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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

**REPORT ON CONSENT IN INTERNATIONAL
PRISONER TRANSFERS**

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CONTENTS

1.	Consent in International Prisoner Transfers	1
2.	Council of Europe Convention on the Transfer of Sentenced Persons	1
3.	Other Regional Systems	3
4.	Additional Protocol to the Convention on the Transfer of Sentenced Persons, 1997	3
5.	EU Framework Decision	5
6.	The EU Framework Decision's Impact on Existing or Future Agreements	6
7.	Bilateral Prisoner Transfer Agreements	
a)	<u>The UN Model Agreement on the Transfer of Foreign Prisoners</u>	7
b)	<u>CASE-STUDY: The United Kingdom</u>	8
8.	Human Rights Implications	
a)	<u>Safeguards</u>	9
b)	<u>European Court of Human Rights Jurisprudence</u>	10
i)	<i>Right to Family Life</i>	10
ii)	<i>Right to Freedom from Torture, Inhuman or Degrading Treatment or Punishment</i>	
c)	<u>Diplomatic Assurances</u>	12
9.	Conclusion	12

1. Consent in International Prisoner Transfers

The “internationalisation of crime”¹ has resulted in an increasing focus on ways to facilitate the transfer of foreign nationals convicted in one state to another state to serve their sentences of imprisonment.

Historically, the consent of a sentenced person has been a requirement for international transfers. Consent remains a central feature of many bilateral and multilateral agreements governing this form of state cooperation.

However, recent developments in regional and inter-state practice have resulted in the delegation of the prisoner’s views from that of a veto, to one issue to consider among several. The result is that States may now transfer prisoners, in certain circumstances, to another State to serve a sentence of imprisonment against their will. While these involuntary transfer processes are supported by penal policy objectives, they may also give rise to human rights violations.

This report outlines the main international prisoner transfer schemes operating within Europe, discusses the procedures introduced by recent developments within the Council of Europe and the European Union and concludes by highlighting some potential human rights implications of involuntary transfers.

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

The Council of Europe Convention² was introduced to facilitate the social rehabilitation of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries. In so doing, it was hoped that States could alleviate the hardships faced by foreign prisoners. The system introduces a transfer mechanism dependent on the consent of not only the sentencing and administering States, but of the sentenced person.³

This consent requirement is attributed to the “convention’s primary purpose to facilitate the rehabilitation of offenders [as]... transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.”⁴

The prisoner’s consent must be given voluntarily and with full knowledge of the legal consequences of giving such consent.⁵ A legal representative of the proposed transferee can give consent to the transfer on the sentenced person’s behalf if one of the States feels this is necessary due to the prisoner’s age or physical or mental condition.⁶ A legal representative is any person authorised by law to act on behalf of the sentenced person and there is no need for such person to be legally qualified. For example, this representative may be a parent or an individual authorised by a competent authority.⁷

The exact procedure for giving consent is governed by the law of the sentencing State.⁸ The sentencing State must provide the administering State with a declaration that contains the prisoner’s consent to the transfer.⁹ The sentencing State must allow the administering State to verify that the consent was informed and given freely through a consul or an official agreed upon by both States.¹⁰

The obligation on the sentencing State to ensure that informed consent was given freely and to afford the administering State the opportunity to verify consent was given in accordance with these conditions derives from the fact that the sentenced person’s consent is “one of the basic elements of the transfer mechanism established by the convention.”¹¹

3. Other Regional Systems

The requirement of freely given, informed and verified consent is also a central aspect of other regional prisoner transfer systems. For example, both the Inter-American Convention on Serving Criminal Sanctions

¹ Para. 9, Explanatory Report to the COE Convention.

² ETS No. 112. Opened for signature 23 March 1983, entered into force 1 July 1985.

³ Art. 3(1)(d) COE Convention.

⁴ Para. 23 Explanatory Report to the COE Convention.

⁵ Art. 7(1) COE Convention.

⁶ Art. 3(1)(d) COE Convention.

⁷ Para. 23 Explanatory Report to the COE Convention.

⁸ Art. 7(1) COE Convention.

⁹ Art. 6(2)(c) COE Convention.

¹⁰ Art. 7(2) COE Convention.

