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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**Council for Penological Co-operation**  
**(PC-CP)**

**DRAFT DISCUSSION PAPER REGARDING THE DEVELOPMENT OF A TOOL FOR COLLECTION  
AND EXCHANGE OF INFORMATION AND DATA RELATED TO PRISONS AND PRISONERS IN THE  
COUNCIL OF EUROPE MEMBER STATES**

In the course of the last decades overcrowding has become a problem faced by half of the European penitentiary administrations. In parallel the public concern regarding deteriorating detention conditions in some countries and overall treatment of prisoners has increased in Europe.

The European Court of Human Rights is delivering a rising number of judgements which deal with different aspects of imprisonment like healthcare, prison conditions leading to inhuman and degrading treatment, voting rights, overcrowding and solitary confinement among others. In addition due to the ever rising numbers of similar applications filed the Court started delivering pilot judgements and setting deadlines for taking measures by the national authorities..

The procedure of delivering pilot judgements allows the Court to deal with a whole group of repetitive applications which arise from largely the same root cause. By selecting some of these cases the Court delivers a judgement extended to cover all similar cases. In such type of judgement the Court determines the violation, its root causes and gives indications to the national authorities what needs to be done to rectify the systemic or structural problem and possibly also what domestic remedy needs to be created to deal with similar violations in the future.

Several pilot judgements related to prisons and prisoners' rights and treatment were delivered so far by the Court, namely *Ananyev and Others v. Russia* (application nos. 42525/07 and 60800/08); *Torreggiani and Others v. Italy* (application no. 43517/09); *Greens and M.T. v. the United Kingdom* (application nos. 60041/08 & 60054/08).

The Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) also highlights in its reports problems leading to inhuman or degrading treatment or torture in places for deprivation of liberty, including prisons and pre-trial detention centres.

After the fall of the Berlin Wall the freedom of movement in Europe has increased significantly. This has had many positive effects on economic and social development, political freedom and cultural exchanges. On the other hand, this has facilitated the capacity of criminals and criminal organisations to operate across borders in all parts of Europe. This leads to increased contacts and requests for extradition, transfer and mutual legal assistance between the ministries of the interior and justice. At the same time the numbers of persons detained abroad as suspects or offenders continue to rise. The ministries of the interior and justice and the prison administrations are more and more often seeking information and data regarding the sentencing and execution of judgements practices in other European countries.

In the framework of the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) and in order to assist Parties to the Convention on the transfer of sentenced persons and its additional protocol are published country information sheets. They contain information relating to issues such as general rules on early release, scope of application with regard to transfer of mentally disordered persons, scope of application with regard to nationals and/or residents, links to national legislation, national guides on procedure.

The Council of Europe Convention on the Transfer of Sentenced Persons (ETS 112)<sup>1</sup> and its Additional Protocol (ETS 167)<sup>2</sup> provide for the possibility to transfer a person sentenced by a court with a final judgement to any punishment or measure involving deprivation of liberty for a limited or unlimited period of time on account of a criminal offence. The Convention is open for signature also to non-member states and has currently 64 signatories. The Convention is primarily intended to facilitate the social reintegration of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries. This Convention is founded to a great extent on humanitarian grounds, considering that communication difficulties, language barriers and deprivation of contact with the family can have adverse effects on foreign prisoners. The Additional Protocol has 36 signatories, all of them Council of Europe member states. Transfer may be requested by either the State in which the sentence was

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<sup>1</sup> Opened for signature in 1983, in force since 1985

<sup>2</sup> Opened for signature in 1997, entered into force in 2000

imposed (sentencing State), the State of which the sentenced person is a national (administering State) or by the sentenced person concerned.

In accordance with the Convention several conditions need to be met in order to transfer a sentenced person:

- the person has to be a national of the administering state;
- the sentencing state, the administering state and the person concerned have to give their consent
- ;
- the act for which the sentence has been imposed should constitute a criminal offence in the administering state (double criminality);
- at least six months of the sentence are still to be served.

The Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167) sets out the rules applicable to transfer of the execution of sentences in two particular cases: firstly where sentenced persons have absconded from the sentencing State to their State of nationality, and secondly where they are subject to an expulsion or deportation order as a consequence of their sentence. In these two cases States may agree on a transfer without the consent of the sentenced person.

In the relations between the Council of Europe member states which are also members of the European Union the above Convention and its Protocol are replaced by the Council Framework Decision (FD) 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

In accordance with FD 2008/909/JHA a person may be transferred without his or her consent and without the consent of the executing (or administering) state (only the non-binding opinion of the person and the state are sought). The only exception is when the executing state is not the state of nationality of the person but has agreed to execute the sentence with a view to the better reintegration of that person into society (i.e. place of long-term or permanent residence, state in which his/her family lives or resides on a long-term basis). Another difference with the Council of Europe Convention is that in accordance with FD 2008/909/JHA the principle of double criminality is not applicable to a whole list of criminal offences (identical to the one contained in the FD on the European Arrest Warrant, FD 2002/584/JHA). The executing state may adapt the sentence in length and nature in order to make it compatible to its own legislation but should not aggravate the punishment by doing so. There are several grounds for non-execution which may be raised by the executing state (age of the person, less than six months remain to be served, immunity, statute-barred offence, etc.)

The FD 2008/909/JHA entered into force on 5 December 2011. The EU carried out an evaluation of the extent to which the member states have complied with this FD and concluded that the vast majority had not done so by the date of entry into force. To-date the situation has not improved significantly. Nevertheless transfers under FD 2008/909/JHA are carried out since its entry into force and appeals against a number of these are pending before the national courts. Some may end up at the European Court of Human Rights.

