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## Working Group on International Cooperation

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**Transfer of sentenced persons (article 17 of the  
Organized Crime Convention)**

## **Transfer of sentenced persons (article 17 of the Organized Crime Convention)**

### **Background paper prepared by the Secretariat**

#### **I. Introduction**

1. With criminals increasingly operating across borders, and in the light of the growth and expansion of transnational organized crime in its different forms, including drug trafficking, it has become progressively more common for countries around the world to convict foreign citizens and sentence them to imprisonment or other forms of deprivation of liberty. The increase in the number of foreign prisoners, which in many countries is disproportionately high compared with the total number of inmates, has contributed significantly to prison overcrowding.<sup>1</sup> Worldwide, nearly half a million people are in detention outside their home countries.<sup>2</sup> In January 2020, foreign nationals made up 15 per cent of the prison population in Europe, with shares ranging from 2 to 70 per cent in most countries.<sup>3</sup> Moreover, foreign prisoners frequently encounter particular difficulties on account of such factors as different languages, culture, customs and religions. At the same time, the problems of communication with foreign prisoners and the need to take account of their specific needs and problems place an additional burden on prison administrations. Against this background, it has become increasingly important in the field of international cooperation in criminal matters to manage issues linked to the transfer of sentenced persons to their home countries.

2. The present background paper was prepared by the Secretariat to facilitate the discussions under item 2 of the provisional agenda of the thirteenth meeting of the

\* [CTOC/COP/WG.3/2022/1-CTOC/COP/WG.2/2022/1](#).

<sup>1</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Strategies to Reduce Overcrowding in Prisons*, Criminal Justice Handbook Series (Vienna, 2013), p. 11.

<sup>2</sup> Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2021* (London; Bangkok, 2021), p. 25; and PrisonWatch, “Percentage and total number FNP worldwide 2020-2015-2010-2005” (2020).

<sup>3</sup> See Marcelo F. Aebi and Mélanie M. Tiago, *Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I Report*, UNILCRIM Series 2021/1 (Strasbourg, Council of Europe; Lausanne, Switzerland, University of Lausanne, 2021), p. 5. See also European Prison Observatory, *Prisons in Europe: 2019 Report on European Prisons and Penitentiary Systems* (Rome, 2019), p. 8.



Working Group on International Cooperation. It presents an overview of the international framework related to the transfer of sentenced persons, including but not limited to the United Nations Convention against Transnational Organized Crime. In addition, it contains an analysis of relevant legal and practical aspects with a view to enabling further dialogue on good practices and challenges encountered specifically in this field of international cooperation in criminal matters and with a view to supporting the discussion of solutions.

## II. Rationale for and objectives of the transfer of sentenced persons

3. There are different policy-related reasons to support the transfer of sentenced persons, ranging from humanitarian concerns and the social rehabilitation or social reintegration of sentenced persons to the proper and effective administration of justice. In particular, persons who serve their sentences in their home countries can be better rehabilitated, resocialized and integrated back into the community. Imprisonment in a foreign country, away from family and friends, may also be counterproductive, as families can provide prisoners with support and improve the likelihood of successful resettlement and reintegration.<sup>4</sup>

4. Moreover, there are also humanitarian considerations to be taken into account. Difficulties in communication because of language barriers, alienation from the local culture and customs and the absence of contact with relatives may have detrimental effects on the foreign prisoner.<sup>5</sup>

5. The transfer of sentenced persons has a strong basis in international human rights law. With regard to United Nations standards and norms on crime prevention and criminal justice, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)<sup>6</sup> echo the duty of competent authorities to facilitate the social rehabilitation of prisoners. Moreover, article 10, paragraph 3, of the International Covenant on Civil and Political Rights specifies that the “essential aim” of a penitentiary system is the “reformation and social rehabilitation” of sentenced persons. Furthermore, the rehabilitation of persons sentenced for offences under the Organized Crime Convention is also a stated objective of the Convention, which provides in article 31, paragraph 3, that “States parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention.”<sup>7</sup>

6. A further practical consideration in favour of an effective and relatively large-scale system of prisoner transfers is that States may benefit from implementing such a system, as they may have a large number of foreign prisoners in their own systems, whose imprisonment may require additional administrative and other resources.<sup>8</sup>

7. In addition, although transfer was once seen as an infringement of the sovereignty of a State owing to the territoriality of criminal law and the exclusive right of the State to administer criminal justice,<sup>9</sup> it may now be viewed as a way to

<sup>4</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (Vienna, 2012), pp. 9–11.

<sup>5</sup> Ibid. p. 11. See Michał Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Freiburg, Germany, Max-Planck-Institut, 1993), pp. 159 and 164. See, further, Explanatory Report to the Convention on the Transfer of Sentenced Persons (*European Treaty Series*, No. 112), para. 9.

<sup>6</sup> General Assembly resolution 70/175, annex.

<sup>7</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (Vienna, 2016), para. 600.

<sup>8</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 15.

<sup>9</sup> See Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, pp. 134, 148–149 and 154–155. See also Candido Cunha, “Current issues in correctional treatment and effective countermeasures: transfer of sentenced persons”, in *Annual Report for 1999 and Resource Material Series No. 57* (Tokyo, Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 2001), p. 263.

ease the diplomatic tension that may arise when one country imprisons a national of another country, or as a joint effort to improve international cooperation as well.