¹¹ Para. 38 Explanatory Report to the COE Convention.

Abroad,¹² and the Scheme for the Transfer of Convicted Offenders within the Commonwealth¹³ mirror the Council of Europe Convention's provisions regarding consent and its verification.

4. Additional Protocol to the Convention on the Transfer of Sentenced Persons

The 1997 Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons¹⁴ deviates from the usual practice of requiring consent for a sentence to be enforced in a country other than the sentencing State in two situations;

- a) where a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed;¹⁵ and
- b) where the sentenced person is subject to expulsion or deportation.¹⁶

As many states cannot extradite their own nationals, the first option ensures where a convicted person has fled to the territory of his State of nationality to avoid the further execution of the sentence in the sentencing State, the convicted person's State of nationality may administer the sentence without the consent of the sentenced person to the transfer of the execution of the sentence.¹⁷ The Additional Protocol assumes that the convicted person has impliedly consented to remaining on the territory of his State of nationality.¹⁸ Moreover, consent was not considered to be appropriate in these instances as such persons, who deliberately sought to frustrate the judicial process, have taken themselves outside of the ambit of the Council of Europe Convention on the Transfer of Sentenced Persons and its consent requirement.¹⁹

This option does not relate to consent for the inter-state transfer of a convicted person, but rather the transfer of authority to execute a sentence to a State to which a person has fled with a view of avoiding imprisonment and which may not be in a position to extradite its own national.²⁰

The second option enables States to transfer a sentenced person to another State to serve their sentence without their consent if they would not be allowed to remain in the territory of the sentencing State upon release due to a deportation or expulsion order.²¹

This provision was justified on the basis that it "does not serve the objective of rehabilitation of the sentenced person to keep such a person in the sentencing State when it is likely that, once he or she has completed the sentence to be served, he or she will no longer be permitted to remain in that State."²²

Such transfers should only occur if expulsions are implemented in a manner that conforms with Article 1 of Protocol No. 7 to the European Convention on Human Rights²³ and all rights of appeal against the expulsion or deportation order have been exhausted.²⁴

As the Article 3 mechanism neither requires nor assumes the prisoner's consent to the transfer,²⁵ the administering State must not give its agreement to the transfer without first taking the sentenced person's opinion into consideration.²⁶ Accordingly, the sentencing State must provide the administering State with a declaration containing the convicted person's opinion on the transfer.²⁷ Although Article 3 only refers to the administering State's duty to take the prisoner's opinion into account, there is a presumption that the sentencing State, in accordance with the rule of law, would take the prisoner's opinion into account before making a decision on transfer.²⁸ The prisoner's opinion will be of particular relevance if the person has more

¹² Articles III(2) and V Inter-American Convention.

¹³ Articles 4(1)(d) and 8 Commonwealth Scheme.

¹⁴ CETS No. 167. Opened for signature 18 December 1997 and entered into force 1 June 2000.

¹⁵ Art. 2(1) Additional Protocol COE Convention.

¹⁶ Art. 3(1) Additional Protocol COE Convention.

¹⁷ Art. 2(3) Additional Protocol COE Convention.

¹⁸ Para. 20 Explanatory Report to the Additional Protocol COE Convention.

¹⁹ Para. 14 Explanatory Report to the Additional Protocol COE Convention.

²⁰ See para. 12 Explanatory Report to the Additional Protocol COE Convention.

²¹ Art. 3(1) Additional Protocol COE Convention.

²² Para. 21 Explanatory Report to the Additional Protocol COE Convention.

²³ Para. 30 Explanatory Report to the Additional Protocol COE Convention.

²⁴ Para. 23 Explanatory Report to the Additional Protocol COE Convention.

²⁵ Para. 24 Explanatory Report to the Additional Protocol COE Convention.

²⁶ Art. 3(2) Additional Protocol COE Convention.

²⁷ Art. 3(3)(a) Additional Protocol COE Convention.

