

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

Introduction

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

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

Back in 1978, in Copenhagen, during their 11th Conference, the Ministers of Justice of the Council of Europe welcomed a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member States or by member States in their relations with non-member States.

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

Its explanatory report opens by stating that the purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. And it continues by explaining that the new instrument seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners. Finally the explanatory report explains that with a view to facilitating the

rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.

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

The Convention on Transfer of Sentenced Persons.

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

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

Also the fact that, according with article 2 paragraph 3, the transfer might be requested by either the sentencing or the administering State innovated the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home

country may have in his repatriation for reasons of cultural, religious, family and other social ties.

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

Thirdly, it allows States, when they are in the position of executing States, to choose one of two procedures to enforce the decision taken in the sentencing State, to continue to enforce or to convert it, therefore enabling them to be as in line with their national procedural rules to recognize and enforce foreign decisions as possible.

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

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

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

Also, this guide towards simplicity and flexibility inspired other multilateral instruments, like the Convention on Transfer of Sentenced Persons

between the CPLP State Parties, which follows very closely the standards of ETS 112.

The Additional Protocol.

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

The purpose of the Additional Protocol was to provide rules applicable to the transfer of the execution of sentences in two different cases, namely when a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed; this situation was somehow approached by articles 68^o and 69^o of the Schengen Agreement. Also the additional Protocol brings a solution to situations where the sentenced person is subject to expulsion or deportation as a consequence of the sentence.

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

However the applicable system in what concerns the (absence) of consent of the persons is different. In the first situation it is simply not previewed to hear the person that escaped; in the second situation the executing State must take into account the opinion of the person whose expulsion

has been decided in the sentencing State that, anyway, will be protected by specialty rule upon his or her arrival in the executing State.

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

A new cycle

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

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

The Committee of Ministers, through several Recommendations, showed its interest in this issue and urged States to consider a proper application of the Convention, first, and then a fair treatment of foreign prisoners, in 1984 (Rec. (84)11), 1988 (Rec. (88)13), 1992 (Rec. (92) 18) and 2012 (Rec. (2012)12).

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

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

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

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

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

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

Let's consider the main problems that affect it:

1. **Procedures take too much time**: this is typically a situation common to all forms of cooperation that might be avoided or limited by the introduction of delays. In fact, this is one of the factors introduced by the FWD of the EAW that substantially changed the quality of cooperation related with the arrest and surrender of persons in the European Union. Such a result could only be obtained through a *binding instrument* that would complement the existing ones. However, such a mandatory solution is it compatible with a

procedure that is mostly voluntary, with no obligation, for the States, to reach a specific result? And will this solution be realistic when other problems, such as the translation of documents, remain unsolved? Or should it be partial, for instance introducing delays only in what concerns the effective date for the transfer of the person, one of the solutions adopted by the FWD 2008/909/JHA?

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

Suggestion:

To consider drafting a mandatory instrument:

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

2. **Translation of the requests and supporting documents is too costly, in terms of money and time.** While reading article 17^o of ETS 112 the distinction between *mandatory translation*, to be provided

to information mentioned in article 4 (identification of the person concerned, information on his or her whereabouts in the executing State, statement of facts upon which the sentence was based and nature, duration and commencement of the sentence) and *optional translation*, left to the discretion of States, revealed by declarations, more or less generous, made to article 6^o specially n^o2 (among which a certified copy of the judgment, that includes, frequently one or two degrees of appeal) is clear. Having consulted the declarations and reservations made by State Parties we can conclude that only Croatia, France, Ireland, Mauritius and Slovakia did not make declarations to article 17^o n^o3. This state of play leads, frequently, to large and, frequently, double translations (it's the case of Portugal that declared that the supporting documents should be addressed in Portuguese or French; in this case, a second translation will be done, in Portugal, in order to submit the case to the national Court) that are not only costly in time and money but also dangerous, in terms of misinterpretation of the original text. Also means for transmission should be modernized as it has been already recommended R (88).

Suggestion:

To consider drafting a non-binding instrument:

To *recommend* States to consider accepting the translation of only the information mentioned in article 4^o and to work, if necessary, on basis of bilateral agreements (Russian Federation/declaration to art.17^o n^o3; Portugal and the Netherlands and France are doing the same).

3. **No time limits for the taking off of the consent of the person convicted.** The most important aspect of the Convention ETS 112 is the fact that it is based on the consent of the person that has been convicted and wants to be returned. For some States the fact that this consent can be revoked at any time, sometimes in a very late stage of the proceedings, has created major problems due to the fact that all costs made, in time and money, will be vain. However, for other States this issue could be strongly linked with Human Rights and therefore the right to change one's mind until the very end should be respected.