### III. International normative framework

#### A. United Nations instruments

##### 1. Organized Crime Convention

8. In accordance with article 17 of the Organized Crime Convention, States parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by the Convention, in order that they may complete their sentences there.

9. During the negotiations on the elaboration of the Convention, the draft of that article was initially included in the draft provision on extradition. It emerged as a distinct article (10 bis) during the fifth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the relevant negotiating body for the Convention and the Protocols thereto, and was finalized and approved without further amendments at the tenth session.<sup>10</sup>

10. Allowing for the transfer of sentenced persons may be particularly useful in achieving the proper and effective administration of justice in cases in which the extradition of a person is refused on the basis of nationality. In such a case, a State may agree to the extradition of one of its nationals on condition that, upon conviction and sentencing, he or she is transferred back to his or her country of origin to serve the sentence. Thus, from that perspective, there is an interrelationship between article 17 and article 16, paragraph 11, of the Organized Crime Convention.

11. The transfer of sentenced persons is based on the concept of the enforcement of foreign sentences, which may also be applicable in extradition proceedings where the surrender of a fugitive is denied on the grounds of nationality, as described in paragraph 10 above. In such cases, the requested State party may, if its domestic law so permits and in conformity with the requirements of such law, enforce the sentence that has been imposed under the domestic law of the requesting State party (art. 16, para. 12, of the Organized Crime Convention).

12. The transfer of sentenced persons and the related review of implementation of article 17 of the Convention will be examined under the fourth thematic cluster (International cooperation, mutual legal assistance and confiscation) of the newly established Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.<sup>11</sup> The reviews under the Mechanism will be conducive to mapping national approaches to this form of international cooperation and developing cumulative knowledge on obstacles to cooperation and on practical means of overcoming them.

##### 2. Other United Nations instruments

*United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*

13. Article 6, paragraph 12, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 stipulates that “the Parties may consider entering into bilateral or multilateral agreements, whether ad hoc or general, on the transfer to their country of persons sentenced to imprisonment and

<sup>10</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.06.V.5), p. 165.

<sup>11</sup> See UNODC, *Organized Crime, Conference of the Parties to the Organized Crime Convention, Review Mechanism, Timeline, “General timeline”*. Available at [www.unodc.org/](http://www.unodc.org/).

other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.”

14. The aforementioned provision imposes no treaty obligation. It merely invites parties to consider entering into agreements on the transfer of prisoners, and those agreements may be bilateral or multilateral, general or ad hoc.<sup>12</sup>

#### *United Nations Convention against Corruption*

15. Article 45 of the United Nations Convention against Corruption replicates the content of the provision for the transfer of sentenced persons set out in article 17 of the Organized Crime Convention, with one minor drafting alteration to ensure that it applies to offences falling within the scope of application of the Convention against Corruption. Article 45 is an invitation to States parties to enter into bilateral or multilateral agreements or arrangements to enable the transfer of sentenced persons to their countries to complete their sentences.<sup>13</sup>

16. Similarly to the aforementioned interrelationship between article 17 and article 16, paragraph 11, of the Organized Crime Convention, agreements made under article 45 of the Convention against Corruption also make it possible to return an extradited person to his or her State of nationality at the request of either the sentencing State or the administering State in situations where extradition would otherwise have been barred on the grounds of the nationality of the person sought.<sup>14</sup>

17. Most States parties to the Convention against Corruption have the necessary legal framework in place to carry out such transfers under certain conditions. In some countries, the transfer of prisoners could theoretically also be carried out on the basis of reciprocity. In practice, however, as demonstrated by the findings of the first reporting cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption with regard to the implementation of article 45 of the Convention, almost all States rely on the provisions of international treaties.<sup>15</sup> A number of difficulties were reported regarding the practical implementation of transfer agreements; those difficulties were associated, for example, with the fact that some States do not regulate relevant administrative procedures in sufficient detail. In the same context, issues have arisen with regard to transferring prisoners to countries with considerably divergent sentencing regimes, ensuring the timely execution of transfer requests, resolving the question of which party should cover the cost of the transfer, and avoiding the break-up of family units if a prisoner wishes to be transferred back to his or her home country, away from his or her family, to serve the sentence there.<sup>16</sup>

## **B. Regional instruments**

### **1. Council of Europe**

18. The first normative instrument established within the Council of Europe for the international execution of sanctions was the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which was opened for signature on 30 November 1964. Twenty countries ratified or acceded to that instrument, which allows for conditionally sentenced or released offenders to be transferred so that they can serve their sentences or other sanctions in their home country.

<sup>12</sup> *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations publication, Sales No. E.98.XI.5), para. 6.48.

<sup>13</sup> See Neil Boister, “Article 45: transfer of sentenced persons”, in *The United Nations Convention against Corruption: A Commentary*, Cecily Rose, Michael Kubiciel and Oliver Landwehr, eds., Oxford Commentaries on International Law (Oxford, Oxford University Press, 2019), p. 437.

<sup>14</sup> See art. 44, para. 12, of the Convention against Corruption.

<sup>15</sup> See UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), p. 219.

<sup>16</sup> *Ibid.*, p. 220.