²⁸ Para. 27 Explanatory Report to the Additional Protocol COE Convention.

than one nationality or may take advantage of the possibility of being deported to country other than that of his nationality.²⁹

States may, however, opt out of the Article 3 mechanism for involuntary transfers.³⁰ To date, Ireland and Turkey have issued declarations stating that they will not apply or take over the execution of sentences under the circumstances set out in Article 3, until notification to the contrary. Belgium has limited the application of Article 3 to persons who are not habitually resident in the country at the time of their arrest and Russia's declaration ruled out taking over the execution of sentences under Article 3, but not its application.³¹

These exceptions to the consent requirement of the COE Convention are obviously limited to instances where the States involved have acceded to the Additional Protocol.³² The Additional Protocol may extend beyond Europe as non-members of the Council of Europe may ratify it.³³

5. EU Framework Decision

The Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008/909/JHA, 27 November 2008 (hereafter EU Framework Decision), will come into effect on 5 December 2011. The EU Framework Decision also adopts the position that the sentenced person's "involvement in proceedings should no longer be dominant by requiring in all cases his or her consent"³⁴ and indeed, takes the exclusion of the consent requirement further.

Not only, in much the same way as in the Additional Protocol, is the consent of sentenced persons not required when they flee or stand to be deported or expelled, but it is also not required when they are to be returned to a State party of which they are nationals and in which they live.³⁵ Factors such as habitual residence, family, social or professional ties will determine whether a sentenced person will be considered to 'live' in his state of nationality.³⁶

If the sentenced person is still in the issuing State, and consent is not required, the sentenced person's opinion must be taken into account.³⁷ The sentenced person's opinion can be given orally or in writing or if due to the prisoner's age, physical or mental condition, this opportunity will be given to his legal representative.³⁸ The issuing State must forward the prisoner's views to the executing State.³⁹

There are however, cases in which the sentenced person's consent to the transfer **is required** before the judgment and a certificate can be forwarded to the executing State.⁴⁰ These include transfers to Member States that consent to the transfer where either the sentenced person is not a national or the sentenced person is a non-resident national but no deportation or expulsion order has been issued.

6. The EU Framework Decision's Impact on Existing or Future Agreements

The final provisions of the EU Framework Decision include an important provision which outlines the effect it will have on existing and future bilateral or multilateral agreements concluded by EU Member States on international prisoner transfers.

²⁹ Para. 28 Explanatory Report to the Additional Protocol COE Convention.

³⁰ Art. 3(6) Additional Protocol COE Convention.

³¹ See

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=167&CM=8&DF=04/12/2010&CL=ENG&VL=1> (visited 03/12/10).

³² The Additional Protocol has been ratified by 35 members of the Council of Europe.

³³ The Additional Protocol is open to accession by the non-member States of the Council of Europe that have acceded to the 1983 Convention. See Articles 18(1) and 19(1) Council of Europe Convention, paras. 11, 79, Explanatory Report CTSP and Articles 4-5 AP CTSP. Although none have currently done so, these provisions pave the way for potential transfer of prisoners without their consent from the UK to Australia, the Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Honduras, Israel, Japan, Korea, Mauritius, Mexico, Panama, Tonga, Trinidad and Tobago, US, Venezuela and vice versa, should these States ratify the Additional Protocol. See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG> (visited 30/11/10).

³⁴ Para. 5 Preamble EU Framework Decision.

³⁵ See Articles 4(1), 6(1)-(2) EU Framework Decision.

³⁶ Para. 17 Preamble and Art. 6(2)(a) EU Framework Decision. This provision will not apply to Polish nationals imprisoned abroad for five years after the EUFWD enters into force. See Art. 6(5) EUFWD.

³⁷ Art. 6(3) EU Framework Decision.

³⁸ Art. 6(3) EU Framework Decision.

³⁹ Art. 6(3) EU Framework Decision.

⁴⁰ See Articles 4(1), 6(1) EU Framework Decision.

According to Article 26(1), the EU Framework Decision will, from the 5 December 2011, replace the corresponding provisions of the Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol in relations between Member States. Therefore, as between EU Member States, the EU Framework Decision's 'no consent' model will replace the 'consent' model of the COE Convention and the supplementary 'no consent' provisions of its Additional Protocol.

