

**THE TRANSFER OF CONVICTED OFFENDERS
FROM AND TO COMMONWEALTH JURISDICTIONS**

Memorandum by the Commonwealth Secretariat
and a Report by Mr. A.M.F. WEBB, C.M.G.,
Q.C., J.P.

As requested by Commonwealth Law Ministers at their 1980 Meeting in Barbados, the Commonwealth Secretariat has continued its work concerning the international transfer of convicted offenders.

2. Mr. Anthony Webb, the consultant who prepared the paper on the subject considered by the Barbados Meeting, has represented the Commonwealth Secretariat as an observer at various meetings organised by the Council of Europe and played an active part in the formulation of the European Convention on the Transfer of Convicted Persons of 1982.

3. His report, annexed hereto, draws attention to the possibilities this Convention presents, both for accession by Commonwealth countries and for use as a model for alternative bilateral or regional arrangements.

ANNEX TO LMM(83)32

**THE TRANSFER OF CONVICTED OFFENDERS
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A Report by Mr. A.M.F. WEBB, C.M.G., Q.C., J.P.

Introductory

At the Meeting of Law Ministers held in Barbados in April/May 1980 Ministers considered a memorandum by the Secretariat and my paper on the Transfer of Convicted Offenders from and to Commonwealth Jurisdictions (LMM(80)5) and certain observations upon that paper: 1980 Meeting, Memorandum, pp. 91, 119, 189, 345 and 375; Minutes pp. 53-60. The Communique issued at the end of that Meeting summarised the sense of Ministers' discussion of this matter and indicated what action might be taken to give effect to the concept of transferring convicted offenders:

"Transfer of Convicted Offenders

12. Having reviewed aspects of various Commonwealth Schemes presently in force, Ministers considered whether it might be appropriate to develop Commonwealth arrangements under which, in appropriate cases, a prisoner might be transferred from a country in which he has been convicted, so that he could serve his sentence in his home country. The Meeting saw a number of positive advantages in the concept, and felt that the rehabilitation of an offender who had been convicted of an offence while abroad might be promoted if he were to serve his sentence in a place where he was more likely to be subject to the influence of his family and friends.

13. Ministers endorsed in principle the suggestion that such a Scheme should be developed and have as its basis the consent of the countries involved and, in particular, that of the prisoner himself.

14. There were some amendments which would need to be made to the proposed arrangements, and the Meeting agreed that the process of consultation should continue both through the Commonwealth Secretary-General and on a regional basis. It also welcomed the generous offer of Canada to contribute the benefit of her considerable experience in the matter."

2. I reported on recent developments in Europe on this matter in the Commonwealth Law Bulletin for October 1981 at (1981) 7 C.L.B. 1530. For convenience I very briefly summarise that report in the following paragraphs and I bring it up-to-date, specifically by annexing to this paper the European convention on the Transfer of Sentenced Persons and of the Explanatory Report relating thereto: Appendix A and B respectively. The Introduction to the Report, and the statement of General Considerations which follows that Introduction, set forth the background to the Convention and the principles upon which it is drafted.

European convention on the transfer of sentenced persons

3. This Convention has now been approved by the European Committee on Crime Problems and by the Committee of Ministers and it is open for signature by Member States of the Council of Europe.

4. The genesis of this Convention was the failure of the earlier (1970) European Convention on the International Validity of Criminal Judgments, which provided (amongst other things) for the transfer of convicted offenders, to achieve that purpose. The 1970 Convention contained very detailed provisions, and specifically excepted various offences, because it was drafted on the premise that if a particular prisoner satisfied all the criteria, then his transfer was automatic, whatever might be his views or those of either of the States concerned, that in which he had been convicted and sentenced and that to which he was transferred to serve that sentence. Consequently the problems posed by the practical difficulties which the presence of foreigners in prison create for prison administrations were not resolved by the 1970 Convention, which was ratified by only five of the 21 members of the Council of Europe. In 1978 the European Committee on Crime Problems was instructed by the European Ministers of Justice to look at the matter again, with a view to proposing a more practical solution; the result of that reconsideration is the new Convention.

5. This Convention was drafted by a Select Committee of Experts, and representatives of Canada, the United States of America and the Commonwealth Secretariat were invited to attend as observers, because of the experience which those countries and Commonwealth countries have gained in actually transferring prisoners. The observers contributed to the deliberations of the Select Committee by reason of this practical experience, and they were able also to help, from time to time, to persuade the Committee to adopt policies and language in the drafting of the Convention and of the recommendations as to the treatment of foreign prisoners, which the Committee is also charged to formulate (see paragraph 11 below), which may enable the former to be accepted by Commonwealth countries if they so desire, and the latter then to be implemented so far as may be practicable.

