the requirements stated in conformity with Article 17, paragraph 3, by way of which information and supporting documents might not be totally or partially translated.

2. The guidelines might inter alia indicate:

a. the mandatory grounds for refusing requests;

b. the usual grounds for refusing requests, for example, that the Party concerned will refuse transfer of those of its nationals that have left or remained outside their country with the intention of abandoning it as their place of permanent residence and/or have no social or family ties there.