19. The second relevant convention is the European Convention on the International Validity of Criminal Judgments, which was opened for signature on 28 May 1970 and has been ratified by 23 States members of the Council of Europe. That Convention deals with the recognition of criminal judgments and applies to sanctions involving the deprivation of liberty, fines or confiscations, and disqualifications. On the basis of the treaty, one State party can ask another to execute a judgment.

20. The Council of Europe Convention on the Transfer of Sentenced Persons, which was opened for signature on 21 March 1983, so far has 68 States parties, including 22 States non-members of the Council of Europe. It is currently the most important instrument for the transfer of sentenced persons for any sentences involving the deprivation of liberty.

21. The Convention on the Transfer of Sentenced Persons distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects: (a) with a view to facilitating the rapid transfer of foreign prisoners, it provides for a simplified procedure which, in its practical application, is intended to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments; (b) a transfer may be requested not only by the State in which the sentence was imposed (“sentencing State”), but also by the State of which the sentenced person is a national (“administering State”), thus enabling the latter to seek the repatriation of its own nationals; (c) the transfer is subject to the sentenced person’s consent; and (d) the Convention on the Transfer of Sentenced Persons confines itself to providing the procedural framework for transfers and does not contain an obligation on contracting States to comply with requests for transfer; for that reason, it was not necessary to list any grounds for refusal in the Convention or to require the requested State to give reasons for its refusal to agree to a requested transfer.<sup>17</sup>

22. The Convention on the Transfer of Sentenced Persons was complemented by an Additional Protocol in 1997 that regulates transfers in two specific circumstances: (a) where the offender has fled from the sentencing State to his or her home country; and (b) where the offender is subject to an expulsion or deportation order. Forty States have ratified the Additional Protocol.

23. A Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons was opened for signature on 22 November 2017. Eight States have ratified that instrument so far. The amending Protocol will enter into force once it has been ratified by all parties to the Additional Protocol. However, it is foreseen that it can be provisionally applied among parties who have made a declaration to that effect (art. 5).

24. A recommendation of the Committee of Ministers of the Council of Europe to member States concerning the practical application of the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto (CM/Rec(2020)3) was adopted on 1 July 2020 and contains comprehensive guidelines that “take into account the Additional Protocol as well as the increased number of Parties to the Convention, the experience gained in its application and the developments in society and technology”.

## **2. Commonwealth**

25. The Scheme for the Transfer of Convicted Offenders within the Commonwealth of 1986, as amended in 1990, largely mirrors the provisions of the Convention on the Transfer of Sentenced Persons. The Scheme is open to all Commonwealth countries that agree to use it as a basis for the transfer of sentenced persons.

## **3. Organization of American States**

26. The Inter-American Convention on Serving Criminal Sentences Abroad was adopted in Managua on 9 June 1993 and entered into force on 12 April 1996. Although

<sup>17</sup> Explanatory Report to the Convention on the Transfer of Sentenced Persons, para. 10.

the Inter-American Convention does not follow the structure of the Convention on the Transfer of Sentenced Persons, it provides a similar model for the transfer of sentenced persons. The Inter-American Convention has been ratified or acceded to by 23 States parties, 6 of which are outside the Americas (Czechia, India, Kazakhstan, Saudi Arabia, Slovakia and Ukraine).

#### 4. European Union

27. Council Framework Decision 2008/909/JHA of 27 November 2008 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,<sup>18</sup> as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 on trials in absentia,<sup>19</sup> provides for a process different from that set out in earlier multilateral instruments.

28. Within its scope of application, the Framework Decision replaces the Convention on the Transfer of Sentenced Persons of 1983 and the Additional Protocol thereto, the European Convention on the International Validity of Criminal Judgments of 1970, the relevant provisions of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 1991.

29. In terms of procedure, rather than submitting a formal request, the sentencing State forwards the judgment to the member State to which it wishes to transfer the sentenced person. To expedite the process, the judgment is accompanied by a standard certificate, which includes the information necessary for the transfer.

#### 5. Other instruments

30. Other regional instruments include the Riyadh Arab Agreement on Judicial Cooperation of 1983, part VII of which contains provisions that facilitate the transfer of persons sentenced to terms of imprisonment to other States to serve those sentences; the Commonwealth of Independent States Convention of 6 March 1998 on the transfer of convicted prisoners to serve out their sentences; and the Convention on the transfer of sentenced persons between States members of the Community of Portuguese-speaking Countries.

### C. Bilateral agreements

31. There is an extensive network of bilateral treaties and agreements dealing with the transfer of sentenced persons. Such bilateral agreements exist and operate contemporaneously with multilateral conventions on the transfer of sentenced persons in many States.

32. Bilateral agreements are a helpful tool in inter-State transfers, as they enable Governments to deal with large numbers of foreign nationals in their prison systems or their own nationals held in prisons abroad, or to deal with more specific, urgent cases.<sup>20</sup> As already noted in the context of extradition, the advantage of bilateral agreements is that they can be tailored to the specific needs of the States in question and can be expanded, amended or, if necessary, terminated in a relatively easy manner. They can be adapted to the specific interests of the two States, which is a particular concern if differences between legal systems need to be overcome. In actual cases,

<sup>18</sup> *Official Journal of the European Union*, L 327, 5 December 2008, p. 27.

<sup>19</sup> *Official Journal of the European Union*, L 81, 27 March 2009, p. 24.

