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Handbook on the International Transfer of Sentenced Persons

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I. Introduction

With the increase in international travel and migration, it has become progressively more common for countries around the world to convict and sentence foreign citizens to terms of imprisonment or other forms of deprivation of liberty. This has raised the issue of how best to deal with such sentenced persons. The *Handbook on the International Transfer of Sentenced Persons* is designed to explain how transferring such persons to another State to serve their sentences can contribute to dealing with them fairly and effectively.

In some countries, the practice is to deport or otherwise remove all foreign sentenced persons immediately. On the face of it, such removal may seem to be an attractive solution, as the State in which the offence has been committed may be reluctant to allow offenders to remain there. However, it has the obvious disadvantage that such foreign sentenced persons may avoid punishment completely. Alternatively, sentenced persons could be made to serve their sentences in the country in which they have committed their crimes, and then be expelled following the completion of the sentence. This approach, however, also presents challenges. Not only may serving a sentence in a foreign country inhibit the rehabilitation of those persons, but there may be other reasons for transferring them back to their home countries to serve their sentences there.

Since 1985, when the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Model Agreement on the Transfer of Foreign Prisoners[1] and the recommendations on the treatment of foreign prisoners,[2] the United Nations and, in particular, the United Nations Office on Drugs and Crime (UNODC) have sought to play an active role in facilitating the transfer of sentenced persons. The *Handbook* is designed to further that process.

A. Target audience

As part of its mandate to counter the proliferation of crime, drugs and terrorism and to promote crime prevention and criminal justice reform, UNODC has played a leading role in establishing and supporting international cooperation among Member States. This has taken the form of promoting extradition, mutual legal assistance, confiscation and information exchange by central authorities. The *Handbook* forms part of the series of tools developed by UNODC to support countries in implementing the rule of law and developing criminal justice reform.

The *Handbook* is designed to be used by all actors involved in the criminal justice system, including policymakers, legislators, prison managers, prison staff, prosecutors, police, members of non-governmental organizations and other individuals interested or active in the field of criminal justice and prison reform. It can be used in a variety of contexts, both as a reference document and a training tool.

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

[2] Ibid., annex II.

B. Scope and limitations

The primary focus of the *Handbook* is on how arrangements can be made to transfer persons sentenced to terms of imprisonment in one country so that, in appropriate cases, they can serve their sentences in another country in accordance with the law in the receiving State. This is a specialized area of law that forms part of the growing international cooperation between States in criminal justice matters. Unlike extradition, which addresses the return of a person sought for prosecution or the enforcement of a sentence, the *Handbook* relates only to the transfer of persons who are currently serving a sentence. Moreover, the focus on the transfer of prisoners who continue to serve their sentences means that the *Handbook* does not deal with the deportation of offenders who have completed their sentences and are thus no longer subject to criminal proceedings.

There is no single international instrument that covers the transfer of sentenced persons throughout the world. The object of the *Handbook* is to describe and explain the key elements of the numerous instruments that exist and are designed to facilitate the transfer of sentenced persons. As its point of departure, the *Handbook* takes the Model Agreement (which is contained in annex I). It also discusses contemporary multilateral and bilateral agreements, and national laws that facilitate and regulate the transfer of sentenced persons. This overview of relevant instruments should assist States that wish to enter into such agreements and adopt such laws in the future. At the same time, the overview should also help States that have already entered into transfer agreements to use them more effectively and more often.

While there is considerable overlap between the various instruments discussed in the *Handbook*, they do not all cover identical areas. Some instruments, for example, also deal with the transfer of non-custodial sanctions. While it is not common practice, it cannot be ignored entirely, not least because even persons who are transferred as prisoners may be released conditionally and serve part of their sentences in the community.

The *Handbook* does not deal with the transfer of sentenced persons to rented penal capacity in neighbouring States.[3]

C. Overview of chapters

The *Handbook* begins by providing an overview of the reasons why States should cooperate in order to transfer sentenced persons. Chapter II contains a discussion on the basic terminology of this subject, including an explanation of some of the key terms that will be used throughout the *Handbook*.

Chapter III shows that, while humanitarian considerations, particularly the facilitation of the social rehabilitation of prisoners by returning them to their countries of origin, have long been the most prominent reason for encouraging transfers, there may also be other grounds for encouraging them.

Chapter IV contains an outline of the initiatives taken by the United Nations to facilitate the transfer of sentenced persons. It also contains a description of the key multilateral instruments

[3] Belgium, for example, has hired prison space in the Netherlands to reduce overcrowding in its prisons (see Matthew Kang, "Belgian Prisoners do time abroad, relieving overcrowding at home", 5 February 2010. Available from www.dw-world.de/dw/article/0,,5221011,00.html; and Alan Hope, "Belgian Prisoners move to Dutch Jail", 26 May 2009. Available from www.flanderstoday.eu/content/belgian-prisoners-move-dutch-jail.).

dealing with the transfer of sentenced persons that are currently in force. In addition, it sets out the important features of bilateral agreements and national implementing legislation.

The different components that can be found in the provisions of prisoner transfer treaties can be categorized according to whether they relate to procedural, practical or principled matters. However, to explain the transfer process, and for ease of comparison, the *Handbook* deals with the components of prisoner transfer in the order in which they occur. Accordingly, issues relating to the requirements for transfer, the transfer process and post-transfer considerations are explored in chapters V, VI and VII respectively. Annex II contains a flowchart showing the transfer procedure under the Model Agreement.

Chapter VIII contains a summary of the key points made in the previous chapters and a discussion on the new approaches that States can adopt and steps that they can take to improve the operation of systems for the transfer of sentenced persons that are already in place. In the chapter, it is stressed that the United Nations also encourages the transfer of sentenced persons in order to combat certain forms of transnational and international crime. The chapter ends with a brief overview of the benefits that systems for the international transfer of sentenced persons entail for States.

II. Transfer terminology

At the outset of a discussion on the transfer of sentenced persons, it is useful to define the relevant terminology that is used in the field in order to ensure a common understanding of the legal terms. It is especially important because of the numerous treaties, both bilateral and multilateral, that govern the issue and the fact that not all employ uniform terms. The following is therefore a discussion and explanation of the terminology used throughout the *Handbook*.

A. States parties

Some differences exist in the terminology used to describe the two States that are parties to a decision to transfer a sentenced person. First, there is the State in which the sentence was imposed on the person who may be, or has been, transferred. That State can be referred to as the sentencing State[4] or the sending State. Then, there is the State to which the sentenced person may be, or has been, transferred in order to serve his or her sentence. This can be referred to as the administering State,[5] the receiving State[6] or the implementing State. A further variation is found in Council of the European Union framework decision 2008/909/JHA 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 (available from http://eur-lex.europa.eu), which refers to the issuing State and the executing State. These correspond roughly to the sentencing and the administering State.

The terms "sentencing State" and "administering State" are used throughout the *Handbook*, unless reference is being made to a specific instrument that uses another term.