6. The new convention departs radically from the principles upon which the 1970 Convention was framed; it adopts the Canadian and American approach, in particular by requiring the consent of each of the three parties concerned: the prisoner, the government of the country in which he was convicted and sentenced and that of the country to which it is proposed to transfer him. No obligation is on governments to agree to any transfer; neither are they obliged to give any reason for their decision, nor is there to be any pressure on a prisoner to agree to be transferred.

7. Another, and significant, difference between the 1970 Convention and the present one is that the latter provides, by Article 19, that States not members of the Council of Europe may accede to it, so that it has potential application not only between other (and in particular Commonwealth) countries and European countries, but also between Commonwealth countries and countries neither Commonwealth nor European. Some members of the Commonwealth may not wish to enter into the possibly wide-ranging (in a territorial sense) arrangements as this Convention may

entail. However its text may at least serve as a model for more local arrangements. Article 22.2 may be relevant in this context.

8. A State not a member of the Council of Europe may, however, only accede to the Convention at the invitation of the Council of Ministers of the Council of Europe; and such an invitation can only be extended if two-thirds of the members of the Committee and all the countries being then member States of the Council of Europe and contracting parties concur. A member of the Commonwealth (not being also a member of the Council of Europe) which may be interested in acceding to the Convention should first communicate this interest, through the normal diplomatic channels, to the Secretary-General of the Council of Europe, who will intimate in due course whether or not a formal request should be made.

Ancillary matters

9. The Select Committee is considering a draft text of a notice for the information of foreign prisoners of the substance of the Convention, so as to facilitate compliance with the obligation imposed by Article 4.1 to furnish information about the Convention to a person to whom it may apply. This text, when agreed, will be the subject of a separate recommendation suggesting that each State, when ratifying the Convention, should deposit an authoritative translation into its official languages, incorporating such modifications as it considers necessary (for example, to reflect any important reservations or declarations by that State of which its nationals should be aware). A copy of each State's version of the standard text would then be sent to each of the other contracting States, for them to reproduce for use in its prisons. This procedure would obviate the necessity for every contracting State to have to arrange its own translations of the text into the language of every other contracting State.

10. The select Committee is also contemplating the text of a leaflet giving a foreign prisoner information about the help which the consular authorities of his country might be able to afford him. The Vienna Convention on Consular Relations provides that consular authorities are, at the request of a prisoner, to be informed of his detention. Possible ways in which a consular authority might be able to assist are -

- (a) visits to the prisoner;
- (b) information, in particular about the possibility of repatriation;
- (c) assistance with problems, including obtaining the services of a lawyer; and
- (d) supply of literature.

This leaflet would mention not only this Convention on the Transfer of Sentenced Persons, but also all the Conventions available to Member States and dealing with foreigners in trouble with the authorities. If the Committee approves such a leaflet, Commonwealth Secretariat will, in due course, be able to circulate copies to Commonwealth Governments, who can then, if they so wish, adapt it for use as they see fit.

Standard Minimum Rules

11. In addition to drafting the Convention, the Select Committee is charged also with making recommendations for standard minimum rules for the treatment of foreign prisoners. The European Council of Ministers approved, in 1973, such rules for prisoners generally, and the Governments of Member States have been recommended to be guided in their internal legislation and practice by the principles set out in those recommendations. The Select Committee is still considering what amplification of these rules may be needed to cover the particular circumstances of foreign prisoners, and it is hoped that it will complete its deliberations on this part of its remit in 1983. The Council of Europe cannot, of course, make even a recommendation to the Government of a non-Member State; the Council can only express the hope that the Government of a non-Member State which accedes to the Convention will conform, so far as may be practicable, to any such rules.

12. The responses received from a number of Commonwealth countries to an inquiry addressed by the Secretariat, whether any particular difficulties were actually being experienced in dealing with foreign prisoners, suggest that these are few; the one problem which seems to arise is that of language. In most cases it appears that foreigners in prison in Commonwealth countries come mainly from neighbouring countries, in which many of the circumstances of life are broadly similar.

APPENDIX A

CONVENTION ON THE TRANSFER
OF SENTENCED PERSONS

The member States of the Council of Europe and the other signatory States hereto,

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members;

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

Considering that this aim can best be achieved by having them transferred to their own countries,

Have agreed as follows:

Article 1

Definitions

For the purposes of this Convention:

- (a) "sentence" means: any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence;
- (b) "judgment" means: a decision or order of a court imposing a sentence;
- (c) "sentencing State" means: the State in which the sentence was imposed on the person who may be, or has been, transferred;
- (d) "administering State" means: the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

Article 2

General principles

1. The Contracting States undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

2. A person sentenced in a Contracting State may be transferred to another Contracting State, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

3. Transfer may be requested by either the sentencing State or the administering State.

Article 3

Conditions of transfer

1. A sentenced person may be transferred under this Convention only on the following conditions:

- (a) if that person is a national of the administering State;
- (b) if the judgment is final;
- (c) if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;
- (d) if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;
- (e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and
- (f) if the sentencing and administering States agree to the transfer.