The Court has already found violations of Article 3 of the European Convention on Human Rights in similar situations where a *refoulement* of asylum seekers is regulated by a EU Framework Decision <sup>3</sup>. It

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<sup>3</sup> Case of M.S.S v. Belgium and Greece (no. 30696/09, ECHR 2011, G.CH.) where “The Court reiterated ... that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] (no. 45036/98, ECHR 2005 VI)). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (*ibid.*, § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under

can on the same grounds find that a transfer of a sentenced person may cause inhuman and degrading treatment.

Whatever the instrument on the ground of which a transfer of a sentenced person is processed, the competent authorities of the sentencing state need to know the conditions in the detention facilities of the administrating/executing state to avoid situations of inhuman and degrading treatment as a result of the transfer. .

There is an evident need to help the competent national authorities, including the courts to take informed decisions regarding transfer of sentenced persons so as to avoid situations where the persons may end up in overcrowded, non-sanitary prison environments with little or badly equipped medical care or in a place or regime which is not beneficial to their rehabilitation. There is in more general terms a need to have a clearer and up-to-date information and reliable and comparable data regarding the prisons in the Council of Europe member states as this will help designing better national penitentiary policies and practices regarding prison management, finances, construction, transportation, transfers inside and outside the country, balanced distribution, avoiding situations of overcrowding, development of treatment, training and work opportunities, staff recruitment and training, etc.

The Council of Europe Annual Penal Statistics (SPACE I) collect data related to penal institutions and can serve as a basis for developing this tool. So far SPACE collect data regarding prison capacity; space allocated per prisoner, types of detained persons (foreigners, pre-trial, sentenced, juveniles, women, dangerous); number of prisoners per type of legal status in custody; number per categories of offences; length of sentence; entries and releases (conditional and non-conditional release); budget per prisoner per type of detention; number of escapes, deaths due to drug or alcohol intoxications and other forms of deaths; amnesties and pardons; age; age of criminal responsibility; age at which deprivation of liberty can be ordered; number and type of staff.

There may be a need to complement the above list and to collect data also regarding:

1. Number of inmates transferred from foreign countries to home country during the reference year (flow)
  - a. Breakdown by status (pre-trial, sentenced, other etc.)
  - b. Breakdown by age of transferred inmates
  - c. Breakdown by sex of transferred inmates
  - d. Breakdown of transfers based on the Convention on the Transfer of Sentenced Persons (ETS112) or other legal instruments, including bilateral agreements
  - e. Breakdown by inmates immediately released after the transfer and those kept in custody
2. Number of transferred inmates from foreign countries to home country on 1<sup>st</sup> September of the year (stock)
  - a. Breakdown by status (pre-trial, sentenced, other etc.)
  - b. Breakdown by age of transferred inmates
  - c. Breakdown by sex of transferred inmates
  - d. Breakdown of transfers based on the Convention on the Transfer of Sentenced Persons (ETS 112) or other legal instruments, including bilateral agreements
  - e. Territorial/regional distribution of penal institutions and distribution of prison capacity per density of the local population;
  - f. Activities available in penal institutions (work, education, training, treatment, leisure) and number of inmates involved in these activities (by category)
  - g. Training of staff;
  - h. IT and other technologies used;
  - i. Inspection and monitoring mechanisms

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the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion (*ibid.*, §§ 155-57).

In addition and based on the data and methodology used by SPACE country factsheets should be developed which should be regularly updated and possibly linked also to the PC-OC country factsheets in order to assist the ministries seeking information and data prior to transfers or prior to embarking on prison or penal reforms. Figures and additional comments on these inmates should provide national and international authorities with complete, comparable up-to-date and reliable information during a given period of time. The main users of this data-source should be policy-makers involved in the development and implementation of the ETS convention, practitioners who seek for the adjustment of national procedures to the European requirements and national and international experts called to make the assessment of the transfers between countries.

To this end the PC-CP needs to hold at least one annual plenary meeting at which the information the data collection tool and the collected information will be updated and validated by the Secretariat and by the team of experts from the University of Lausanne in dialogue with all member states.

In case financing is sufficient on-site peer-to-peer visits and a dedicated web site with restricted access can be created in order to enable the national authorities to consult and update as necessary the relevant information on-line or to seek information and contacts with their counterparts in other member states.

This will also help the national authorities to plan and implement better transfer decisions and to contribute to collecting the comparative and reliable information needed for managing prison entries, reintegration programs and releases into free society, budget, staff, prison construction and development of treatment programmes.

The information collected through this kind of tool is also a valuable source for analysing trends over specific periods of time which –from a long-term point of view- would allow the authorities to envisage reforms of legislation or practice as needed.

In a long-term perspective, the possibility to produce analytical studies of the data gathered will be discussed with the experts and the working group of the CDPC. These studies could highlight the most recurrent questions and difficulties encountered and serve as a basis for the elaboration of recommendations to address them.

This process will allow to better estimate the extent to which the major Council of Europe standards and other international instruments are implemented by the member states (the European Prison Rules, the Council of Europe Probation Rules, the European Rules for juvenile offenders subject to sanctions and measures, the CM Recommendation on foreign prisoners).

This will be an evolving tool which will improve in quality and comparability of data over time and can expand to cover additional indicators and parameters.

The data and information will also be a useful indication of possible steps which might need to be taken not only at national but also at European level.