B. Sentence or sanction

Another area that may cause some confusion is the types of punishment that a State levies on an individual that may be subject to a transfer agreement. In practice, and in the *Handbook*, the main focus of transfers of sentenced persons is on sentences of imprisonment or other measures that involve deprivation of liberty (incarceration).[7] This is also the focus of the Model Agreement on the Transfer of Foreign Prisoners, which, as its name suggests, deals with prisoners and not other

[4] This is the term used in, for example, the Convention on the Transfer of Sentenced Persons (Council of Europe, *European Treaty Series*, No. 112); and the Inter-American Convention on Serving Criminal Sentences Abroad.

[5] As used in, for example, the Convention on the Transfer of Sentenced Persons and the Scheme for the Transfer of Convicted Offenders within the Commonwealth.

[6] As used in, for example, the Inter-American Convention on Serving Criminal Sentences Abroad.

[7] See Wolfgang Schomburg and others, *Internationale Rechtshilfe in Strafsachen* (International Cooperation in Criminal Matters), 4th ed. (Munich, Beck, 2006), p. 701.

sentenced persons.[8] The question remains, however, about the place of non-custodial sentences in international transfer arrangements. Individual instruments vary significantly in this regard. In the Convention on the Transfer of Sentenced Persons (hereinafter referred to as the "European Convention"; available from http://conventions.coe.int),[9] "sentence" refers to

> "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" (article 1, paragraph a).

This definition seems to exclude sentences that are implemented primarily in the community.

In contrast, the Inter-American Convention on Serving Criminal Sentences Abroad (available from www.oas.org) has a wider scope for the definition of "sentence". In the Convention, the term encompasses final judicial decisions "imposing, as a penalty for the commission of a criminal offence, imprisonment or a term of parole, probation, or other form of supervision without imprisonment" (article 2, paragraph 3).

At the European Union level, on the other hand, it was considered that the transfer of these two forms of punishment could and should be distinguished. Consequently, two framework decisions were adopted by the Council of the European Union in 2008: framework decision 2008/909/JHA 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 and framework decision 2008/947/JHA on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions.

As stated above, the *Handbook* focuses primarily on the transfer of persons who are imprisoned. However, States may also wish to transfer persons who are subject to community sanctions. If States that are not parties to the Inter-American Convention wish to do so, they may accede to a specialist instrument. In the European context, for example, such an instrument is the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.[10] However, that Convention has been acceded to by a limited number of States and has proved very difficult to implement in practice. It is therefore probably more valuable for States, particularly neighbouring States, to develop bilateral agreements to deal with the transfer of persons on whom non-custodial sentences have been imposed.

C. Recognition of sentence

There are different ways in which States can recognize the sentences that may be imposed on persons who are to be transferred. The terminology related to those different ways is presented here and discussed in more depth in chapter VI.

There are two modes of recognition that may be available: continued enforcement or conversion. Continued enforcement refers to a process whereby, through a court or administrative order, the sentence imposed by the sentencing State is enforced by the administering State. The sentence is not normally altered by the administering State. If, however, the sentence is by its nature

[8] Note by the Secretariat on the Model Agreement on the Transfer of Foreign Prisoners and recommendations for the treatment of foreign prisoners (A/CONF.121/10), para. 20.

[9] Council of Europe, *European Treaty Series*, No. 112.

[10] Council of Europe, *European Treaty Series*, No. 51.

or duration incompatible with the law of the administering State, or if its law so requires, the administering State may adapt the sentence to a punishment prescribed by its own law for a similar offence. The adapted sentence must, as far as possible, correspond with the initial sentence. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum sentence prescribed by the law of the administering State. In practice, this means that, where the process of continued enforcement is followed, the powers of the administering State to change the initial sentence are quite limited.

Conversion of the sentence refers to a process whereby the administering State, through a judicial or administrative procedure, imposes a new sentence based on the factual findings of the court in the sentencing State. The administering State is bound by these facts but imposes a new sentence within the terms of its national law. Such a sentence may be less severe than that imposed initially by the sentencing State, but it may not be more severe. There are usually further restrictions as well. For example, article 11, paragraph 1, of the European Convention provides that the administering State may not convert a sanction involving deprivation of liberty to a pecuniary sanction and that it must deduct the full period of deprivation of liberty served from the new sentence. Pursuant to that same article, the administering State is not bound by its own minimum sentences for similar offences. The administering State may, however, adapt a sentence for a particular offence by reducing it to the national statutory maximum for that offence.

D. Nationals

International arrangements for transferring sentenced persons are designed to deal with the transfer of foreign nationals back to their countries of origin. The importance placed on social bonds for the successful rehabilitation and reintegration of the prisoner has encouraged States to define nationality broadly, in order to enable the acceptance of non-nationals who reside in, or have close ties with, the proposed administering State. This approach is reflected in the flexible use of the term "national" in various multilateral instruments and bilateral agreements.

Depending on the instrument, the term "national" may refer to persons with nationality, residence rights or close ties with a particular State.[11] Other instruments allow State parties to define the term themselves.[12] States may do this by way of a single declaration or a joint agreement.[13] These provisions and declarations enable States to exercise control over the persons to whom such transfers may be available. The definitions adopted will be discussed further in chapter V, in which the requirements for transfer are outlined.

[11] See para. 1 of the Model Agreement; and para. 17 of the preamble to framework decision 2008/909/JHA.

[12] See art. 3, para. 4, of the European Convention; and para. 4 (3), of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.

[13] For example, the Agreement on the application, among the Member States of the European Communities, of the Council of Europe Convention on the Transfer of Sentenced Persons (COM(2004)334 final).

III. Why consider transferring sentenced persons?

When a State considers whether or not to ratify a multilateral convention on the transfer of sentenced persons or to enter into a bilateral transfer agreement with another State, it has to proceed from the assumption that it may, in the future, wish to transfer sentenced persons to or from other States that are party to such instruments or agreements. In many, if not all cases, once it has entered into such an agreement, a State will have to decide whether to seek the transfer of a foreign national serving a sentence in one of its prisons or to accept a request from another State to receive a sentenced person from it and take responsibility for implementing a decision or a sentence imposed by a court in that State, with all the administrative and judicial responsibilities that that would entail. The crucial question is, therefore, why transfer foreign prisoners abroad or have nationals brought back to serve their sentences in their home countries?

When a sentence is given, the traditional aims of sentencing may be assumed to have been taken into account. This means that, to the extent required by the rules that govern the exercise of sentencing discretion in the sentencing jurisdiction, the judge or court handing down the sentence should have balanced the requirements of retribution, deterrence, rehabilitation and incapacitation. The sentence imposed in the sentencing State should also provide the overall time frame for its subsequent implementation in the administering State. Nevertheless, the priorities at the implementation stage may be different from those that governed the imposition of the sentence, which may lead to different priorities when the transfer of a sentenced person is contemplated.