2. In exceptional cases, Contracting States may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1(c).

3. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9(1) (a) and (b) in its relations with other Contracting States.

4. Any Contracting State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" within the meaning of this Convention.

Article 4

Obligation to furnish information

1. Any sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.

2. If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final.

3. The information shall include:

- (a) the name, date and place of birth of the sentenced person;
- (b) his address, if any, in the administering State;

- (c) a statement of the facts upon which the sentence was based;
- (d) the nature, duration and date of commencement of the sentence.

4. If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to that State the information referred to in paragraph 3 above.

5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State or the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer.

Article 5

Requests and replies

1. Requests for transfer and replies shall be made in writing.
2. Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.
3. Any Contracting State may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.
4. The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.

Article 6

Supporting documents

1. The administering State, if requested by the sentencing State, shall furnish it with:
 - (a) a document or statement indicating that the sentenced person is a national of that State;
 - (b) a copy of the relevant law of the administering State which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State, or would constitute a criminal offence if committed on its territory;
 - (c) a statement containing the information mentioned in Article 9(2).
2. If transfer is requested, the sentencing State shall provide the following documents to the administering State, unless either State has already indicated that it will not agree to the transfer:
 - (a) a certified copy of the judgment and the law on which it is based;
 - (b) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;
 - (c) a declaration containing the consent to the transfer as referred to in Article 3(1) (d); and
 - (d) whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State, and any recommendation for his further treatment in the administering State.
3. Either State may ask to be provided with any of the documents or statements referred to in paragraphs 1 or 2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Article 7

Consent and its verification

1. The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3(1) (d) does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.
2. The sentencing State shall afford an opportunity to the administering State to verify, through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above.

Article 8

Effect of transfer for sentencing State

1. The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in the sentencing State.
2. The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed.

Article 9

Effect of transfer for administering State

1. The competent authorities of the administering State shall:
 - (a) continue the enforcement of the sentence immediately through a court or administrative order, under the conditions set out in Article 10; or
 - (b) convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.
2. The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.
3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.
4. Any Contracting State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in another Contracting State on sentenced persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

Article 10

Continued enforcement

1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.
2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court

or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Article 11

Conversion of sentence

1. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

- (a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;
- (b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction;
- (c) shall deduct the full period of deprivation of liberty served by the sentenced person; and
- (d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

2. If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure.

Article 12

Pardon, amnesty, commutation

Each State may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Article 13

Review of judgment

The sentencing State alone shall have the right to decide on any application for review of the judgment.

Article 14

Termination of enforcement

The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 15

Information on enforcement

The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

- (a) when it considers enforcement of the sentence to have been completed;
- (b) if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- (c) if the sentencing State requests a special report.

Article 16

Transit

1. A Contracting State shall, in accordance with its law, grant a request for transit of a sentenced person through its territory if such a request is made by another Contracting State and the State has agreed with another Contracting State or with a third State to the transfer of that person to or from its territory.
2. A Contracting State may refuse to grant transit:
 - (a) if the sentenced person is one of its nationals, or
 - (b) if the offence for which the sentence was imposed is not an offence under its own law.
3. Requests for transit and replies shall be communicated through the channels referred to in the provisions of Article 5(2) and (3).
4. A Contracting State may grant a request for transit of a sentenced person through its territory made by a third State if that State has agreed with another Contracting State to the transfer to or from its territory.
5. The Contracting State requested to grant transit may hold the sentenced person in custody only for such time as transit through its territory requires.
6. The Contracting State requested to grant transit may be asked to give an assurance that the sentenced person will not be prosecuted, or, except as provided in the preceding paragraph, detained, or otherwise subjected to any restriction on his liberty in the territory of the transit State for any offence committed or sentence imposed prior to his departure from the territory of the sentencing State.
7. No request for transit shall be required if transport is by air over the territory of a Contracting State and no landing there is scheduled. However, each Contracting State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory.

Article 17

Languages and costs

1. Information under Article 4, paragraphs 2 to 4, shall be furnished in the language of the Contracting State to which it is addressed or in one of the official languages of the Council of Europe.
2. Subject to paragraph 3 below, no translation of requests for transfer or of supporting documents shall be required.
3. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, require that requests for transfer and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language in addition to the official language or languages of the Council of Europe.