Other bilateral or multilateral agreements entered into by EU Member States may still be relied on, **in so far** as they allow the objectives of the EU Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for the enforcement of sentences. EU Member States must notify the Council and Commission of existing agreements they wish to continue applying and new agreements concluded within 3 months of their conclusion.⁴¹

7. Bilateral Prisoner Transfer Agreements

a) The UN Model Agreement on the Transfer of Foreign Prisoners

The UN's Model Agreement on the Transfer of Foreign Prisoners⁴² provides a guide for the conclusion of bilateral and multilateral agreements on prisoner transfer. It makes it clear that prisoners' consent is a key requirement for international transfers.⁴³ It also provides that prisoners should be fully informed about the consequences of transfer,⁴⁴ and that the administering State should be given the opportunity to verify whether the consent of the prisoner was indeed given freely.⁴⁵ The UN Model Agreement therefore replicates the consent model of the Council of Europe Convention, the Inter-American Convention and the Commonwealth Scheme.

However, there are indications that states are adopting the 'no consent' model advocated by the EU Framework Decision in their bilateral agreements.

b) CASE-STUDY: The United Kingdom

Until recently, the bilateral prisoner transfer agreements (PTA) concluded by the United Kingdom has included a consent requirement.⁴⁶ Recently however, the British Government has made clear its intention to conclude, where possible, 'no consent' prisoner transfer agreements with other States.⁴⁷ To facilitate this policy decision, the UK's primary domestic legislation, the Repatriation of Prisoners Act 1984, has been amended so that the prisoner's consent is now only necessary if required by the relevant international arrangement.⁴⁸

Although other UK PTAs have not explicitly included consent requirements,⁴⁹ the first full 'no consent' PTA concluded by the UK was signed with Rwanda on 11 February 2010.⁵⁰ The agreement states that, where both Parties agree, a prisoner may be transferred by the sentencing State to the other State to serve his sentence, without his consent.⁵¹ To prevent prisoners insisting on the application of other transfer schemes that require consent, thereby giving them a veto over the transfer, the UK-Rwanda PTA states that its provisions prevail over any other multilateral agreements governing the transfer of sentenced persons.⁵²

Unlike the UK's previous bilateral PTAs, the agreement with Rwanda introduces a new condition for transfer – the sentenced person must be subject to an order for deportation or removal from the sentencing state.⁵³

⁴¹ Art. 26(2)-(4) EU Framework Decision.

⁴² Adopted by the Seventh UN Congress on Crime Prevention and Criminal Justice (1985).

⁴³ Art. 5 UN Model Agreement. Art. 9 UN Model Agreement adds that "In cases of the person's incapability of freely determining his will, his legal representative shall be competent to consent to the transfer."

⁴⁴ Art. 6 UN Model Agreement.

⁴⁵ Art. 7 UN Model Agreement.

⁴⁶ See, for example, Art. 3(9) UK-Thailand PTA.

⁴⁷ Para. 9, Explanatory Memorandum to the UK and Rwandan Agreement on the Transfer of Sentenced Persons, available online at <http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2010/RwandaTransferSentenced> (visited 01.12.10).

⁴⁸ See Art. 44 Police and Justice Act 2006, available online at http://www.opsi.gov.uk/Acts/acts2006/ukpga_20060048_en_1 (visited 30.11.10).

⁴⁹ See the UK's PTAs with Ghana, Libya and Uganda.

⁵⁰ This agreement is not yet in force.

⁵¹ Art. 2(3) UK-Rwanda PTA.

⁵² See Art. 2(2) UK-Rwanda PTA.

⁵³ Art. 3(b) UK-Rwanda PTA.

This aligns the bilateral ‘no consent’ procedure with the rationale for involuntary transfers under the Additional Protocol and EU Framework Decision.

Although a prisoner may still request, and indeed consent to a transfer under this agreement,⁵⁴ it is likely to be used primarily on a ‘no consent’ basis. If it is used in this manner, the sentenced person must be given an opportunity to present his views in writing to the transferring State before the final decision has been reached.⁵⁵

8. Human Rights Implications

The preceding sections outlined the new multilateral and bilateral mechanisms that facilitate the involuntary transfer of sentenced persons to other States to serve their sentences. While these mechanisms have been introduced for important penal policy reasons (to reduce overcrowding, to facilitate rehabilitation and reintegration⁵⁶), they have the potential to infringe upon the proposed transferees’ human rights. In particular, involuntary transfers may violate the prisoners’ right to family life and right to freedom from torture, inhuman or degrading treatment.⁵⁷ The instruments and their explanatory reports recognise the importance of providing foreign prisoners with safeguards.