A. Rehabilitation, resocialization and reintegration

When implementing sentences of imprisonment, considerable attention is paid to the rehabilitation of offenders to ensure that they are resocialized and eventually reintegrated into the community.[14] In other words, the objective of rehabilitation may become more significant than it was at the time when the sentence was initially imposed. At that imposition of the sentence,

[14] See paragraphs 58; 59; 60 (2); 61; 62; 64; 65; 66 (1); and 80 of the Standard Minimum Rules for the Treatment of Prisoners (*Human Rights: A Compilation of International Instruments*, Volume I (First Part): *Universal Instruments* (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34). The complex relationship between the three concepts of rehabilitation, resocialization and reintegration is discussed in Sonja Snacken and Dirk van Zyl Smit, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford, Oxford University Press, 2009), pp. 73-85. They are used interchangeably here to reflect the need to enable, as far as possible, sentenced persons to develop so that they lead a crime-free life and take their full place in society in the future.

the primary objective of sentencing may have been to ensure that offenders received retributive punishment for the crime they had committed.[15]

It may be the case that a sentence can be implemented in different ways that would all meet the requirements of the initial sentence but differ in their effectiveness in terms of rehabilitating the sentenced individual. The transfer of foreign sentenced persons to serve their sentences in their home countries is an alternative way of implementing a sentence. All things being equal, sentenced persons who serve their sentences in their home countries can be rehabilitated, resocialized and reintegrated into the community better than elsewhere. This is a positive reason for transferring sentenced persons to a State with which they have social links to serve their sentences.[16] Imprisonment in a foreign country, away from family and friends, may also be counterproductive as families may provide prisoners with social capital and support, which improve the likelihood of successful resettlement and reintegration.[17]

The argument for encouraging the transfer of sentenced persons has a strong basis in international human rights law. Article 10, paragraph 3, of the International Covenant on Civil and Political Rights,[18] which, as of 25 January 2011, has been ratified or acceded to by 167 States, specifies that the "essential aim" of a penitentiary system is the "reformation and social rehabilitation" of prisoners. The Standard Minimum Rules for the Treatment of Prisoners[19] echo this duty to facilitate the social rehabilitation of offenders. These more detailed rules are used as a guide to interpret the provision of the International Covenant in respect of "social rehabilitation".[20] Similarly, the strong emphasis in the revised European Prison Rules on managing detention "so as to facilitate the reintegration into free society of persons who have been deprived of their liberty" (rule 6) has influenced the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[21]

Almost all instruments that regulate international prison transfers specify social rehabilitation as one of the grounds for supporting such transfers.[22] For example, paragraph 1 of the Model Agreement states:

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[15] This shift of emphasis was recognized by the Grand Chamber of the European Court of Human Rights in *Dickson v United Kingdom*, Application No. 44362/04, Judgment of 4 December 2007, para. 28:

> "In recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognized as a means of preventing recidivism, more recently and more positively, it constitutes rather the idea of resocialization through the fostering of personal responsibility. This objective is reinforced by the development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release."

[16] See Van Zyl Smit, "International imprisonment", *International and Comparative Law Quarterly*, vol. 54, No. 2 (2005), pp. 357-386; Płachta, Michał, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Freiburg, Max-Planck-Institut, 1993), pp. 159, 162 and 166-7; and Eveline De Wree, Tom Vander Beken and Gert Vermeulen, "The transfer of sentenced persons in Europe: much ado about reintegration", *Punishment and Society*, vol. 11, No. 1 (January 2009), pp. 111-128.

[17] See La Vigne and others, "Examining the effect of incarceration and in-prison family contact on prisoners' family relationships", *Journal of Contemporary Criminal Justice*, vol. 21, No. 4 (November 2005); Alice Mills and Helen Codd, "Prisoners' families and offender management: mobilizing social capital", *Probation Journal*, vol. 55, No. 1 (March 2008), pp. 11-12.

[18] General Assembly resolution 2200 A (XXI), annex.

[19] *Human Rights: A Compilation of International Instruments*, Volume I (First Part): *Universal Instruments* (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34.

[20] See Human Rights Committee, general comment 21, para. 5.

[21] Council of Europe, *European Treaty Series*, No. 5.

[22] See preamble, European Convention; para. 9, explanatory report on the European Convention; preamble and art. V, Inter-American Convention on Serving Criminal Sentences Abroad; preamble, Additional Protocol to the European Convention (*Council of Europe, European Treaty Series*, No. 167); preamble and para. 1, Model Agreement; and paras. 8 and 9, preamble, and arts. 3, para. 1, 4, para. 2, and 4, para. 6, framework decision 2008/909/JHA.

> The social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of cooperation.

The recommendations on the treatment of foreign prisoners, which were adopted at the same time as the Model Agreement, have a similar emphasis on social rehabilitation. In paragraph 2 of the recommendations it is stated that foreign prisoners should have the same access as national prisoners to education, work and vocational training. In paragraph 3, it is also stated that foreign prisoners should in principle be eligible for measures alternative to imprisonment, as well as for prison leave and other authorized exits from prison. In practice, this can often be best achieved by transferring such individuals to their country of origin.

Other international instruments have a similar focus. The preamble to the Inter-American Convention speaks about being "inspired by the desire to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons". Paragraph 9 of the preamble to framework decision 2008/909/JHA gives a particularly full account of the underlying thinking:

> Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

B. Humanitarian concerns

A second argument in favour of transferring sentenced persons is that, even if it cannot be demonstrated that their chances of social rehabilitation and successful reintegration into the community would be improved by transferring them, it may be more humane for them to serve their sentences in their home countries.[23] Differences in language, culture and religion and distance from family and friends may increase the difficulties of imprisonment and aggravate the impact of the sentence imposed.[24] The *Handbook on Prisoners with Special Needs*[25] gives a full account of the difficulties that foreign prisoners often face. In many instances, transferring prisoners to a familiar country can greatly ease those difficulties.

[23] Dirk Van Zyl Smit, "International imprisonment", p. 364; Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, pp. 166-7 and 206; Claus Kress and Göran Sluiter, "Imprisonment", in *The Rome Statute of the International Criminal Court*, vol. 1, Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds. (Oxford, Oxford University Press, 2002), p. 1,766; and Dirk van Zyl Smit and John R. Spencer, "The European dimension to the release of sentenced prisoners" in *Release from Prison: European Policy and Practice*, Nicola Padfield, Dirk van Zyl Smit and Frieder Dünkel, eds. (Cullompton, Willan, 2010), p. 36.

[24] Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, pp. 159 and 164; explanatory report on the European Convention, para. 9; David Biles, "The international transfer of prisoners", *Trends and Issues in Crime and Criminal Justice*, No. 38 (July 1992); and De Wree, Vander Beken and Vermeulen, "The transfer of sentenced persons in Europe: much ado about reintegration", pp. 121-122.

[25] Criminal Justice Handbook Series (United Nations publication, Sales No. E.09.IV.4).

There is also a strong humanitarian argument for transfer if the prison conditions and regimes in the sentencing State are particularly poor or are not in line with international minimum standards.[26] Such humanitarian concerns may be heightened by the particular circumstances of individual prisoners. For example, the sentenced person may be pregnant (see box 1) or ill (see box 2); hygiene may be poor and proper treatment may not be available in the country where such a sentenced person is being held prisoner.