4. Except as provided in Article 6(2) (a), documents transmitted in application of this Convention need not be certified.

5. Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.

Article 18

Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the month following the expiration of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

3. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 19

Accession by non-member States

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting Parties, may invite any State not a member of the Council and not mentioned in Article 18(1) to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 20

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21

Temporal application

This Convention shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 22

Relations to other Conventions and Agreements

1. This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.
2. If two or more Contracting States have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.
3. The present Convention does not affect the right of States Party to the European Convention to the International Validity of Criminal Judgments to conclude bilateral or multilateral agreements with one another on matters dealt with in that Convention in order to supplement its provisions or facilitate the application of the principles embodied in it.
4. If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.

Article 23

Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application.

Article 24

Denunciation

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.
3. The present Convention shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 25

Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention and any State which has acceded to this Convention of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance, approval or accession;
- (c) any date of entry into force of this Convention in accordance with Articles 18(2) and (3), 19(2) and 20(2) and (3);
- (d) any other act, declaration, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at, the, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

ANNEX B

EXPLANATORY REPORT on the Convention on the Transfer of Sentenced Persons

Introduction

1. At the eleventh conference (Copenhagen, 21 - 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of Resolution No.1 by which the Committee of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problems (CDPC), *inter alia*, "to consider the possibility of drawing up 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".

2. Following this initiative, the creation of a Select Committee of Experts on Foreign Nationals in Prison was proposed by the CDPC at its 28th plenary session in March 1979 and authorised by the Committee of Ministers at the 306th meeting of their Deputies in June 1979.

3. The Committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, the CDPC (at its 29th plenary session

in March 1980) authorised the Select Committee, at its own request, to prepare a multilateral Convention rather than a model agreement, provided it would not conflict with the provisions of existing European Conventions.

4. The Select Committee was composed of experts from 15 Council of Europe member States (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers. Mr. J. J. Tulkens (Netherlands) was elected Chairman of the Select Committee. The Secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. The draft for a Convention on the Transfer of Sentenced Persons was prepared during the Select Committee's first five meetings, held from 3 to 5 October 1979, 4 to 6 March 1980, 7 to 10 October 1980, 1 to 4 June 1981 and 1 to 4 December 1981 (enlarged meeting to which experts from all member States were invited). In addition, a drafting group met from 7 to 9 October 1980 (during the Select Committee's third meeting) and from 24 to 26 November 1980.

6. The draft Convention was finalised by the CDPC at its 31st plenary session in May 1982 and forwarded to the Committee of Ministers.

7. At the ... meeting of their Deputies in 1982, the Committee of Ministers approved the text of the Convention and decided to open it to the signature of member States.

General considerations

8. 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. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1977 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has so far been ratified by only a small number of member States, and the procedure it provides is not conducive to being applied in a way such as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitably administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

9. In facilitating the transfer of foreign prisoners, the Convention takes account of modern trends in crime and penal policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interest of the prisoners as well as of the governments concerned.

10. The Convention distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects:

- With a view to facilitating the rapid transfer of foreign prisoners, it provides 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.

- 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.
- The transfer is subject to the sentenced person's consent.
- The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

11. Unlike the other Conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open for accession also by like-minded democratic States outside Europe. Two such States - Canada and the United States of America - were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

Commentaries on the articles of the Convention

Article 1 - Definitions

12. Article 1 defines four terms which are basic to the transfer mechanism which the Convention provides.

13. The definition of "sentence" (a) makes clear that the Convention applies only to a punishment or measure which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

14. It follows from the definition of "judgment" (b) that the Convention applies only to sentences imposed by a court of law.

15. The two States involved in the transfer of a sentenced person are defined as "sentencing State" and "administering State" (c and d).

Article 2 - General principles

16. Paragraph 1 contains the general principle which governs the application of the Convention. Its wording is inspired in Article 1(1) of the European Convention on Mutual Assistance in Criminal Matters. The reference to "the widest measure of co-operation in respect of the transfer of sentenced persons" is intended to emphasise the Convention's underlying philosophy: that is desirable to enforce sentences in the home country of the person concerned.

17. Paragraph 2 refers the sentencing State to the possibility, afforded by the Convention, of having the sentenced persons transferred to another Contracting State for the purpose of enforcing the sentence. That other State, i.e. the "administering State", is - by virtue of Article 3(1) (a) - the State of which the sentenced person is a national.

Although the sentenced person may not formally apply for his transfer (see paragraph 3, he may express his interest in being transferred under the Convention, and he may do so by addressing himself to either the sentencing State or the administering State.

18. According to paragraph 3, transfers may be requested by either the sentencing State or the administering State. This provision signifies an important departure from 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.

