

The Convention on Transfer of sentenced persons in practice, experiences and proposals for improvement¹

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

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

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

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

- **length of proceedings** and **time** needed to arrange **practical aspects of the transfer**
- incomplete or unnecessary **documentation**
- **communication problems** between competent authorities of Parties concerned
- **withdrawal of the consent**

¹ Presentation made by Ms Barbara Goeth- Flemmich (Austria) on 27 November 2013 during the special session of the PC-OC devoted to the Convention on the Transfer on Sentenced Persons and its Additional Protocol.

- informing the **person concerned** (about the **consequences of his transfer**, detention conditions, early release policies, etc.)
- obstacles due to **differences in procedures**
- **lack of information on follow up after transfer**
- interpretation of the **6 months prison sentence** to be served and exceptions (Art. 3.1.c and 3.2)
- dealing with transfers of mentally ill offenders
- how to deal with sentences including **payment of fines**
- **overcrowded prisons** which prevent to accept further prisoners.

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

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

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

1.Social rehabilitation (Convention/Additional Protocol):

The Convention serves in principle two goals: to further the ends of justice and to provide social rehabilitation. According to the Explanatory Report to the Convention 30 years ago penal policy has come to lay greater emphasis upon the **social rehabilitation of offenders**. The Convention's underlying philosophy is that it is desirable to enforce sentences in the home country of the person concerned for reasons of cultural, religious, family and other social ties. According to the preamble

to the Additional Protocol the same is valid for the Protocol. However some States Parties to the Protocol refuse transfer arguing that the person concerned did not consent to his/her transfer, though the Protocol has been elaborated to allow also a transfer if the person concerned does not consent. From this background a discussion should be held in order to clarify ***under which conditions the transfer of a sentenced person even without his/her consent serves his/her social rehabilitation? Is social rehabilitation possible in the sentencing State even if a expulsion or deportation order has been issued against this person as a result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison? If yes, under which circumstances?***

2.Length of transfer proceedings:

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

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

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

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

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

1.2. Arrangement of the effective transfer

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

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

The **arrangement of the effective transfer** proves to be another very time-consuming element of the transfer proceedings in practice. The Convention is silent on that point. Whereas the **Extradition Convention** provides in **Article 18.3.** that the **requested State shall inform the requesting State of the place and date of surrender**, the Convention does not indicate, if it is the sentencing or the administering State that proposes date and time of transfer.

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

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

The **coordination of the effective transfer** is made often via **Interpol channels** especially in cases of transfer by airplane. However in some States the NCB pretends not to be competent for the coordination of the effective transfer, which causes major problems, as proposed dates for transfer are not communicated (in time) to the competent judicial authorities/ prison administration and as a consequence the person concerned is not brought to the airport or any other place of surrender. The officers of the administering State have to return to their home country

without the sentenced persons. This sort of communication problems occur in practice quite often, causing considerable delays in transfer proceedings and causing considerable unnecessary costs. From this background it should be considered to provide at the PC-OC website not only contact details of the competent contact points in the MoJ, but also **contact details of the Police or Penitentiary Police in charge for the effective transfer.**

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

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

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

3.Communication problems: *How can communication problems between the competent authorities of the States Parties be solved?*

Several proposals received have already been executed:

- **Central register of contact details** (AUS, DK, Korea), create a website with relevant information (Costa Rica) (s. website transfer of sentenced persons - country information) s. also Rec (92) 18 Art. 1.i „*direct contacts*“ and 2.a. „*Secretary General of CoE keep an updated list of contact points.*“
- Establish an **effective way or communication system** between central authorities, **regular meetings** of persons in charge (Korea), (s. regular meetings PC-OC, phone, mail contacts, collaborative space- secure **virtual discussion forum** (Ecuador; AUS).

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

4. Revocation of the consent

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

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

5.1. Relevant information for the sentenced persons:

Article 4.1. of the Convention obliges a sentencing State to **inform any sentenced person** to whom the Convention may apply **of the substance of the Convention**. In order to provide the persons concerned this relevant information a **standard text** has been elaborated. **Recommendation No R (84)11** of the Committee of Ministers

concerning information about the Convention on the Transfer of Sentenced Persons Contracting Parties were asked to provide **translations of this standard text** in their official languages in order to distribute copies of the translations to each of the Contracting States **for use by their prison authorities**.

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

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

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

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

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

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

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

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

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

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

Points for discussion and proposals with regard to both instruments:

1. Which **additional information** should be provided at the **PC-OC's website** (early release policies, detention conditions, fines, transfer of measures imposed, contact details of authorities responsible for the effective transfer, etc.)?

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

Points for discussion and proposals with regard to the Convention:

1. **Review of the standard text providing information to the sentenced person** (Rec No R [84]11) in order to obtain his/her informed consent?
2. ***Does the Convention apply in cases where the sentenced person is already (legally staying) in the administering State?*** Some States decline this possibility arguing that in such cases no transfer of a sentence person, but only a transfer of the sentence takes place. However, the enforcement of the foreign sentence in the country of origin serves best the interest of the person concerned. Should State Parties decide that the Convention is not applicable in such cases, an **amendment of the Convention** should be considered.
3. ***Is rehabilitation precluded, when the sentenced person has already been sentenced repeatedly, is a recidivist, and is therefore transfer not possible under the Convention ?***
4. ***Should the concept of the Convention be changed, where it requires (Article 3.1.a) that the sentenced person is a national of the administering State?*** Article 3.4. provides that States may, by declaration, *define the term „national“ for the purpose of the Convention.* (Rec [88] 13

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

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

1. **Elaboration of a standard text** providing information to the person concerned (s. standard text for transfer under the Convention)
2. Should the Additional Protocol be applicable also in situations where the **return** of the person concerned to his/her State of nationality cannot be considered as **„having fled from the sentencing State“**?
3. Some States decline a request for transfer if the request is based on an **expulsion or deportation order** which is **not consequential to the sentence imposed** (s. the wording in Article 3 para 1 of the additional Protocol). If the competent authority of the sentencing State has however already issued an expulsion or deportation order, which prevents the sentenced person to reenter the territory of the sentencing States for a long period of time (10 years or an unlimited period of time) it seems to be redundant to issue after each new conviction a new deportation or expulsion order stating more or less the same which was already stated in the first expulsion or deportation order. According to the legislation in some States it is therefore not foreseen to issue a new expulsion or deportation order consequential to a new conviction. In such cases

a transfer is impossible, even though an expulsion or deportation order for an unlimited period of time exists.

4. Some States also decline **requests for transfer based on Article 3 of the Additional Protocol** arguing that the person concerned has **not consented** to his/her transfer and therefore **rehabilitation** in the administering State seems impossible. In this context some questions should be discussed: Is there a real chance of rehabilitation in the sentencing State if there is an expulsion or deportation order for an unlimited period of time issued against the prisoner and he/she will have to return to the administering State as soon as he/she will be released from prison in the sentencing State? Is the situation different if intense family or social ties exist in the sentencing State? etc.