Box 1. Prisoner transfer as humanitarian assistance for pregnant prisoners

A 20-year-old British citizen was sentenced to life imprisonment in the Lao People's Democratic Republic in June 2009 for smuggling heroin into the country while en route to Australia. She had originally faced the death penalty but, in order to avoid that sentence, she became pregnant while in prison. At the time of her conviction and sentence, the Governments of the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic were in the process of finalizing a bilateral prisoner transfer agreement. The agreement was brought into effect administratively by the two Governments before it was finalized in order to assist the prisoner, who had requested to be transferred back to the United Kingdom in order to have better prison conditions for herself and in which to give birth.[a]

[a]*Orobator v. Governor of Her Majesty's Prison Holloway and Secretary of State for Justice*, case No. CO/9527 [2010] EWHC 58 (Admin).

Box 2. Humanitarian transfer for ill prisoners

Mexico and the United States of America have a very active prisoner transfer programme. There are so many prisoners transferred between the two countries each year that transfer dates are scheduled quarterly, a year in advance, even before specific prisoners are identified for transfer. Ordinarily, the transfers occur via El Paso, Texas, in the United States. Mexican officials collect the American prisoners approved for transfer in Monterrey, Nuevo León, Mexico, and then fly them to El Paso. In El Paso, the Mexican prisoners approved for transfer are collected and returned to Mexico. Rarely are special transfers arranged. On one occasion, an American in custody in Mexico became severely ill. He practised a religion that prohibited blood transfusions. The prisoner lost one of his legs because of his illness and his kidneys began to fail. Even though he was approved for transfer by both Mexico and the United States, he was too ill to board a plane for the usual transfer. As an alternative, Mexico and the United States agreed to a special transfer and the prisoner was returned to the United States by ambulance.

Finally, the humanitarian argument is also applicable to the needs of the family and dependants of a sentenced person who is held in a foreign prison while they remain in their country of origin. Research suggests that prisoners' families face an array of challenges as a consequence of their family

[26]Council of Europe, Parliamentary Assembly, Social and Health and Family Affairs Committee, "Operation of the Council of Europe Convention on the Transfer of Sentenced Persons: critical analysis and recommendations", document 9137 (2001), para. 15.

member's imprisonment that include marital difficulties, financial and housing problems, social stigma and victimization, loneliness, anxiety and emotional hardship. Prisoners' children may experience psychological harm and develop behavioural problems.[27] Such indirect consequences of imprisonment are highly likely to be exacerbated by the imprisonment of a family member abroad.

The need to take humanitarian concerns into account is recognized by the Inter-American Convention on Serving Criminal Sentences Abroad. Article V provides that:

> In taking a decision on the transfer of a sentenced person, the States parties may consider, among other factors … the state of health of the sentenced person; and the family, social or other ties the sentenced person may have in the sentencing State and the receiving State.

C. Law enforcement and international cooperation

There are many significant law enforcement benefits to the transfer of sentenced persons. If there is no prisoner transfer programme, the vast majority of foreign nationals in custody in a sentencing State will eventually be repatriated by means of deportation and the receiving countries have no control over the timing and mode of the convicted person's arrival in their country or over what the person will do, and have no information regarding the offence committed. This is not beneficial to the sentencing State or the administering State.

The benefits for the sentencing State are that it can remove a foreign national prisoner at the expense of the administering State rather than by deportation and can free up resources that can be devoted to its own prisoners and their rehabilitative needs. Finally, by being transferred, a prisoner has the opportunity to re-establish and strengthen his or her ties to the administering State, which reduces the chance that he or she will return to the sentencing State and reoffend.

The administering State benefits by receiving detailed information about the offence of which the prisoner was convicted, the prisoner's prior record (if any) in the sentencing State and the prisoner's adjustment to life in prison. This sort of detailed information is not available when a prisoner is deported at the end of his or her sentence. This may be particularly important, for example, in the case of a sex offender who may need to be placed on a register of sex offenders in the administering State after his or her release. Additionally, the administering State is given the opportunity of using its criminal justice system to exercise some control over the prisoner prior to and following release into the community. The administering State can assist the prisoner in reintegrating into society, using the tools available through its criminal justice system, thus indirectly benefiting crime prevention and law enforcement.

The transfer of sentenced persons is seen to be an important means of cooperation to prevent and combat crime, which is the purpose of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,[28] the United Nations Convention against

[27] See Mills and Codd, "Prisoners' families and offender management: mobilizing social capital", p. 16; Shirley Klein, Geannina Bartholomew and Jeff Hibbert, "Inmate family functioning", *International Journal of Offender Therapy and Comparative Criminology*, vol. 46, No. 1 (February 2002), p. 98; and Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York, 2011). Available from www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201/socioeconomic-impact-pretrial-detention-02012011.pdf (accessed 26 January 2012).

[28] United Nations, *Treaty Series*, vol. 1582, No. 27627.

Corruption[29] and the United Nations Convention against Transnational Organized Crime.[30] All three conventions refer to the possibility of concluding agreements to facilitate the transfer of persons convicted abroad of the offences covered by the Conventions to another State to complete their sentence.

Allowing for the transfer of sentenced persons may be particularly useful in achieving the proper and effective administration of justice in cases in which the extradition of a person is refused on the basis of nationality. In such a case, a State may agree to the extradition of one of its nationals on condition that, upon conviction and sentencing, he or she is transferred back to his or her country of origin to serve the sentence.[31] Similarly, when extradition is requested for the purposes of enforcing a sentence and is denied on grounds of nationality, the requested State, if its domestic law so permits, may choose to recognize and enforce the foreign criminal judgement through which the sentence was imposed in the requesting State. This option is also provided for in international instruments.[32]

D. International relations

There may be diplomatic reasons for States to enter into prisoner transfer agreements and to allow transfers when they are requested. Although transfer was once seen as an infringement of the sovereignty of a State, owing to the territoriality of criminal law and the exclusive right of the State to administer criminal justice,[33] it may now be viewed as a more subtle expression of sovereignty in that it involves relinquishing power in a bid to protect citizens, ensure public security and improve international cooperation.[34] As recognized in the preamble to the Model Agreement, the development of mutual cooperation in the field of criminal justice to further the ends of justice and the social resettlement of sentenced persons requires that foreigners should be given the opportunity to serve their sentences within their own society. The transfer of sentenced persons is based on respect for both sovereignty and jurisdiction. This respect is demonstrated by the transfer process, which entails elements of reciprocity and mutual trust between States.

At a practical level, it must be recognized that requests for the transfer of prisoners are often accompanied by some degree of diplomatic pressure from the requesting State. It therefore makes sense to have in place an agreement to regulate the transfer of sentenced persons in order to deal with such potential situations and to smooth international relations. A clear framework also makes the role of consular officials much easier.

In framework decision 2008/909/JHA, the relationship between States has been developed by applying the principle of mutual recognition to the area of the transfer of sentenced prisoners. This means that States accept the outcomes of each other's judicial processes and, if certain formalities are met, do not question them further. Ideally, mutual recognition should allow transfer processes to be simplified and, where necessary, more sentenced persons to be transferred.