a) Safeguards

Involuntary transfers under the Additional Protocol must comply with the requirements of Protocol no. 7 to the European Convention on Human Rights:⁵⁸ prisoners must be given an opportunity to submit reasons against their transfer and to have their cases reviewed with the benefit of representation.⁵⁹

The EU Framework Decision states that sentenced persons must be provided with adequate safeguards to ensure that the Framework Decision is implemented and applied in a manner which respects principles of equality, fairness and reasonableness, and the prisoners’ fundamental rights.⁶⁰

The ‘no consent’ transfer procedure in the UK-Rwanda PTA should only be used if the proposed transfer is compatible with the prisoner’s rights under the European Convention on Human Rights.⁶¹ Moreover, this bilateral agreement states that post-transfer, each Party must “treat all sentenced persons transferred... in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman and degrading treatment or punishment.”⁶²

b) European Court of Human Rights Jurisprudence

i) *Right to Family Life*

Article 8, which protects the right to private and family life, is one of the “most open-ended provisions”⁶³ of the European Convention on Human Rights. It does not operate to prevent expulsion or guarantee a right of residence.⁶⁴ Moreover, interference with family life may be justified if the decision is made in accordance with the law, is necessary in a democratic society and serves a legitimate aim.⁶⁵ In other words, a transfer will not violate the prisoner’s rights if the decision is based on accessible and foreseeable criteria, if the action is justified by a pressing social need and it is proportionate to the aim pursued.

All of these elements will typically be present in the transfer of convicted criminals to a country with which they have social and legal links to facilitate their rehabilitation. When making their decisions, however, States should take into consideration a number of factors: the nature and seriousness of the offence committed by the prisoner; the length of time the prisoner has spent in the country; the prisoner’s conduct in prison; the nationalities and situation of the prisoner’s family; the length of any marriage and whether it produced children, and if so, their ages; whether the couple lead a real and genuine family life; and the difficulties a

⁵⁴ Art. 8(1) UK-Rwanda PTA.

⁵⁵ See Articles 4(4) and 8(4) UK-Rwanda PTA.

⁵⁶ See para. 21 Explanatory Report to the Additional Protocol COE Convention, para. 9 Preamble and Articles 3(1), 4(2) EU Framework Decision and para. 6 Explanatory Memorandum to UK-Rwanda PTA.

⁵⁷ Jim Murdoch *The Treatment of Prisoners; European Standards* COE 2006 at 324.

⁵⁸ Para. 30 Explanatory Report to the Additional Protocol COE Convention.

⁵⁹ See Art. 1 Protocol No. 7 to the European Convention on Human Rights, E.T.S. 117, 01/11/88.

⁶⁰ Paras. 5, 6, 13 Preamble and Art. 3(4) EU Framework Decision.

⁶¹ Para. 9 Explanatory Memorandum to UK-Rwanda PTA

⁶² Art. 9 UK-Uganda PTA and Art. 9 UK-Rwanda PTA.

⁶³ Robin C.A. White & Clare Ovey, *Jacobs, White & Ovey, The European Convention on Human Rights* (5th ed.) (OUP: Oxford, 2010) at 334.

⁶⁴ *Ibid* at 345.

⁶⁵ Art. 8(2) ECHR.

spouse would face in the prisoner's country of origin (although this cannot by itself preclude an involuntary transfer).⁶⁶ Ultimately, the prisoner's right to family life will be balanced against the wider interests of the community.

ii) *Right to Freedom from Torture, Inhuman or Degrading Treatment or Punishment*

In sharp contrast, Article 3 of the European Convention on Human Rights, which protects the right to freedom from torture, inhuman or degrading treatment or punishment, is an absolute and non-derogable right. Consequently, states are under a positive duty not to transfer individuals to a state in which they will be subject to a real risk of ill-treatment prohibited by Article 3.⁶⁷