<sup>20</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 22. See also Mohammed Abdul-Aziz, "International perspective on transfer of prisoners and execution of foreign penal judgements" in *International Criminal Law*, 3rd ed., vol. II, M. Cherif Bassiouni, ed., *Multilateral and Bilateral Enforcement Mechanisms* (Leiden, Netherlands, Martinus Nijhoff Publishers, 2008), pp. 537–539.

the presence of a pre-existing extradition treaty may also mean that requests face fewer obstacles, are processed faster and have a higher chance of approval than requests made between States that have no prior history of cooperation. The disadvantages of bilateral treaties, on the other hand, are that they are very resource-intensive to negotiate, especially for smaller or developing States that cannot afford an extensive international negotiating programme, and that their increased number inevitably entails a lack of uniformity.<sup>21</sup>

#### **D. A soft-law model instrument as guidance: the Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners**

33. At the United Nations level, the Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners was agreed upon in 1985.

34. In terms of historical background,<sup>22</sup> it should be noted that the process of international transfer was given a considerable boost by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1975. The Congress recommended that “in order to facilitate the return to their domicile of persons serving sentences in foreign countries, policies and practices should be developed by utilizing regional cooperation and starting with bilateral arrangements”.<sup>23</sup>

35. Following that recommendation, basic principles were elaborated by the Secretariat for consideration by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1980. The Sixth Congress adopted resolution 13, in which Member States were urged “to consider the establishment of procedures whereby such transfers of offenders may be effected, recognizing that any such procedures can only be undertaken with the consent of both the sending and receiving countries and either with the consent of the prisoner or in his interest”.<sup>24</sup> In the same resolution, the Congress requested the Committee on Crime Prevention and Control (the predecessor of the Commission on Crime Prevention and Criminal Justice) to give priority to the development of a model agreement for the transfer of offenders.

36. At its eighth session, the Committee on Crime Prevention and Control considered a draft model agreement on the transfer of foreign prisoners and recommendations on the treatment of foreign prisoners. On the recommendation of the Committee, the Economic and Social Council, in its decision 1984/153, decided to transmit to the Seventh Congress the draft resolution to which the draft model agreement and recommendations were annexed. As a result, the Seventh Congress adopted the Model Agreement,<sup>25</sup> together with the recommendations on the treatment of foreign prisoners.<sup>26</sup>

<sup>21</sup> See UNODC, *Digest of Cases of International Cooperation in Criminal Matters Involving the United Nations Convention against Transnational Organized Crime as a Legal Basis* (Vienna, 2021), p. 107.

<sup>22</sup> See also Abdul-Aziz, “International perspective on transfer of prisoners”, p. 531.

<sup>23</sup> *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1–12 September 1975: report prepared by the Secretariat* (United Nations publication, Sales No. E.76.IV.2), chap. I, para. 23 (j).

<sup>24</sup> *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August–5 September 1980: report prepared by the Secretariat* (United Nations publication, Sales No. E.81.IV.4), chap. I, sect. B.13.

<sup>25</sup> *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. 1, sect. D.1, annex I.

<sup>26</sup> *Ibid.*, annex II.

37. The Secretariat prepared explanatory notes on the Model Agreement with a view to providing clarification.<sup>27</sup> Although the Model Agreement includes, for the sake of completeness, a preamble and final clauses referring to bilateral solutions only, it is also intended to be used for multilateral negotiations.<sup>28</sup>

38. In addition, by its resolution 45/119, the General Assembly adopted the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released. The Assembly invited Member States, if they had not established treaty relations with other States in that area, or if they wished to revise existing treaty relations, to take into account the Model Treaty whenever doing so. The main objective of the Model Treaty is to provide States with a framework flexible enough to allow offenders on probation, parole or under suspended sentences to return to their countries of origin or to move to other countries by transferring the responsibility for supervision to the party concerned.

#### IV. National implementing legislation

39. To support the implementation and use of transfer mechanisms, including in the absence of any multilateral or bilateral agreements and on the basis of reciprocity, States need to ensure that their national legislation facilitates such cooperation. Even though much of the framework relating to the transfer of sentenced persons is found in relevant treaties, as with other forms of international cooperation, domestic legislation can be a complementary tool and ensure the efficient administration of transfers of sentenced persons. It can also ensure that the process of transferring sentenced persons is subject to judicial control. Furthermore, a domestic statutory framework assigns authority, ensures clarity in relation to the principles behind the transfers and gives legality to the transfer process.<sup>29</sup>

40. To ensure the efficiency of the transfer of sentenced persons, it is recommended that national laws address the following issues at a minimum: providing for definitions of all critical terms; identifying and designating a central authority to receive and respond to requests; enumerating the basic requirements for transfer; ensuring clarity of application and other procedures; and identifying the steps and procedures that a country is to follow in administering the programme, processing applications and making transfer decisions. Other relevant considerations include the following: whether sentenced persons are entitled to be represented by counsel, and, if so, at what stage of the proceedings; whether juveniles and mentally ill persons are eligible for transfer, and, if so, whether special procedures and protections apply; the transferability of sentenced persons on parole, probation or other forms of conditional release; the impact that transfers have on the rights of returning nationals and the immigration status of transferred sentenced persons; the identification of limitations on subsequent prosecutions of conduct forming the basis for the transferred offence; and any specific reporting requirements of the sentencing and administering countries.<sup>30</sup>

### V. Basic requirements for transfer: an indicative overview

#### A. Final judgment

41. A basic requirement for the transfer of a sentenced person is the existence of a final judgment of conviction and sentence; under paragraph 10 of the Model Agreement, “a transfer shall be made only on the basis of a final and definitive sentence having executive force.” Thus, all available remedies must have been

<sup>27</sup> A/CONF.121/10. See also Abdul-Aziz, “International perspective on transfer of prisoners”, pp. 532–536.