Article 3 - Conditions for transfer

19. The first paragraph of Article 3 enumerates six conditions which must be fulfilled if a transfer is to be effected under the terms of the Convention.

20. The first condition (a) is that the person to be transferred is a national of the administering State. In an effort to render the application of the Convention as easy as possible the reference to the sentenced person's nationality was preferred to including in the Convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other State" and "the State of origin" used in Article 5 of the European Convention on the International Validity of Criminal Judgments.

It is not necessary that the person concerned is a national of only the administering State. Contracting States may decide to apply the Convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals.

Paragraph 1(a) is to be read in conjunction with paragraph 4 which grants Contracting States the possibility to define, by means of a declaration, the term "national".

This possibility, corresponding with that provided in Article 6(1) (b) of the European Convention on Extradition, is to be interpreted in a wide sense: the provision is intended to enable Contracting States to extend the application of the Convention to persons other than "nationals" within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.

21. The second condition (b) is that the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

22. The third condition (c) concerns the length of the sentence still to be served. For the Convention to be applicable the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

Two considerations have led to the inclusion of this condition: the first is that the Convention is conceived as an instrument to further the offender's social rehabilitation, an objective which can usefully be pursued only where the length of the sentence still to be served is sufficiently long. The second reason is that of the system's cost-effectiveness; the transfer of a prisoner is costly, and the considerable expenses incurred by the States concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned has only a short sentence to serve.

In exceptional cases, however, Contracting States may - in application of paragraph 2 - agree to a transfer even though the time to be served is less than that specified, as the general rule, in paragraph 1(c). The introduction of this element of flexibility was deemed useful to cover cases where the aforementioned two considerations do not fully apply, for instance where the prospects of rehabilitation are favourable despite a sentence of less than six months or where the transfer can be effected expeditiously and at low cost, e.g. between neighbouring States.

23. The fourth condition (d) is that the transfer must be consented to by the person concerned. This requirement which is not contained in the European Convention on the International Validity of Criminal Judgments constitutes one of the basic elements of the transfer mechanism set up by the Convention. It is rooted in the Convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.

This provision is to be read in conjunction with Article 7 which contains rules on the way in which consent is to be given and on the possibility for the administering State to verify that consent has been given in accordance with the conditions laid down in that Article.

Consent is to be given by the sentenced person's legal representative in cases where one of the two States considers it necessary in view of the age or of the physical or mental condition of the sentenced person. The reference to the sentenced person's "legal representative" is not meant to imply that the representative must be legally qualified; it includes any person duly authorised in law to represent the sentenced person, e.g. a parent or someone specially authorised by the competent authority.

24. The fifth condition (e) is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed that act could, under the law of the administering State, have had a sanction imposed on him.

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

25. The sixth condition (f) confirms the Convention's basic principle that a transfer requires the agreement of the two States concerned.

26. Paragraph 3 is to be seen in connection with Article 9 which grants the administering State a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing State as to which of these two procedures it will follow (Article 9, paragraph 2). The general rule is therefore that the administering State may choose between the two enforcement procedures in each individual case.

If, however, a Contracting State wishes to exclude, in a general way, the application of one of the two procedures, it can do so under the provisions of paragraph 3: by way of a declaration, it may indicate that it intends to exclude the application of either the "continued enforcement procedure" or the declaration made under procedure" in its relations with other Contracting States. As paragraph 3 applies to the "relations with other Contracting States" it enables the State making such a declaration to exclude one of the two enforcement procedures not only where it is in the position of the administering State but also where it is the sentencing State; in the latter case the declaration would have the effect of making that State's agreement to a requested transfer dependent on the administering State not applying the excluded procedure.

Article 4 - Obligation to furnish information

27. Article 4 concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, the administering State, and the sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by the sentencing State to the sentenced person on the substance of the Convention; paragraph 2 to 4 refer to information between the two States concerned after the sentenced person has expressed an interest in being transferred; paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer.

28. According to paragraph 1, any sentenced person who may be eligible for transfer under the Convention shall be informed, by the sentencing State, of the Convention's substance. This is to make the sentenced person aware of the possibilities for transfer offered by the Convention and the legal consequences which a transfer to his home country would have. The information will enable him

to decide whether he wishes to express an interest in being transferred. It is to be noted, however, that the sentenced person cannot himself make the formal request for transfer; it follows from Article 2(3) that transfer may be requested only by the sentencing or the administering State.

The information to be given to the sentenced person must be in a language he understands.

29. Paragraphs 2 and 3 apply where the sentenced person has expressed an interest to the sentencing State in being transferred under the Convention. In that event, the sentencing State informs the State of which the sentenced person is a national that he has expressed an interest in being transferred. This information has to be provided as soon as practicable after the judgment becomes final and enforceable, and it must include the elements enumerated in paragraph 3.