[29] Ibid., vol. 2349, No. 42146.

[30] Ibid., vol. 2225, No. 39574.

[31] See article 16, paragraph 11, of the Organized Crime Convention; and article 44, paragraph 12, of the Convention against Corruption.

[32] See article 16, paragraph 12, of the Organized Crime Convention; and article 44, paragraph 13, of the Convention against Corruption.

[33] Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, pp. 134, 148-9 and 154-5.

[34] Ibid., p. 164.

E. Practical considerations

A further argument in favour of an effective and relatively large-scale system of prisoner transfers is that States may benefit from implementing such a system as they may have a high number of foreign prisoners in their own system, whose imprisonment may require additional administrative and other resources.[35] To some extent, this may be weighed against the cost of receiving convicted nationals who, as a result of reciprocal arrangements, may be returned to serve sentences imposed abroad. However, it is not only a matter of calculating whether a State will be a "net exporter" of prisoners, as the numbers involved may be relatively small.[36] In many instances, the grounds for sending and receiving prisoners may be quite different. A State, for example, may accept its own nationals back for humanitarian reasons while the transfer of foreigners in its prisons to their country of origin may be based on other considerations.

F. Combining justifications

Bilateral transfer agreements, like their multilateral counterparts, are entered into for several inter-related reasons. These include the alleviation of the hardships faced by those serving sentences in foreign countries, the facilitation of the rehabilitation and reintegration of prisoners, the reduction of the cost of providing consular services to nationals imprisoned overseas and the cost of housing foreigners in national prison systems, the promotion of community safety by ensuring released prisoners can be effectively supervised and monitored, the enhancement of cooperation in judicial and penal matters, the recognition of good international relations between States and the need to meet public expectations that a Government can bring nationals imprisoned abroad home.

Ideally, the different policy considerations supporting the transfer of sentenced persons lead to similar conclusions when applied to actual cases: transfer would encourage rehabilitation and at the same time be the most humane way of treating the prisoners. In addition, transfers would assist in public protection and serve to reduce the cost of implementing sentences as States would not have to provide specifically for the foreigners in their prisons.

In practice, this may not always be the case. Where a sentenced person is transferred for one purpose, other purposes may be less well served. For example, a prisoner could be transferred because the authorities in the sentencing State believe that it would improve public protection or lower imprisonment costs in their State. However, the transfer may not be in the best interests of the individual, whose chances of rehabilitation or humanitarian needs may be better met by staying in the country where the offence was committed. Transfer arrangements come in different forms. Some give both the sentencing State and the administering State the possibility of deciding whether a transfer should be allowed or not, while the sentenced persons may have the right to refuse a transfer. In other instances, such discretionary powers are severely restricted.

There are, therefore, policy choices to be made with regard to the decision to adopt agreements for the transfer of sentenced persons and also the substance of what such agreements should contain. In the following chapter, the different legal instruments that can be used to effect the transfer of sentenced persons are outlined.

[35] See the presentation by the European Group for Prisoners Abroad to the forty-fourth meeting of the Committee of Experts on the Operation of European Conventions in the Penal Field, 25-27 February 2002, document PC-OC (2002) 06; and the Summary Meeting Report of the fourth meeting of the Restricted Group of Experts on International Cooperation, 3-4 May 2007, document PC-OC Mod (2007) 06 Rev.

[36] Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, pp. 154, 160 and 167.

IV. Overview of legal instruments

Specialized legal instruments that enable the transfer of sentenced persons from one country to another are surprisingly recent. The reason for this is the overriding role that the doctrine of State sovereignty played in shaping nineteenth-century international relations and its prominence in the criminal law of the period.[37] It was firmly believed that States had the authority to enforce the criminal sentences of their own courts only, making it impossible for them to enforce the sentences of other States, or even for their own courts to impose new sentences based on the factual findings of foreign courts.

Increased cooperation between States led to a watering down of the rigid application of the doctrine. The first steps away from it came as a result of bilateral agreements between States. A 1954 judicial convention between Lebanon and the Syrian Arab Republic is credited as being the first such agreement.[38] It allowed the contracting States to execute each other's sentences but, except in the case of short sentences, the consent of both States and the sentenced person was required.

In subsequent years, there were various other such bilateral agreements between States. Gradually, however, it emerged that a multilateral arrangement would be more effective. The first such arrangement was agreed between Denmark, Finland, Iceland, Norway and Sweden in 1963. Pursuant to the agreement, each of the countries enacted identical laws on the enforcement of penal sentences. The laws provided that a prisoner sentenced in any of the countries could serve his or her sentence in his or her home country if the individual was a national of any of the countries of the agreement.[39]

Multilateral arrangements structured around international treaties also began to emerge. The first of these, in 1964, was the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. As its name suggests, it does not deal directly with sentenced prisoners but it does provide for the original prison sentence being carried out in the State to which the sentenced person has been transferred (see articles 16-21).

A. Initiatives of the United Nations

The process of international transfer was given a considerable boost by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which met in 1975. The Congress recommended that, "in order to facilitate the return to their domicile of persons serving sentences in foreign countries, policies and practices should be developed by utilizing regional cooperation and starting bilateral agreements".[40]

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[37] Ibid., pp. 134-143.

[38] Ibid., p. 143.

[39] See, for example, the Act of Sweden concerning cooperation with Denmark, Finland, Iceland and Norway on the enforcement of criminal sanctions (1963:193).

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

Following this recommendation, some basic principles were elaborated by the Secretariat for consideration by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which met in 1980, in its preparation for the drafting of model guidelines for the transfer of foreign prisoners (A/CONF.87/8, para. 69). The purpose of the principles was to promote the social rehabilitation of persons convicted of crimes abroad by facilitating their return to their home country to serve their sentence. Such transfers had to be based on the consent of both States and the sentenced person. Accordingly, the proposed scheme would be based on international cooperation founded on respect for national sovereignty and jurisdiction. The Sixth Congress adopted resolution 13 on the transfer of prisoners, in which Member States were urged "to consider the establishment of procedures whereby such transfers of offenders may be effected, recognizing that any such procedure can only be undertaken with the consent of both the sending and the receiving countries and either with the consent of the prisoner or in his interest".[41]

Resolution 13 also requested the Committee on Crime Prevention and Control (the predecessor of the Commission on Crime Prevention and Criminal Justice) to give priority to the development of a model agreement for the transfer of offenders. At its seventh session, the Committee suggested[42] that the question of foreign prisoners, and ways and means of meeting their specific needs, including transfer, should be dealt with during the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders; that suggestion was endorsed by the Economic and Social Council in its resolution 1982/29.

At its eighth session, the Committee considered a draft model agreement on the transfer of foreign prisoners and recommendations on the treatment of foreign prisoners. On the recommendation of the Committee, the Economic and Social Council, by its decision 1984/153, decided to transmit the draft resolution, to which the draft model agreement and recommendations were annexed, to the Seventh Congress. In order to assist the Seventh Congress in its deliberations, a note by the Secretariat on the Model Agreement on the Transfer of Foreign Prisoners and recommendations for the treatment of foreign prisoners was also prepared (A/CONF.121/10). As a result, the Seventh Congress adopted the Model Agreement, together with the recommendations on the treatment of foreign prisoners.