<sup>28</sup> A/CONF.121/10, para. 34.

<sup>29</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 58.

<sup>30</sup> See UNODC, *Model Legislative Provisions against Organized Crime*, 2nd ed. (Vienna, 2021), p. 132.



exhausted, or the time limit for such remedies must have expired without the parties having availed themselves of them. Moreover, a suspended sentence cannot be given as a reason for requesting a transfer. That provision of the Model Agreement does not, however, preclude the possibility of a later review of the sentence in the sentencing State in the light of newly produced evidence.<sup>31</sup>

42. Similarly, article II, paragraph 3, of the Inter-American Convention on Serving Criminal Sentences Abroad provides that “a sentence is understood to be final when no ordinary legal appeal against the conviction or sentence is pending in the sentencing State and the period for its appeal has expired.”<sup>32</sup>

## **B. Remainder of sentence to be served**

43. For a transfer of a sentenced person to be carried out, paragraph 11 of the Model Agreement requires that “at the time of the request for transfer, the prisoner shall, as a general rule, still have to serve at least six months of the sentence; a transfer should, however, be granted also in cases of indeterminate sentences.”

44. The minimum period of six months as the remainder of the sentence to be served is found in most multilateral instruments and seems appropriate in view of the aim of the transfer, namely the social rehabilitation and reintegration of the prisoner, which would be hampered in the case of a shorter period. Moreover, from a practical point of view, transfer proceedings take time to complete, and therefore a period of less than six months may not be sufficient as a time frame for carrying out the transfer. States may, however, agree bilaterally to use a transfer instrument in cases where the rest of the enforceable sanction is less than six months.<sup>33</sup>

## **C. Dual criminality**

45. Another condition for a transfer is the fulfilment of the requirement of dual criminality. This requires that the offence for which the sanction is imposed in the sentencing State should also be an offence according to the legislation of the administering State. The underlying idea is that an administering State would be reluctant to implement a sentence for conduct that would not be regarded as criminal if committed in its territory. The condition is similar to the rule that applies in the context of extradition and mutual legal assistance.<sup>34</sup>

46. Dual criminality is considered to be fulfilled irrespective of whether the laws of the two States place the offence within the same category of offence or use the same terminology, as long as the conduct underlying the offence is a criminal offence under the laws of both States.<sup>35</sup>

47. In the Framework Decision, an approach was adopted to depart from the double criminality requirement in specific circumstances. Article 7, paragraph 1, of the Framework Decision contains a list of offences for which double criminality is not required. Those offences, “if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State, shall, under the terms of this framework decision and without verification of the double criminality of the act, give rise to recognition of the judgment and enforcement of the sentence imposed”. Thus, the executing authority can only verify double criminality

<sup>31</sup> A/CONF.121/10, para. 21.

<sup>32</sup> See also art. 3, para. 1 (b), of the Convention on the Transfer of Sentenced Persons and the Explanatory Report to the Convention, para. 21.

<sup>33</sup> A/CONF.121/10, para. 22.

<sup>34</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 26.

<sup>35</sup> See para. 24 of the Explanatory Report to the Convention on the Transfer of Sentenced Persons, referring to art. 3, para. 1 (e), of the Convention. See also art. III, para. 3, of the Inter-American Convention on Serving Criminal Sentences Abroad. See, further, art. 43, para. 2, of the Convention against Corruption.

for: (a) those offences that do not belong to one of the 32 categories of offences listed in article 7, paragraph 1; (b) offences that belong to one of those categories but are punishable in the issuing State only by a custodial sentence or a detention order for a maximum period of less than three years; or (c) all offences when a declaration has been made under article 7, paragraph 4. Many member States have made declarations that enable a verification of double criminality for all offences.<sup>36</sup>

48. An explanatory note on paragraph 3 of the Model Agreement takes the principle of dual criminality further by indicating that the offence has to fall within the competence of judicial authorities. Thus, a punishment imposed by administrative authorities would in no case, even if it amounted to deprivation of liberty, fall within the scope of such a transfer agreement.<sup>37</sup>

#### **D. Links to the administering State**

49. A key requirement for an international transfer to take place is that the sentenced person should have some link to the State to which he or she is to be transferred. In paragraph 1 of the Model Agreement, reference is made to “the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence”. The Model Agreement takes no position on whether a prisoner should be transferred to the country of nationality or to the country of residence, if they are different, but leaves it to the administering State to decide whether it will also accept non-nationals residing in its territory.<sup>38</sup>

50. In article 3, paragraph 1 (a), of the Convention on the Transfer of Sentenced Persons, it is stipulated that the sentenced person must be “a national of the administering State”. Article 3, paragraph 4, of that Convention provides that any State may define, as far as it is concerned, the term “national” for the purposes of the Convention. In the declarations made with respect to the Convention, while some States refer to the definition of nationality under national constitutional law or legislation, others prefer to define the term, for the purposes of the operation of the Convention, more specifically.<sup>39</sup>

51. In guideline 1 (a) on the practical application of the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto, contained in appendix 1 to recommendation CM/Rec(2020)3, States parties to the Convention are invited to ensure the widest possible application of the Convention and the Additional Protocol, in particular “by using the possibility under Article 3, paragraph 4 of the Convention to define or redefine the term ‘national’, for the purpose of the Convention, in a broad sense, including usual residence and having regard to any close ties the persons concerned have with the administering State, in particular the presence of family and children of the sentenced person”.