30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that State to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.

31. If the sentenced person has expressed his interest in a transfer not to the sentencing State, but to the State of which he is national, paragraph 4 applies: in that case the sentencing State provides the information referred to in paragraph 3 only upon the express request of the State of which the person is a national.

32. By virtue of paragraph 5, the sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

Article 5 - Requests and replies

33. This Article specifies the form and the channels of transmission to be used for requests for transfer and replies thereto.

34. Requests and replies must be made in writing (paragraph 1). They must, in principle, be transmitted between the respective Ministries of Justice (paragraph 2), but Contracting States may declare that they will use other ways of transmission as, for instance, the diplomatic channel (paragraph 3).

35. In line with the Convention's aim to provide a procedure for the speedy transfer of sentenced persons, paragraph 4 requires the requested State promptly to inform the requesting State whether it agrees to the requested transfer.

Article 6 - Supporting documents

36. Article 6 states which supporting documents must be provided, on request, by the administering State to the sentencing State (paragraph 1), and by the sentencing State to the administering State (paragraph 2). These documents must be provided before the transfer is effected. As regards the documents to be provided by the sentencing State, they may be sent to the administering State either together with the request for transfer or afterwards; they need not be sent if either State has already indicated that it will not agree to the transfer.

37. In addition, paragraph 3 provides that either of the two States may request any of the documents or statements referred to in paragraph 1 or 2 before making a request for transfer or taking a decision on whether or not to agree to the requested transfer. This provision is intended to avoid setting the transfer procedure in motion when there are doubts as to whether all the conditions for transfer are satisfied. The sentencing State may, for instance, wish to ascertain beforehand - i.e. before making a request for transfer or before agreeing to a requested transfer - whether the sentenced person is a national of the

administering State, or the administering State may wish to ascertain beforehand that the sentenced person consented to his transfer.

Article 7 - Consent and its verification

38. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the Convention. It was therefore deemed necessary to impose an obligation on the sentencing State to ensure that the consent is given voluntarily and with full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering State an opportunity to verify that consent has been given in accordance with these conditions.

39. Under paragraph 2, the administering State is entitled to that verification either through a Consul or through another official on which the two States agree.

40. As the Convention is based on the principle, that enforcement in the administering State requires the sentenced person's prior consent, it was not considered necessary to lay down a rule of speciality to the effect that the person transferred under the Convention with a view to enforcement of a sentence may not be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. Other Conventions which provide for this rule of speciality, as for instance, the European Convention on Extradition in its Article 14 or the European Convention on the International Validity of Criminal Judgments in its Article 9, do not require the consent of the person concerned, so that in those cases the rule of speciality is a necessary safeguard for him.

The absence of a speciality rule should be included in the information on the substance of the Convention which is to be given to sentenced persons under Article 4(1).

Article 8 - Effects of transfer for sentencing State

41. This Article safeguards the application of the principle of ne bis in idem in respect of the enforcement of the sentence after a transfer has been effected.

42. To avoid that the sentenced person serves a sentence for the same acts or omissions more than once, Article 8 provides that enforcement in the sentencing State is suspended at the moment when the authorities of the administering State take the sentenced person into charge (paragraph 1), and that the sentencing State may no longer enforce the sentence once the administering State considers enforcement to have been completed (paragraph 2).

Article 9 - Effect of transfer for administering State

43. This Article concerns the enforcement of the sentence in the administering State. It states the general principles which govern enforcement; the details of the different enforcement procedures are regulated in Articles 10 and 11.

44. According to paragraph 1, the administering State may chose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order (Article 10), or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing State (Article 11). It is to be noted, however, that in accordance with Article 3(3) Contracting States have the possibility to exclude, in a general way, the application of one of these two procedures.

45. If requested, the administering State must inform the sentencing State as to which of these two procedures it intends to apply (paragraph 2). This obligation has been imposed on the administering State because the information may have a bearing on the sentencing State's decision on whether or not to agree to a requested transfer.

46. The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 - commonly called "execuatur" - is that in the first case the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.

47. In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.

48. Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.

Article 10 - Continued enforcement

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11 under which the administering State substitutes a sanction for that imposed in the sentencing State, the procedure under Article 10(2) enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

Article 11 - Conversion of sentence

51. Article 11 concerns the conversion of the sentence to be enforced, i.e. the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "exequatur". The provision should be read in conjunction with Article 9(1) (b). It is essential for the smooth and efficient functioning of the Convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for a

similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The Article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

53. However, as regards the extent of the conversion and the criteria applicable to it, paragraph 1 states four conditions to be observed by the competent authority of the administering State.