This obligation is absolute and is not dependent in any way upon the proposed transferee's conduct or criminal record or the threat he is deemed to pose to national security or public order.⁶⁸ Moeckli notes that the ECtHR's jurisprudence empathetically rejects arguments forwarded by some States in favour of creating a two-tier system whereby nationals would have a right to an absolute prohibition on torture, but foreign nationals could be exposed to the risk of ill-treatment if they were considered to be dangerous.⁶⁹ Such a system must be rejected as it would be based on the indefensible premise that foreign prisoners "do not deserve human rights... because they are less human,"⁷⁰ this viewpoint represents "an attack on the very idea of human rights".⁷¹

Article 3 may also invalidate a proposed involuntary transfer on medical grounds.⁷² However, the circumstances of the prisoner's medical and social situation must be of an exceptional nature to bring the transfer within the threshold of Article 3.⁷³

The positive obligation derived from Article 3 applies not only to transfers to states with poor human rights records, but also to transfers to countries that are bound by the ECHR, if the receiving State has a record of persecuting people from the same background as the proposed transferee⁷⁴ or if it is likely that the receiving State will send the prisoner to a third state in which there is a risk that he would be subject to the prohibited treatment.⁷⁵

c) Diplomatic Assurances

States may seek "information, undertakings or assurances"⁷⁶ or conclude supplementary memoranda of understanding with a view to guaranteeing that transferred prisoners will be treated in accordance with international human rights law.⁷⁷ However, non-binding diplomatic assurances may not be sufficient to displace the sentencing State's obligations to the prisoner, particularly if there is evidence to show that prohibited practices are used or tolerated by state authorities.⁷⁸ Moreover, the weight attached to diplomatic assurances will be dependent on whether they provide effective post-transfer monitoring or any remedial action in the event that assurances are not being respected.⁷⁹

9. Conclusion

⁶⁶ See para. 48 Boultif v Switzerland App. 54273/00, 02.08.01 and para. 35 Amrollahi v Denmark App. 56811/00, 11.07.02.

⁶⁷ See paras. 146, 149 Saadi v Italy App. 37201/06, 22.02.08, paras. 79-80 Chahal v UK App. 70/1995/576/662, 11.11.96, para. 47 D v UK (1997) 24 EHRR 423 and para. 91 Soering v UK App. 14038/88, 07.07.89.

⁶⁸ See para. 79 Chahal v UK App. 70/1995/576/662, 11.11.96 and Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd ed. (OUP; Oxford, 2009) at 86-7.

⁶⁹ Daniel Moeckli, "Saadi v Italy: The Rules of the Game Have Not Changed" (2008) 8(3) *Human Rights Law Review* 534-548 at 548.

⁷⁰ Para. 2, Concurring Opinion of Judge Zupančič, Saadi v Italy App. 37201/06, 22.02.08.

⁷¹ Moeckli, note 69, at 548.

⁷² See paras. 50-54 D v UK (1997) 24 EHRR 423 02.05.97.

⁷³ See para. 50 N v UK App. 26565/05, 27.05.08. See also Ameghigan v The Netherlands App. 25629/04, 25.11.04 and Ammari v Sweden App. 60959/00, 22.10.02.

⁷⁴ Shamayev and Others v Georgia and Russia App. 36378/02, 12.04.05.

⁷⁵ T.I v UK, App. 43844/98, 07.03.00.

⁷⁶ See Art. 5 UK-Rwanda PTA.

⁷⁷ See Art. 4(7) UK-Rwanda PTA.

⁷⁸ See para. 105 Chahal v UK App. 70/1995/576/662, 11.11.96 and paras. 146-7 Saadi v Italy App. 37201/06, 22.02.08.

⁷⁹ See paras. 39-40, *Committee on the Prevention of Torture's 15th General Report CPT/Inf* (2005) 17 and paras. 46, 51 *Interim Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/60/316, 30.08.05.

International prisoner transfers systems are currently used by states, international organisations and international criminal courts as a tool to combat national, transnational and international crime. This report has focused on multilateral and bilateral mechanisms used to transfer foreign prisoners convicted of crimes committed in the sentencing State to another State to serve their sentence. The prisoner's consent may or not be required for such transfers. Where the sentenced person's consent is not required, it is important to note that their views must still play an integral part in the decision-making process, particularly given the potential human rights implications of involuntary transfers. Moreover, States cannot transfer prisoners if there is real risk of ill-treatment in the proposed enforcing State.