52. Paragraph 4 (1) (a) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth provides that the Scheme applies both to nationals of the administering State and to persons who have close ties to it. Under paragraph 4 (3), parties can define the term “national” by way of declaration.

53. The Framework Decision refers to nationality and permanent residence, as well as to the “State in which a person lives”, which indicates the place to which that

<sup>36</sup> See *Handbook on the Transfer of Sentenced Persons and Custodial Sentences in the European Union* (Official Journal of the European Union, C 403/02, 29 November 2019), paras. 5.3 and 5.5.4.

<sup>37</sup> A/CONF.121/10, para. 12.

<sup>38</sup> *Ibid.*, para. 8.

<sup>39</sup> Some extend the definition of the term to include spouses of citizens of the administering State, persons with close ties to the State whom the relevant Government views it is appropriate to accept, persons who were nationals at the time of the commission of the offence, persons with dual nationality if one nationality is that of the administering State, persons who lost their nationality as the result of a war and stateless persons or aliens who ordinarily reside in the administering State.

person is attached based on habitual residence and on elements such as family, social or professional ties (preamble, para. 17).

## E. Consent of sentenced person

54. The transfer of a sentenced person is normally regarded as discretionary and subject to the consent of the individual in question.<sup>40</sup> As has been explained in the context of the Model Agreement, “the requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the proposed model agreement on the consent requirement.”<sup>41</sup>

55. Any sentenced person who may be eligible for a transfer should be informed of the possibilities and the legal consequences of such a transfer, or at least of where such information can be obtained, to enable him or her to decide whether to express interest in a transfer. Such information should be given in a language that the prisoner can understand. The prisoner should also be informed whether he or she might be prosecuted for offences committed before the transfer. As this depends also on the domestic law of the administering State, that State should be involved in the information procedure.<sup>42</sup>

56. The Model Agreement leaves it to the discretion of the States concerned to decide whether a prisoner should be transferred to the country of his or her nationality or residence. In any case, in the Model Agreement it is stated that the transfer should take place only with the express consent of the prisoner. Such consent should refer to the transfer itself and also to the State to which the transfer is to be effected.<sup>43</sup>

57. The Additional Protocol to the Convention on the Transfer of Sentenced Persons provides for two instances in which consent is required. The first is when the person seeks to avoid the further execution of the sentence by fleeing the sentencing State to the territory of another State party, which may administer the sentence (art. 2). The second is when a sentenced person would be subject to deportation or expulsion that would result in that person no longer being allowed to remain in the territory of the sentencing State once he or she is released from prison (art. 3). In the latter case, although the sentenced person’s consent is not required, the administering State must not give its agreement to the transfer without first having taken that person’s opinion into consideration (art. 3, para. 2).

58. One of the novelties introduced by the Framework Decision in the area of the transfer of sentenced persons, compared with previous international transfer regimes, is that it increases the number of situations in which the consent of the sentenced person is not required. Thus, under article 6, paragraph 2, of the Framework Decision, the consent of the sentenced person is not required when: (a) the person is a national of the executing State and also lives there; or (b) the person will be deported to the executing State once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgement; or (c) the person has fled or otherwise returned to the executing State in view of pending criminal proceedings against him or her in the issuing State or following the

<sup>40</sup> See art. 3, para. 1 (d), of the Convention on the Transfer of Sentenced Persons.

<sup>41</sup> A/CONF.121/10, para. 14, referring to para. 5 of the Model Agreement on the Transfer of Foreign Prisoners.

<sup>42</sup> A/CONF.121/10, para. 15, referring to para. 6 of the Model Agreement. See also art. 7 of the Convention on the Transfer of Sentenced Persons and guideline 3 for the practical application of the Convention and the Additional Protocol thereto, contained in appendix I to recommendation CM/Rec(2020)3; and art. III, para. 2, of the Inter-American Convention on Serving Criminal Sentences Abroad.

<sup>43</sup> A/CONF.121/10, para. 16, referring to para. 7 of the Model Agreement.

conviction in that issuing State. In all other cases, the informed consent of the sentenced person is required.<sup>44</sup>

## F. Human rights considerations

59. In previous meetings, the Working Group has dealt with human rights considerations in extradition proceedings twice. At its ninth meeting, in May 2018, the Working Group discussed challenges faced in the course of extradition proceedings, including consultations and sharing of information between the requested and the requesting State. At its tenth meeting, in October 2018, the discussion revolved around challenges faced in expediting the extradition process, including addressing health and safety and other human rights issues. Among those human rights issues was the prohibition on surrendering a person sought to a requesting State if there is a threat to his or her life, or if he or she is likely to be subject to torture or to inhuman or degrading treatment or punishment in the requesting State, and that, depending on the circumstances, extradition may also be refused for humanitarian reasons.<sup>45</sup> It was also highlighted that consultations played a pivotal role in providing assurances and guarantees regarding the treatment of the person sought after his or her surrender to the requesting State.<sup>46</sup>

60. Similar considerations are also applicable to the transfer of sentenced persons. States are increasingly concerned about the conditions in which the prisoner will serve the sentence in the State to which they have been transferred. That has been demonstrated by the inclusion of provisions on prison conditions in relevant agreements. The right of the sentenced person to family or private life (see, for example, art. 8 of the Convention on the Transfer of Sentenced Persons) is also of relevance.