54. Firstly, the 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 (a). It has therefore no freedom differently to evaluate 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" facts relating, for instance, to premeditation and intent on the part of the convicted person. The reason for this condition is that the substitution by a sanction of a different nature or duration does not imply any modification of the judgment; it merely serves to obtain an enforceable sentence in the administering State.

55. Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction (b). This provision reflects the fact that the Convention applies only to the transfer of sentenced persons, "sentence" being defined in Article 1(a) as a punishment or measure involving deprivation of liberty. However, it does not prevent conversion to a non-custodial sanction other than a pecuniary one.

56. Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering State (c). This provision applies to any part of the sentence already served in the sentencing State as well as any provisional detention served during remand in custody prior to conviction, or any detention served during transit.

57. Fourthly, the penal position of the sentenced person must not be aggravated (d). This prohibition refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: it must not be harsher than that imposed in the sentencing State. If, for instance, under the law of the administering State the offence carries a more severe form of deprivation of liberty than that which the judgment imposed (e.g. penal servitude or forced labour instead of imprisonment), the administering State is precluded from enforcing this harsher kind of sanction. In addition, paragraph 1(d) provides in respect of the length of the sentence to be enforced that the authority which converts that sentence is not bound by any minimum which its own law may provide for the same offence, i.e. that it is allowed not to respect that minimum with the result that it can enforce the sanction imposed in the sentencing State even if it is less than the minimum laid down in its own law.

58. As the conversion procedure may take some time, paragraph 2 requires the administering State, if the procedure takes place after the transfer of the sentenced person, to keep that person in custody or otherwise ensure his presence in the administering State, pending the outcome of that procedure.

Article 12 - Pardon, amnesty, commutation

59. Whereas Article 9(3) makes the administering State solely responsible for the enforcement of the sentence, including any decisions related to it (e.g. the decision to suspend the sentence), pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering State, in accordance with its Constitution or other laws.

Article 13 - Review of judgment

60. This Article provides that the sentencing State alone has the right to take decisions on applications for review of the judgment. The exclusive competence of

the sentencing State to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement so that Article 9(3) does not apply. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact. As the sentencing State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issue.

61. The term "review" within the meaning of Article 13 covers also proceedings which in some States may result in a new examination of the legal aspects of the case, after the judgment has become final.

62. The sentencing State's competence to decide on any application for review should not be interpreted as discharging the administering State from the duty to enable the sentenced person to seek a review of the judgment. Both States must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person's right to apply for a review.

Article 14 - Termination of enforcement

63. Article 14 concerns the termination of enforcement by the administering State in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing State (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering State must terminate enforcement as soon as it is informed by the sentencing State of any such decision or measure.

Article 15 - Information on enforcement

64. This Article provides for the administering State to inform the sentencing State on the State of the enforcement: (a) when it considers enforcement of the sentence to have been completed (e.g. sentence served, remission, conditional release, pardon, amnesty, commutation); (b) if the sentenced person has escaped from custody before completion of the sentence; and (c) whenever the sentencing State requests a special report.

65. It is to be noted that the information to be supplied by virtue of Article 15(a) may be provided either for each individual case or by means of periodical - e.g. annual - reports covering, for a given period, all cases in which completion of sentence has occurred.

Article 16 - Transit

66. This Article has been drafted on the lines of Article 21 of the European Convention on Extradition and Article 13 of the European Convention on the International Validity of Criminal Judgments. It lays down rules governing the transit of persons passing from the sentencing State to the administering State through the territory of another Contracting State.

67. Paragraph 1 imposes an obligation on Contracting States to grant requests for transit, in accordance with their national law, but this obligation is subject to a double condition: the request for transit must be made by another Contracting State, and that State must have agreed with another Contracting State or with a third State to the transfer of the sentenced person. The latter condition means that the obligation to grant transit becomes effective only when the sentencing and the administering State have agreed on the transfer of the sentenced person.

68. It is to be noted that the obligation to grant transit applies only where the request emanates from the Contracting State. If it is made by a third State, paragraph 4 applies. It contains an option, not an obligation: a request for transit may be granted if the requesting third State has agreed with another Contracting State to the transfer of the sentenced person.

69. Paragraph 1 does not exclude the transit of a national of the State of transit, but paragraph 2(a) entitles a Contracting State to refuse transit if the person

concerned is one of its own nationals. This applies also where transit is to be effected by air and the State concerned has made the declaration under paragraph 7.

Paragraph 2(b) entitles a Contracting State to refuse to grant transit if the offence for which the sentence was imposed is not an offence under its own law.

70. As regards the channels of communication for requests for transit and replies, paragraph 3 makes the provisions of Article 5, paragraphs 2 and 3, applicable: in principle, requests and replies must pass through the Ministries of Justice of the two States concerned, but Contracting States may declare that they will use other ways of transmission.

