



**Discussion Paper: International transfer of sentenced persons in the Pacific
27th PILON Meeting
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Introduction

At the 26th meeting of the Pacific Islands Law Officers' Network (PILON) in Rarotonga in December 2007, members agreed that the Secretariat would develop a discussion paper on the current procedure across the region for the international transfer of sentenced persons, and examining options for a regional arrangement and possibilities to become members of other international arrangements. This paper has been prepared for discussion at the 27th meeting of PILON in Vanuatu, in December 2008.

International transfer of sentenced persons arrangements are generally consent-based arrangements, allowing eligible prisoners in custody in a foreign country to apply to transfer to their own country to serve the balance of their sentence, provided certain conditions are met.

A number of different terms are used in arrangements, legislation and treaties to describe this process, such as transfer of convicted offenders, prisoners, sentenced offenders, and repatriation of prisoners. This paper uses the term "transfer of sentenced persons."

This paper considers existing arrangements for the transfer of sentenced persons and explores options for Pacific island countries to establish transfer arrangements. The paper concludes that the most time and cost efficient method of creating a framework for prisoner transfers with the most countries is to seek membership to the Council of Europe *Convention on the Transfer of Sentenced Persons*.

Why have transfer arrangements?

To allow the transfer of a sentenced person to occur, countries must firstly have international arrangements and domestic legislation in place to provide a legal basis for such a transfer. The motivations for concluding such an arrangement and agreeing to conduct a transfer will vary from country to country, and considerations may differ according to whether the country is the sentencing or receiving country in a particular case.

On the part of the receiving country, the incentive to accept nationals to complete their sentence at home stems in large part from humanitarian concerns. The psychological impact of serving a sentence in an environment where the culture

and/or the language is foreign to a prisoner may be far greater than if the prisoner were detained in a familiar environment.

Rehabilitation of the sentenced person is also a strong incentive for receiving a national from a foreign prison. The chances of rehabilitation are higher if a sentenced person has contact with friends and relatives and has access to appropriate educational and vocational training opportunities which will support that person once they are released from custody.

On the part of the sentencing, or transferring country, communication and cultural adjustment difficulties can make accommodating foreign sentenced persons more expensive and time-consuming for prison authorities. Accordingly, there is a significant economic incentive for prison authorities to agree to transfer a sentenced person to their home country.

Improved transfer arrangements may also help ameliorate the problem posed by criminal deportees. The policies around criminal deportation in Pacific countries, including Australia, New Zealand and the US have been identified by the Pacific Islands Forum Secretariat as contributing to increasing crime rates and other social problems in the countries where criminal deportees are returned. This issue arises in the context of the transfer of sentenced persons where an offender may be deported at the end of his or her sentence. If sentenced persons were able to serve sentences in their home countries, there may be a greater chance of rehabilitation where they have access to friends, family and culturally and community tailored rehabilitation resources. An enhanced transfer scheme would also enable a receiving country to be aware of the criminal history of an offender. For example, where a sexual offence is committed, the prisoner can be placed on the Sex Offenders Register.

What issues are involved in the transfer process?

Differences in sentencing frameworks may be a consideration when negotiating arrangements with a particular country or group of countries. Negotiations will also be more complex when agreement is required by multiple levels of government, for example, in federated systems where incarceration of offenders is a responsibility of the province/state rather than the federal government.

Under the terms of most arrangements, a number of conditions must be met for a transfer to take place:

- all parties must agree to the transfer (the sentenced person, the transferring country and the receiving country)
- all outstanding fines and restitution orders must be satisfied and the conviction and sentence are not subject to further appeal,
- the offence for which the prisoner is serving a sentence would also be an offence in the receiving country (this requirement may be waived in certain cases),
- a minimum amount of time remains to be served by the prisoner at the time of the request for transfer (this may also be waived in certain cases), and
- the length of and conditions on the sentence in the receiving country must be agreed between the receiving and transferring country.

Sentencing countries are often interested in ensuring the validity of the original sentence. To achieve this, and depending on the transfer arrangements in place, transferring countries determine the nature of the sentence to be served in the receiving country in one of the following ways:

- i. Continued enforcement, where the sentence to be served is equal, or as close as possible under national law, to the original sentence, or
- ii. Conversion of sentence, where the receiving country is free to adapt the sentence to what would be considered appropriate under national laws.

Continued enforcement is the more commonly used method, although international arrangements may provide for both.

Options for Pacific island countries wishing to establish/extend transfer arrangements

There are only limited arrangements for international transfer of sentenced persons in the Pacific. The following options are open to countries wishing to establish prisoner transfer arrangements with other Pacific island and non-Pacific island countries, and are discussed in further detail below:

1. Joining the Council of Europe *Convention on the Transfer of Sentenced Persons*
2. Negotiating a multilateral or regional treaty
3. Negotiating bilateral treaties, or
4. Implementing domestic legislation that does not require a treaty.