Suggestion:

To consider drafting a mandatory instrument:

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

4. **Impacts of early release in the procedures of transfers.** This question that is also linked with the reading and interpretation of article 3 n°1 c) of the ETS 112 seems to affect the good cooperation since it seems pointless to initiate a transfer procedure when early release will be decided before its end, sometimes even before the delay of 6 months is expired, in the administering or in the sentencing State (Lithuania). Article 6 n° 1 b) and n°2 a) does not impose an obligation to give information on the legal system for

early release for any of the States. Also late impacts of the difference between early release systems that were already envisaged by Recommendation n° R (88) 13 n°4 have been underlined (Italy).

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

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

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

5. Both the Convention and the Additional Protocol exclude from their field of application **the situation when a person is legally in the executing State (Hungary), for instance because the execution of a sentence has been suspended, but was, later on, revoked.** Differently from the situation solved by the Additional Protocol, when leaving the territory of the sentencing State the person was not yet fleeing from the execution of the sentence. However, that person, when going back to the State of his or her nationality, is very probably and voluntarily putting him or herself in a position of not satisfying the duties or injunctions that usually condition the suspension of sentences. That will imply the revocation of the suspension of the sentence. This situation will hardly be solved through existent instruments: in fact, as it was already stated in the explanatory report of the Additional Protocol “the mother Convention is of no use (...) because the sentenced person is not

present in the sentencing State and is thus unavailable for transfer. Nor can the problem in practice be dealt with under existing forms of international co-operation. For example, the normal method of returning a fugitive from justice – extradition – is generally not available because most countries do not extradite their own nationals. Also, the European Convention on the International Validity of Criminal Judgments (ETS 070) might provide a solution to the problem by allowing for the transfer of the sentence from State B to State A for execution. However, only a few States have ratified that Convention that is commonly considered as very comprehensive and detailed”.

Suggestion:

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

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

Besides problems related with delays, that have been already mentioned, some States underline that it's difficult to identify the appropriate counterparts, during the formal procedure of transfer and, especially when it reaches the final stage. The first situation should not be a problem due to the Country information available in

the site of PC-OC, provided that it remains accurate and updated. However the final stage of the removal is often taken care by the Police or the Penitentiary forces. Recently the central authority, in Portugal, has been asked to confirm a date for the transfer of French prisoners. This intervention, that was extremely urgent, just a few days before the date that was scheduled for the removal, was justified since the French authorities were not identifying the services that are responsible, in Portugal for the removal.

Suggestion:

To update the country information to include several recent State Parties to the ETS 112.

To amend the country information to describe the procedures of final removal and to identify, with the appropriate coordinates, the services which are responsible to coordinate them.

To find ways to gather and describe good practices in the coordination of the later stage of the transfer procedure (concentration; delays; exchange of prisoners).

- 7. Several situations that were an obstacle to a concrete transfer based on the application of the Additional Protocol were spotted.** Some States informed that, in procedures based on the Additional Protocol, transfers were refused due to the absence of consent or due to the fact that the expulsion decision was not consequential to the sentence imposed. If the first situation seems to be contrary to the spirit and the text of the Protocol the second would justify

further debates due to the very clear wording of article 3 of the Protocol.

Suggestion:

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

8. Finally obstacles related with payment of fines, costs of transfer and final removal or mentally ill prisoners were brought to the discussion. The Committee had already some reflections that are gathered in the tools for implementation of this instrument, to be consulted in our part of the COE site. Since very few States considered these situations as obstacles to cooperation **it would be may be wiser to debate them further on to conclude on its real impact and to identify the appropriate solution.**
9. Open item to link with the conclusions of the workshops.

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

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

To try to understand the system I monitored a procedure of transfer, from Portugal to Brazil where one of the major factors for delay does not appear, since we speak the same language.

What I found out is that a procedure that started on June 2011 was only terminated, with the effective removal of the prisoner, in December 2012, in a total of 18 months. The major factors for such a delay were the fact that there were no vacancies in the Estate Prison where the prisoner should be removed to and a final delay of 7 months that elapsed before the person was removed. No legal, no procedural obstacles, practical clear problems.

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

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

The scenario in the Council of Europe is completely different and would not justify such an exercise. However, at a bilateral level, a common approach to this form of cooperation that would include information on

the legal system, a simple description of the several phases of the national procedure and the identification of the actors involved and of practical problems in view of a common solution, could be encouraged.

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

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