Since then, the United Nations has continued to encourage the international transfer of sentenced persons in the context of other international initiatives it has taken to prevent organized crime, drug trafficking and corruption.[43] For example, article 17 of the Organized Crime Convention covers the transfer of sentenced persons.[44] It provides that:

> States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

It should be emphasized that this provision refers to both multilateral and bilateral transfer agreements. Both such agreements provide possible frameworks for the transfer of sentenced persons. Although the Model Agreement includes, for the sake of completeness, a preamble and final clauses referring to bilateral solutions only, it is intended to be used also for multilateral negotiations (A/CONF.121/10, paragraph 34).

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[41] *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980: report prepared by the Secretariat* (United Nations publication, Sales No. E.81.IV.4), chap. I, sect. B.13.

[42] See E/1982/37, para. 21.

[43] Such as the 1988 Convention, the Convention against Corruption and the Organized Crime Convention.

[44] Article 45 of the Convention against Corruption contains a similar provision on the transfer of sentenced persons.

The transfer of sentenced persons is also a factor in initiatives that the United Nations has taken to deal with international crimes such as genocide, crimes against humanity and war crimes.[45] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 were both established by the Security Council. Although the tribunals both have detention facilities, they do not have prisons in which sentences can be served in the long term. They both therefore rely on cooperating States that enter into bilateral enforcement agreements to implement the sentences in their national prison facilities. Similar transfer arrangements may be required to deal with prisoners sentenced by other international tribunals, such as the Special Court for Sierra Leone.[46] In order to implement the sentences it will impose, the International Criminal Court will also be dependent on transferring the persons it sentences to serve their terms in national prisons.

International prisoner transfers are also likely to become a key component of the UNODC Counter-Piracy Programme.[47] Until there is a functioning and fair criminal justice system in Somalia, many suspected pirates, apprehended by either regional or foreign navies, are being tried in nearby countries, such as Kenya and Seychelles. Although extensive refurbishment, building and training is ongoing in both States to improve prison conditions for both the foreign nationals on trial for piracy and the local prison population, the ultimate goal is to transfer those convicted of piracy in Kenya and Seychelles to Somalia to serve their sentences of imprisonment in their home country. In order to do that, steps are being taken to ensure that treatment in Somali prisons is in accordance with international standards and that an adequate level of supervision is provided to ensure that prisoners are neither subject to human rights abuses nor able to secure undue advantage through the corruption of staff. To that end, UNODC is intending to renovate and construct new prisons in Puntland and Somaliland and to train custodial staff and prison management with the aim of facilitating the transfer of sentenced persons from Kenya and Seychelles to Somalia once prison conditions meet minimum international standards. An agreement to allow for the transfer of sentenced persons has been signed between Seychelles and Somalia.

B. Multilateral instruments[48]

Most prominent of the multilateral instruments has been the European Convention, which entered into force on 1 July 1985. Although the Council of Europe was the initiator of the agreement, it is open to signature by States outside Europe (see article 18, paragraph 1, and article 19, paragraph 1). The Convention has 64 States parties, including 18 from outside Europe.[49] In this respect, it is

[45] See Kress and Sluiter, "Imprisonment", pp. 1,757-1,824; and Van Zyl Smit, "International imprisonment", p. 357.

[46] Róisín Mulgrew, "On the enforcement of sentences imposed by international courts: challenges faced by the Special Court for Sierra Leone", *Journal of International Criminal Justice*, vol. 7, No. 2 (2009), pp. 373-396.

[47] See UNODC, "Counter-Piracy Programme, Support to the trial and related treatment of piracy suspects", issue five (February 2011), issue six (June 2011) and issue eight (February 2012).

[48] The *Handbook* has sought to focus on agreements that are used often. For example, it does not consider the European Convention on the International Validity of Criminal Judgments (*European Treaty Series*, No. 70), which predates the Convention on the Transfer of Sentenced Persons. It is of legal historical interest and is still in force; however, it was ratified by so few States that it is of no practical significance. In practice its functions have been overtaken by the Convention on the Transfer of Sentenced Persons.

[49] Australia, Bahamas, Bolivia (Plurinational State of), Canada, Chile, Costa Rica, Ecuador, Honduras, Israel, Japan, Mauritius, Mexico, Panama, Republic of Korea, Tonga, Trinidad and Tobago, United States of America and Venezuela (Bolivarian Republic of).

much more successful than the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, to which relatively few parties have acceded—and then often with several reservations—with the result that it is used relatively rarely.

The Scheme for the Transfer of Convicted Offenders within the Commonwealth (available from www.thecommonwealth.org) largely mirrors the provisions of the European Convention. The Scheme is open to all Commonwealth countries who accept to use it as a basis for the transfer of sentenced persons.

The Inter-American Convention on Serving Criminal Sentences Abroad was adopted at the 23rd session of the Organization of American States General Assembly in Managua, on 6 September 1993 and it entered into force on 4 December 1996. Although this Convention does not follow the layout of the European Convention, it provides a similar model for the transfer of sentenced persons. As of 31 January 2012, the Inter-American Convention has been ratified or acceded to by 17 States parties, two of which are not from the Americas (Czech Republic and Saudi Arabia). A number of the States parties to the Inter-American Convention are also signatories to the European Convention.

One feature of the European Convention, explained more fully below, is that the transfer of a sentenced person is subject to the consent of the sentenced person concerned. The requirement has been modified somewhat by the Additional Protocol to the Convention (available from http://conventions.coe.int),[50] which was opened for signature by States parties to the Convention in 1997. Articles 2 and 3 of the Additional Protocol provide that sentenced persons who have fled from the sentencing State or who would be subject to deportation or expulsion after completing their sentence may be transferred without their consent. As of 31 January 2012, the Additional Protocol has been ratified or acceded to by 35 States parties, all of which are member States of the Council of Europe.

The most recent development in respect of multilateral prisoner transfers is framework decision 2008/909/JHA.[51] By its nature, the framework decision is limited to the 27 member States of the European Union and is binding on them: they were obliged to implement it by 5 December 2011.[52] The distinguishing feature of the framework decision is that it extends the category of prisoners who are subject to transfer without their consent beyond those referred to in the Additional Protocol to the European Convention. In essence, all foreign nationals who do not meet a narrow list of exceptions will be subject to transfer if the sentencing State initiates the process. The receiving State will only be in a position to prevent such a transfer if it can invoke one of the grounds of non-recognition or non-enforcement listed in article 9. The introduction of a duty to enforce sentences imposed by the courts of another State can be linked to the principle of mutual recognition. In 1999, the principle of mutual recognition was endorsed as the cornerstone of judicial cooperation in criminal matters within the European Union. The "special mutual confidence" of member States in other member States' legal systems enables them to recognize the judicial decisions of other States.[53]

[50] Council of Europe, *European Treaty Series*, No. 167.