1. Council of Europe Convention on the Transfer of Sentenced Persons

Seeking to join the Council of Europe Convention (the COE Convention) is by far the most cost-effective and expeditious method of facilitating prisoner transfers with a large number of countries. Since opening for signature in 1983 with the signatures of several European countries, the COE Convention has expanded to 63 countries, the greatest number for an arrangement of its kind (see Annex 1 for a complete list of countries).

Non-Council of Europe countries may accede to the COE Convention with the unanimous consent of all parties to the Convention. Amongst PILON members, Tonga and Australia have already joined the COE Convention. If a PILON member country was successful in joining, it could stand to benefit from achieving transfer arrangements with some 63 countries that have also ratified the COE Convention. The process for joining the COE Convention is discussed in further detail in Annex 1.

Under the COE Convention, countries are required to consider the following criteria to transfer a prisoner:

- i. *Sentence*: the prisoner must have been convicted and sentenced.
- ii. *Finality*: there should generally be no more means or intention to appeal when the person applies for a transfer.
- iii. *Nationality*: this is generally an open formula, with countries free to determine what nationality means. For example, countries may consider things such as citizenship or length of residency, and business or family ties in that country.
- iv. *Dual criminality*: that the offence would also be considered a crime, with attached sanctions, if it was committed in the receiving country.
- v. *Consent*: the consent of all parties (the prisoner, the receiving country and the sentencing country) must be obtained. In multi-level government systems, the consent of the jurisdiction where the sentence has been given and the jurisdiction where the sentence is to be served must also be obtained.
- vi. *Time left to serve*: there should be at least six months of the sentence left to serve before a transfer can go ahead.

An important feature of the COE Convention (and most other transfer arrangements) is that it is completely consent based. There is no obligation for either a sending or a receiving country to either make or accept a request to transfer a sentenced person. The COE Convention merely provides the framework through which a transfer could take place, and only if all parties consent to a transfer.

2. Negotiating a multilateral or regional treaty

Some regions and organisations have established transfer arrangements which cater for particular cultural and political needs. It is useful to consider the operation of these multilateral arrangements for comparative purposes.

Commonwealth countries can sign up to the Commonwealth Scheme for the Transfer of Convicted Offenders (the Commonwealth Scheme). The Commonwealth Scheme was agreed to in 1986 and is a less than treaty status agreement. Commonwealth countries can join the Scheme by incorporating it into domestic laws and advising the Commonwealth Secretariat accordingly. The Commonwealth Scheme has similar requirements and features as the COE Convention, but with a few differences. For example, the Scheme specifies that unless voluntarily agreed to by all parties, the sentencing state alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.

Other significant multilateral agreements facilitating the transfer of sentenced persons include:

- in the Americas: Inter-American Convention on Serving Criminal Sentences Abroad (or Organisation of American States (OAS) Convention)
- in the Arab states: Riyadh Arab Agreement on Judicial Cooperation, and
- in the African states: Organisation Communale Africaine et Malgache (OCAM) Convention on Judicial Cooperation.

These arrangements share many common features with the COE Convention, but have a few minor differences. For example, the Arab states' arrangement does not provide for converting a sentence in a receiving country. Some agreements also limit transfer where certain punishments may be imposed, for example, the death penalty or torture.

A regional Pacific arrangement would enable countries to take advantage of geographical and political similarities to conclude arrangements with a number of neighbouring countries. However, many of the above multilateral arrangements were negotiated before the COE Convention became the most widespread agreement. To negotiate a multilateral arrangement in the Pacific would also be a comparatively time and resource intensive exercise, when compared with the option of joining an existing arrangement.

3. Negotiating bilateral treaties

Bilateral negotiation of transfer arrangements may be useful in instances where countries either:

- do not agree with the terms of existing multilateral arrangements open to them, or
- are eager to quickly achieve arrangements with a particular country where the two countries are not jointly party to a multilateral arrangement.

In the longer term, bilateral negotiation is a time-consuming and costly method of achieving international transfer relationships with more than a few countries. Furthermore and depending on the countries involved and their domestic processes, bilateral treaties can actually take longer to become operational.

In practice, many countries are party to a combination of both multilateral and bilateral arrangements. For example, the United States is a party to two multilateral conventions: the COE Convention and the Inter-American Convention on Serving Criminal Sentences Abroad. In the Pacific, the United States also has bilateral prisoner transfer agreements with the Federated States of Micronesia, the Marshall Islands and Palau, as they are not party to those two multilateral arrangements.