61. Particularly when a sentencing State seeks to remove a sentenced person without that person's consent, the sentencing State must ensure that the transfer will not violate the basic human rights of the person concerned. This may entail obtaining assurances from the potential administering State that the person's fundamental human rights will not be infringed.<sup>47</sup> In some instances, this may be specified directly in a bilateral agreement.<sup>48</sup>

## VI. Enforcement of the sentence

### A. Models of enforcement

62. There are two modes of recognition that may be available: continued enforcement or conversion of the sentence. Continued enforcement refers to a process whereby, through a court or administrative order, the sentence imposed by the sentencing State is enforced by the administering State. In such a case, the administering State is bound by the legal nature and duration of the sentence as determined by the sentencing State. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentences, it may be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As for its nature, the punishment or measure should, as far as possible, correspond to that

<sup>44</sup> See *Handbook on the Transfer of Sentenced Persons and Custodial Sentences in the European Union*, para. 2.4.

<sup>45</sup> CTOC/COP/WG.3/2018/5, paras. 41–44.

<sup>46</sup> See CTOC/COP/WG.3/2018/2, sects. II and III, CTOC/COP/WG.3/2018/3, para. 18, and CTOC/COP/WG.3/2018/6, para. 10.

<sup>47</sup> Regarding informal consultations at different stages of proceedings to transfer sentenced persons, including, where appropriate, prior to and after the refusal of relevant requests, see also the recommendation contained in document CTOC/COP/2018/13, resolution 9/3, annex II, subpara. (c).

<sup>48</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 38.

imposed by the sentence to be enforced. It should not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor should it exceed the maximum sentence prescribed by the law of the administering State.<sup>49</sup>

63. The second model refers to the conversion of the sentence to be enforced, namely the judicial or administrative procedure by which a sanction prescribed by the law of the administering State substitutes for the sanction imposed in the sentencing State. When converting the sentence, the competent authority is bound by the findings as to the facts insofar as they appear – explicitly or implicitly – from the judgment pronounced in the sentencing State. It therefore has no freedom to evaluate differently the facts on which the judgment is based. This applies to “objective” facts relating to the commission of the act and its results, as well as to “subjective” elements relating, for instance, to premeditation and intent on the part of the convicted person.<sup>50</sup>

64. In the case of conversion of a sentence, the administering State is entitled to adapt the nature or duration of the sanction according to its national law, taking into due consideration the sentence passed in the sentencing State. A sanction involving deprivation of liberty must not, however, be converted to a pecuniary sanction.<sup>51</sup> In any case, no aggravation of the prisoner’s penal situation is permitted.<sup>52</sup>

## **B. Amnesty, pardon or commutation**

65. In relation to amnesty, pardon or commutation, paragraph 22 of the Model Agreement and article 19, paragraph 1, of the Framework Decision state that both the sentencing and the administering State may grant amnesty or pardon to the sentenced person. Article 12 of the Convention on the Transfer of Sentenced Persons also makes reference to the competence of both States in relation to the commutation of the sentence.

66. However, other international instruments specify that the sentencing State retains the power to grant pardon, amnesty or commutation (art. VIII of the Inter-American Convention on Serving Criminal Sentences Abroad; para. 13 (1) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth; art. 61 of the Riyadh Arab Agreement on Judicial Cooperation).

67. However, when a review of a judgment is sought, the consistent approach in all international instruments is that only the sentencing State has jurisdiction in that respect (see, on an indicative basis, art. 13 of the Convention on the Transfer of Sentenced Persons and art. 19, para. 2, of the Framework Decision).

## **C. Double jeopardy and the rule of speciality**

68. Sentenced persons who have been transferred are protected against further prosecution in various ways. Paragraph 13 of the Model Agreement and article VII, paragraph 1, of the Inter-American Convention on Serving Criminal Sentences Abroad stipulate that the administering State is prohibited from trying such persons for the same act for which they were convicted and sentenced in the sentencing State and on which the implementation in the administering State is based.

69. The rule of speciality, in the traditional meaning that has been developed in extradition law and practice, limits the power of the requesting State over the person surrendered to it through the extradition process. According to this rule, an extradited person cannot be proceeded against, sentenced, detained, re-extradited to another

<sup>49</sup> David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford Commentaries on International Law Series (Oxford, Oxford University Press 2007), pp. 192–193. See also art. 10 of the Convention on the Transfer of Sentenced Persons.

<sup>50</sup> See art. 11 of the Convention on the Transfer of Sentenced Persons and the Explanatory Report to the Convention, para. 54. See also para. 17 of the Model Agreement.

<sup>51</sup> Model Agreement, para. 16.

<sup>52</sup> A/CONF.121/10, para. 26.