[51] For a discussion of cooperation on earlier measures to facilitate prisoner transfer specifically within the European Union, see Dirk and Spencer, "The European dimension to the release of sentenced prisoners", pp. 9-46.

[52] With the exception of Poland, who entered a temporary derogation of limited scope for a maximum of five years from 6 December 2011. See preamble, para. 11; art. 6, para. 5; art. 26, para. 1; art. 28, para. 1; and art. 29, para. 1.

[53] Framework decision 2008/909/JHA, preamble, paras. 1, 3 and 5.

With its entry into force, the framework decision replaced the European Convention and the Additional Protocol to the European Convention in respect of transfer decisions among European Union member States (article 16, paragraph 1). Significantly, however, it does not replace bilateral (or other multilateral) agreements where they can contribute to the smoother transfer of prisoners between European Union member States (article 26, paragraphs 2 and 3).

In addition to the regional conventions discussed above, subregional multilateral arrangements also exist. For example, the Council of Arab Ministers of Justice endorsed the Riyadh Arab Agreement for Judicial Cooperation in April 1983. Part VII of the Agreement contains provisions that facilitate the transfer of persons sentenced to terms of imprisonment to other States to serve these sentences.

C. Bilateral agreements

The fact that bilateral agreements may remain in force, even between European Union member States that are bound by framework decision 2008/909/JHA, demonstrates the important role that bilateral prisoner transfer agreements continue to play in international prisoner transfers, both in Europe and elsewhere. Various bilateral agreements continue to be entered into by States throughout the world, even as the number of regional multilateral agreements has increased. In this regard, the United Nations has played an important role. The Model Agreement provides a basis for States that wish to negotiate a bilateral agreement. However, in considering aspects of some existing bilateral agreements, it becomes clear that they sometimes differ in significant ways from the Model Agreement.

The reasons for adopting bilateral transfer agreements are often similar to the reasons for concluding multilateral agreements. Indeed, bilateral agreements exist and operate contemporaneously with multilateral conventions for the transfer of sentenced persons in many States. For example, although the United Kingdom is a State party to the European Convention and the Scheme for the Transfer of Convicted Offenders within the Commonwealth and is subject to framework decision 2008/909/JHA, the Government has also concluded bilateral prisoner transfer agreements with Antigua and Barbuda, Barbados, Brazil, Cuba, Dominica, Egypt, Ghana, Guyana, India, Lao People's Democratic Republic, Libya,[54] Morocco, Nicaragua, Pakistan, Peru, Saint Lucia, Sri Lanka, Thailand, Uganda, Venezuela (Bolivarian Republic of) and Viet Nam, as well as with Hong Kong, China. Likewise, while Canada is a party to the European Convention, the Scheme for the Transfer of Convicted Offenders within the Commonwealth and the Inter-American Convention on Serving Criminal Sentences Abroad, the Government has also concluded bilateral prisoner transfer agreements with Argentina, Barbados, Bolivia (Plurinational State of), Brazil, Cuba, Dominican Republic, Egypt, France, Mexico, Mongolia, Morocco, Peru, Thailand, United States and Venezuela (Bolivarian Republic of).

The presence of both multilateral and bilateral agreements may lead to duplication. Many States begin an international prisoner transfer programme with a bilateral agreement with a neighbour and later accede to a multilateral convention. In some cases, this has caused States to have two and sometimes three different prisoner transfer agreements with the same partner. Some of the bilateral agreements have specific provisions that may be suitable only for neighbouring States while multilateral conventions tend to be broader and more flexible. Since there may be particular benefits related to transferring prisoners under a particular agreement, some States will opt for one over another. For example, Canada and the United States are party to three separate agreements. The original bilateral treaty between the two States prohibits the transfer of persons convicted of immigration offences. Neither the European Convention nor the Inter-American Convention on Serving

[54] Since 16 September 2011, "Libya" has replaced "Libyan Arab Jamahiriya" as the short name used in the United Nations.

Criminal Sentences Abroad has such a prohibition and thus a Canadian held in custody in the United States and convicted of an immigration offence may be transferred under either of those conventions. Several agreements also exist between Panama and the United States. The authorities of Panama prefer to transfer prisoners under the European Convention, as it allows more flexibility with regard to the continued enforcement of lengthy sentences. Conversely, the authorities in France prefer to operate under bilateral agreements as they are more specific to the French system. By and large, the United States views most of the agreements as substantially similar and encourages States to accede to one of the two major multilateral conventions to which it is a party, with a view to avoiding the lengthy and costly process of negotiating, signing and ratifying new bilateral treaties. In the United States, the view is taken that reliance on existing mechanisms provides a more effective and standardized system.

While this argument may have merit, bilateral agreements are still a valid and, at times, necessary mechanism for facilitating the transfer of sentenced persons. They enable States to conclude agreements with a wider and more diverse range of States than may be the case with regional multilateral agreements, to which States from outside a region may be unable or unwilling to accede. Bilateral agreements also allow for the inclusion of provisions that deviate from multilateral conventions. For example, the relevant bilateral agreement between Sweden and Thailand differs from the European Convention (the main mechanism used by Sweden for transferring sentenced persons abroad) in several respects. Unlike under the Convention, under the bilateral agreement, only citizens of Sweden and Thailand can be transferred, not foreign citizens habitually resident in Sweden. More significantly, Swedish prisoners in Thailand must serve either a minimum of four years or a third of the total prison sentence in a Thai prison before they can be transferred. If a Swedish prisoner has been sentenced to life imprisonment for drug offences, he or she must serve at least eight years. There is no corresponding provision in the Convention.

The bilateral agreements entered into by a State with other States may vary in respect of particular provisions. For example, an analysis of the bilateral prisoner transfer agreements of the United Kingdom shows a range of different procedures in relation to which a State determines whether a transferred prisoner can be pardoned or granted early release. A number enable the administering State to reduce the term of the sentence by granting parole, conditional release or remission. Some follow multilateral models and allow either State to make such decisions, while others state that, unless both parties agree differently, only the sentencing State may grant pardon, amnesty or commutation. And finally, some agreements grant the sole power to make decisions relating to pardon, amnesty and commutation to the sentencing State, prohibiting any revision, modification or cancellation of the judgement by the administering State. The example of the United Kingdom therefore demonstrates the range of models that a State can use in bilateral agreements.

Bilateral agreements are a helpful tool in inter-State transfers as they enable Governments to deal with large numbers of foreign nationals in their prison systems or their own nationals held in prisons abroad or to deal with more specific urgent cases. Moreover, bilateral agreements can be extended to cover prisoners housed in dependent territories. They can take different forms (bilateral treaties, guarantees of reciprocity, inter-State agreements and memorandums of understanding) and include provisions that deviate from practice established in previous agreements. In this regard, they can be tailored to reflect current requirements and policy.