71. Paragraph 5 provides for the State of transit to hold the sentenced person in custody only for such time as transit through its territory requires.

72. Paragraph 6 concerns the sentenced person's immunity from arrest and prosecution in the State of transit. It provides that the State requested to grant transit may be asked to give an assurance to the effect that the sentenced person will enjoy immunity in respect of any offence committed or sentence imposed prior to his departure from the territory of the sentencing State, with the exception of custody which the transit State may impose in application of paragraph 5. There is, however, no obligation on the State of transit to give such an assurance.

73. Paragraph 7 deals with transit by air where no landing in the territory of the State of transit is scheduled. In such cases no request for transit is required. Contrary to the provisions of Article 21 (4)(a) of the European Convention on Extradition which require notification of the transit State in such cases, paragraph 6 of Article 16 leaves it to each Contracting State to decide, by means of a declaration, whether it wishes to require such notification.

Article 17 - Languages and costs

74. This Article deals with the questions of language (paragraphs 1 to 3), certification (paragraph 4), and costs (paragraph 5).

75. With regard to the languages to be used for the purposes of applying the Convention, Article 17 distinguishes between the information exchanged between the two States concerned in accordance with Article 4, paragraphs 2 to 4, which must be furnished in the language of the recipient State or in one of the official languages of the Council of Europe (paragraph 1), and requests for transfer and supporting documents for which it is stated that no translation is required (paragraph 2), unless the State concerned has declared that it requires requests for transfer and supporting documents to be accompanied by a translation (paragraph 3).

76. Paragraph 4 provides that with the exception of the copy of the judgment imposing the sentence - referred to in Article 6 (2)(a) - supporting documents transmitted in application of the Convention need not be certified.

77. As concerns costs, paragraph 5 provides that they shall be borne by the administering State, with the exception of those costs which are incurred exclusively in the territory of the sentencing State. By precluding Contracting States from claiming refund from each other of any expenses incurred during the transfer procedure, the provision intends to facilitate the practical application of the Convention.

The administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person.

Articles 18 to 25 - Final clauses

78. With the exception of Articles 18 and 19, the provisions contained in Articles 18 to 25 are, for the most part, based on the "Model Final Clauses for Conventions and Agreements concluded within the Council of Europe" which were approved by

the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these Articles do not therefore call for specific comments, but the following points, relating to Articles 18, 19, 21, 22 and 23, require some explanation.

79. Articles 18 and 19 have been drafted on the precedent established in Articles 19 and 20 of the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Contracting Parties as soon as possible. As similar considerations apply in the case of the Convention on the Transfer of Sentenced Persons, Article 18 provides that it is open for signature by the member States of the Council of Europe as well as by non-member States which have participated in its elaboration. The provision is intended to apply to two non-member States, Canada and the United States of America, which were represented on the Select Committee by observers and actively associated with the elaboration of the Convention. They may sign the Convention, just as the member States of the Council of Europe, before its entry into force. According to Article 18(2), the Convention enters into force when three member States have expressed their consent to be bound by it. Other non-Member States may, by virtue of Article 19, be invited by the Committee of Ministers to accede to the Convention, but only after its entry into force and after consultation of the Contracting Parties.

80. Article 21 ensures the Convention's full temporal application. It enables Contracting States to avail themselves of the transfer mechanism with regard to any enforcement which falls within the Convention's scope of application and which is to be effected after its entry into force, regardless of whether the sentence to be enforced has been imposed before or after that date.

81. Article 22 intends to ensure the smooth co-existence of the Convention with other treaties - multilateral or bilateral - providing for the transfer of detained persons.

Paragraph 1 concerns extradition treaties and other treaties providing for the transfer of detained persons for purposes of confrontation or testimony. Paragraph 2 safeguards the continued application of agreements, treaties or relations relating to the transfer of sentenced persons, including uniform legislation as it exists, for instance, within the Nordic co-operation. Paragraph 3 concerns complementary agreements concluded in application of Article 64(2) of the European Convention on the International Validity of Criminal Judgments. Paragraph 4 applies where a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or any other instrument on the transfer of sentenced persons. In such a case, the requesting State must indicate on the basis of which instrument it makes the request. Such indication is binding on the requested State.

82. Article 23 which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the Convention follows the precedents established in other European Conventions in the penal field, namely in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, in Article 7 of the Additional Protocol to the European Convention on Extradition, in Article 10 of the Second Additional Protocol to the European Convention on Extradition, in Article 10 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and in Article 9 of the European Convention on the Suppression of Terrorism. The reporting requirement which Article 23 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention which might prove necessary.