State or subjected to any other restriction of personal liberty for any offence committed before the surrender other than the one for which extradition was requested and granted.<sup>53</sup>

70. Article 18, paragraph 1, of the Framework Decision provides for the speciality rule as a rule tailored to the transfer of a sentenced person. Thus, a person transferred to an administering State must not “be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her transfer other than that for which he or she was transferred”.<sup>54</sup>

71. Nevertheless, a number of specific exceptions to the rule of speciality are set out in article 18, paragraph 2, of the Framework Decision. The sentenced person may therefore be prosecuted in the executing State: (a) when, having had an opportunity to leave the territory of the executing State, the person has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it; (b) when the offence is not punishable by a custodial sentence or a detention order; (c) when the criminal proceedings do not give rise to the application of a measure restricting personal liberty; (d) when the sentenced person could be liable to a penalty or a measure not involving deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure in lieu may give rise to a restriction of his or her personal liberty; (e) when the person consented to the transfer; (f) when the sentenced person, after his or her transfer, has expressly renounced entitlement to the specialty rule with regard to specific offences preceding his or her transfer; and (g) for cases other than those mentioned above, where the issuing State gives its consent.<sup>55</sup>

## VII. Impact of the COVID-19 pandemic on the transfer of sentenced persons

72. In meetings held after the outbreak and spread of the coronavirus disease (COVID-19) pandemic, the Working Group was informed about the impact of the pandemic on international cooperation in criminal matters in general, including the transfer of sentenced persons.<sup>56</sup> It was noted that problems similar to those posed by the pandemic in extradition and the execution of European arrest warrant proceedings had also been encountered in the transfer of sentenced persons, thus leading to the suspension of transfers during the initial stage of the pandemic in most States. However, as reported in the context of the European Union, such transfers of prisoners were made possible again at a later stage.<sup>57</sup>

73. Practical issues encountered by national authorities when carrying out transfers were mainly related to the closure of borders and the cancellation of flights, as well as to situations that required physical contact and medical screening. Sanitary rules had to be observed in the interest of the sentenced persons and the escorting officers. In terms of practical arrangements, new travel restrictions, additional polymerase chain reaction (PCR) tests and quarantine regulations due to COVID-19 restrictions were among the challenges encountered.<sup>58</sup>

<sup>53</sup> CTOC/COP/WG.3/2018/2, para. 32.

<sup>54</sup> According to para. 6 of the Model Agreement, the prisoner must be fully informed of the possibility and of the legal consequences of a transfer, in particular whether or not he or she might be prosecuted because of other offences committed before the transfer.

<sup>55</sup> See *Handbook on the Transfer of Sentenced Persons and Custodial Sentences in the European Union*, para. 8.

<sup>56</sup> CTOC/COP/WG.3/2021/2, paras. 18–21.

<sup>57</sup> See Council of the European Union, “The impact of COVID-19 on judicial cooperation in criminal matters: executive summary”, document 5563/22, p. 10.

<sup>58</sup> See Petra Pavlas, “The invisible of the invisible: foreign nationals in prison and probation during COVID-19”, 6 September 2021.

74. Particularly with regard to the implementation of the Framework Decision, as discussed in the Working Group,<sup>59</sup> a prioritization of transfers on the basis of case-by-case evaluation was highlighted. In some States, decisions on the recognition of judgments continued to be issued.

75. Foreign prisoners, as a group of people with additional needs stemming from language and communication barriers, found their situation exacerbated during the pandemic, also in the light of the increased risk of infection inside prisons. Prison authorities also found it more challenging to meet those additional needs and to protect the rights of those prisoners. In some cases, there was no consular access to people in prison, and vital legal counselling for foreign prisoners was also curtailed. The situation of detained foreign nationals has been exacerbated by a lack of certainty around decisions relating to the post-release stage, such as whether a prisoner will be deported or transferred back to the country of origin upon completion of the prison sentence.<sup>60</sup>

76. Another consequence reported to the Working Group was the slowing down of progress in negotiating bilateral agreements on mutual legal assistance, extradition and the transfer of sentenced persons.<sup>61</sup>

## VIII. Conclusions and recommendations

77. The Working Group may wish to encourage States parties to exchange best practices and lessons learned in the field of transfer of sentenced persons, especially with regard to practical aspects associated with this form of international cooperation in criminal matters and the implementation of article 17 of the Organized Crime Convention, including by submitting relevant legislation and cases to the United Nations Office on Drugs and Crime Sharing Electronic Resources and Laws on Crime (SHERLOC) knowledge management portal.

78. The Working Group may wish to recommend that the Conference of the Parties to the Organized Crime Convention:

(a) Encourage States parties to have in place a solid legal basis for the implementation of article 17 of the Organized Crime Convention, through bilateral or multilateral agreements or arrangements and/or through national legislation that gives effect to such agreements or arrangements or can alternatively be used to facilitate transfers, and to adopt flexible approaches to support a combined use of available legal tools;

(b) Encourage States parties to facilitate training activities for competent authorities involved in the field of transfer of sentenced persons, including prison authorities and consular officials involved in the legal counselling of sentenced persons.

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<sup>59</sup> CTOC/COP/WG.3/2021/3, para. 15.

<sup>60</sup> Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2021*, p. 26.

<sup>61</sup> CTOC/COP/WG.3/2021/3, para. 23.