4. Implementing domestic legislation

Some PILON members have domestic legislation to implement international transfer of sentenced persons arrangements. Tonga and Australia both have domestic legislation, but require a country to be a nominated "transfer country." This is satisfied by member status to the COE Convention or through concluding other international transfer arrangements.

It is also possible for some countries to implement stand-alone domestic legislation which allows consideration of transfers on a case-by-case basis where there is no bilateral or multilateral agreement in place. Samoa and Kiribati have domestic legislation for the international transfer of sentenced persons and require countries to be added to a schedule of eligible countries by Executive Order. Samoa has added the Cook Islands to its schedule, but the PILON Secretariat is not aware of any countries listed in Kiribati's Schedule. The Cook Islands also has enabling legislation requiring a country to be a "prescribed country". This can be achieved by an Executive Council

Order and implemented by Regulations. The PILON Secretariat is not aware of prescribed countries for the Cook Islands.

The practice of nominating transfer countries in domestic legislation by Executive act does not provide a predictable and inclusive system for transferring sentenced persons in the region, and may not be an option for all countries, depending on their legal systems. This practice may be a useful option for countries only interested in achieving transfer arrangements with a limited number of countries, but does not provide an efficient basis for concluding transfer arrangements with a large number of countries.

Who pays for the transfer?

Generally, the receiving country is responsible for costs incurred, except where the cost is incurred in the sentencing country before the transfer has occurred. Costs may include administrative expenses, airfares for both the sentenced person and accompanying officers, and other miscellaneous costs associated with the transfer. Some of the costs of a transfer can also be recouped from the transferee if there is relevant legislation to allow this (and depending on the ability of the prisoner to pay).

Discussion

Discussion amongst members at the PILON meeting might include some of the following questions/topics:

- Is the international transfer of prisoners an important issue for member countries, and is it likely to increase in importance in the future?
- Do member countries consider the costs of housing foreign prisoners to be a concern?
- What other difficulties have member countries identified with foreign prisoners?
- Do members have legislation or arrangements in place which are not mentioned in this paper?
- Is criminal deportation an important issue for member countries, and would improved transfer arrangements help the problem?
- Do prisoner transfers happen without legislation or arrangements in place? If so, on what basis are these transfers conducted?
- Would ministers be receptive to transferring prisoners?

Recommendations

The PILON Secretariat recommends that member countries consider ways in which the transfer of sentenced persons can be better facilitated in the region.

If members agree, the PILON Secretariat suggests that this may best be achieved through member countries seeking to join the COE Convention. Joining the COE Convention is the most time and cost efficient method of achieving transfer relationships with as many countries as possible, both within the Pacific region and further abroad.

Annex 1: Countries Party to the Council of Europe Convention on the Transfer of Sentenced Persons

Member States Party to the Convention

Albania	Germany	Portugal
Andorra	Greece	Romania
Armenia	Hungary	Russia
Austria	Iceland	San Marino
Azerbaijan	Ireland	Serbia
Belgium	Italy	Slovakia
Bosnia and Herzegovina	Latvia	Slovenia
Bulgaria	Lichtenstein	Spain
Croatia	Lithuania	Sweden
Cyprus	Luxembourg	Switzerland
Czech Republic	Malta	The Former Yugoslav Republic of
Denmark	Moldova	Macedonia
Estonia	Monaco	Turkey
Finland	Montenegro	Ukraine
France	Netherlands	United Kingdom
Georgia	Norway	
	Poland	

Non-member States Party to the Convention

Australia
Bahamas
Bolivia
Chile
Costa Rica
Ecuador
Israel
Japan
Korea
Mauritius
Mexico
Panama
Tonga
Trinidad and Tobago
United States
Venezuela

Annex 2: Additional information on process of accession to the Council of Europe Convention

Before joining the Convention, countries would need to enact complementary legislation to provide a framework for the transfer of sentenced persons. In federated nations, this also involves the implementing legislation in the states and territories as well.

To seek an invitation from the Committee to join the Convention, a representative of the government of a country would write to the Council of Europe of its interest to accede to the Convention. Following consultation with other parties to the Convention, the Council would make a formal decision on inviting the individual countries to accede to the Convention. The consultation prior to this decision could take up to three months.

During consultation, the Council would generally advise countries on whether informal feedback from other parties suggests that they are positive about accession. This feedback would indicate the likelihood of an invitation to accede being made. If successful, the Council would formally invite countries to accede to the Convention. Once a country's domestic requirements for the Convention's entry into force are complete, countries would be in a position to lodge an instrument of accession with the Secretary of the Council.