

Special PC-OC Session on Transfer of Sentenced Persons

Strasbourg, November 27, 2013

Report on the issues and proposals discussed in Workshop 2 “The Additional Protocol in practice”

I- Issues discussed

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

- *Definition of flight:*

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

- *Interpretation of paragraph 11 of Explanatory Memorandum:*

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

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

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

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

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

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

The participants agreed they should first discuss the scope of Article 3 of the Additional Protocol in order to (i) clearly identify the situations covered by that provision and (ii) try to reach a common

understanding as to the requirement that the removal order should be “consequential” to the conviction.

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

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

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

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

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

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

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

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

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

II- Proposals

A- Regarding the implementation of Article 2:

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

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

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

B- Regarding the implementation of Article 3:

Participants agreed that clarification is needed with regards to the requirement of a “consequential” link between the conviction(s) and the removal order. It was agreed that discussions should be continued within the PC-OC as to how this clarification should be made (binding vs. non-binding instrument).

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

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

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