States may wish to exclude the commission of certain crimes from the operation of a prisoner transfer agreement. For example, the transfer of persons convicted of offences under military law is not permitted under the agreement between India and the United Kingdom.[55] The Government of the Lao People's Democratic Republic also included a provision in its transfer agreement with

[55] Art. 3, para. 1 *(g)*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India on the Transfer of Sentenced Persons.

the United Kingdom stating that sentenced persons convicted of an offence against the President, the President of the National Assembly or Prime Minister or their spouses, an offence against the internal or external security of the State or an offence under legislation protecting national art treasures will not be eligible for transfer under the bilateral agreement.[56]

D. National implementing legislation

Irrespective of the form of transfer agreement adopted, some States will also require national legislation that implements the agreement. Such legislation gives effect to the multilateral and bilateral agreements entered into by a particular State in domestic law. The Transfer of Prisoners Act 2001 of Mauritius illustrates this function. In part I, section 3, paragraph 1 *(a)*, which deals with the application of the Act, it states that, where an agreement has been entered into between Mauritius and a foreign State for the transfer of prisoners or the enforcement of sentences, the Prime Minister may, by regulations, designate that country as a country to which the Act applies. In part I, section 3, paragraph 2, it is stated that where a Commonwealth country notifies the Secretary-General of the Commonwealth that it has enacted legislation giving effect to the Scheme for the Transfer of Convicted Offenders within the Commonwealth, that notification will be deemed to be an agreement between Mauritius and that country. Part I, section 3, paragraph 3, also notes that the accession by Mauritius to the European Convention should be deemed to be an agreement between Mauritius and all other State parties to the Convention.

National legislation may also ensure that the process of transferring sentenced persons is subject to judicial control (see box 3). Part II, section 6, paragraph 2, of the Transfer of Prisoners Act, 2004, of the United Republic of Tanzania, for example, provides that "a prisoner or his representative who is aggrieved by the decision of the Minister may appeal to a court".

Box 3. Considering new legislation: the Malaysian experience

In 2008, Malaysia embarked on a plan of action to consider setting up a regime on the international transfer of prisoners through specific legislation. A workshop was organized by the Attorney General's Chambers of Malaysia to enable international experts to share their views on both the legislative framework and international agreements with Malaysian Government officials. Draft legislation was prepared by the Government of Malaysia, drawing on the issues discussed at the workshop and the legislation of other jurisdictions. A second workshop was held with experts from Australia and the United Kingdom, during which detailed discussions were held regarding an international transfer of prisoners bill for Malaysia.

The Ministry of Home Affairs of Malaysia, which is the ministry in charge of matters relating to the international transfer of prisoners, has called for inter-agency meetings to discuss the regime and the bill in order to allow Malaysia to identify how the regime would function and how it could be successfully implemented. The bill is currently undergoing further fine-tuning before being tabled before both Houses of Parliament.

[56]Art. 4, para. 1 *(h)*, Treaty between the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons.

Even in States where national implementing legislation is not required, usually because treaties are self-executing, it may still be regarded as sound practice to have such legislation to deal with the practical issues relating to transfer in more detail.

Legislation may also facilitate the transfer of prisoners to and from the State in the absence of an agreement. For example, the Act on international cooperation in the enforcement of criminal judgements (1972:260) of Sweden mainly envisages cooperation with States that have acceded to the European Convention or those with which Sweden has a bilateral agreement. However, prisoners may be transferred to or from States without commitments under a convention or obligations under an agreement, if there are "extraordinary reasons" for doing so.

The legislative process may be more complex in federal States, for it is necessary to ensure that implementing legislation is enacted at both the federal and state level. For example, in Australia, the International Transfer of Prisoners Act 1997 provides the federal legal framework for the country's International Transfer of Prisoners Scheme. The Act is supplemented by various federal regulations, which give effect to the bilateral and multilateral treaties to which Australia is a party. The Scheme is further operationalized at the state and territory levels by state and territory legislation.

National legislation may have to be amended to reflect changes to multilateral and bilateral transfer schemes. For example, the Repatriation of Prisoners Act 1984 of the United Kingdom enables prisoners to serve their sentences in their own country where there is an international agreement in place allowing for such a transfer. One of the principal requirements of the Act is that the prisoner gives his or her consent to transfer. However, recent regional instruments that bind the United Kingdom (the Additional Protocol to the European Convention and framework decision 2008/909/JHA) remove the consent requirement in certain instances. The 1984 Act therefore had to be amended to reflect that a prisoner's consent is now only necessary if required by the relevant international arrangement (see article 44 of the Police and Justice Act 2006).

E. Conclusion

There is, therefore, no single international legal framework that governs all international transfers of sentenced persons. The instrument that comes closest to universal acceptance is the European Convention. However, since December 2011, prisoner transfers within the European Union are governed by framework decision 2008/909/JHA, so the Convention has lost some of its significance as it will no longer be applied to prisoner transfers between European Union member States. Moreover, it is likely that the number and range of international agreements for the transfer of sentenced persons will continue to expand.

States wishing to transfer prisoners therefore have to look closely at what international instruments are available to them. If they are not already parties to an appropriate agreement, they can accede to existing multilateral instruments and/or enter into new bilateral or multilateral agreements. The next chapter discusses the requirements that must be fulfilled prior to the transfer of a sentenced person.

V. Requirements for transfer

All agreements for the transfer of sentenced persons contain explicit conditions that must be fulfilled before such a person can be transferred. In this chapter, the substance of these conditions is explained. As will become apparent, there are variations between the provisions of the different instruments. In the main, the similarities far outweigh the differences. An exception to this rule can be found, however, when the provisions that relate to consent, of both the sentenced person and the administering State, are compared. There may also be internal procedural differences: civil-law countries in particular often require judicial approval for transfers, while in other countries the judiciary plays a lesser role.

A. Final judgement

The first requirement for a sentenced person to be a candidate for transfer is that the judgement of conviction and sentence against him or her must be final. In the words of paragraph 10 of the Model Agreement: "a transfer shall be made only on the basis of a final and definitive sentence having executive force."[57] This requirement applies in all instruments, but the subtle differences between the instruments and between national legal systems in reaching what they regard as finality make it necessary to think carefully about the terms "sentence" or "judgement" and the term "final".

In most instances, one would recognize a judgement of a court, but terminology may differ slightly, so the Scheme for the Transfer of Convicted Offenders within the Commonwealth, for example, also makes provision for a "decision or order of a court or tribunal imposing a sentence" (paragraph 2 *(b) (iii)*).[58] The term "final" is potentially more controversial, for in some systems offenders are regarded as sentenced persons and begin serving their sentences as soon as they are imposed, while in other systems they retain the status of on-trial prisoners until all avenues of appeal have been exhausted. Where the transfer of sentenced persons is concerned, however, the term "final" should be understood as referring to the exhaustion of all normal appeal processes. Thus, all available remedies must have been exhausted, or the time limit for such remedies must have expired without the parties having availed themselves of them. This is most clearly expressed in article II, paragraph 3, of the Inter-American Convention on Serving Criminal Sentences Abroad, which provides that "a sentence is understood to be final when no ordinary legal appeal against the conviction or sentence is pending in the sentencing State and the period for its appeal has expired." Other instruments, such as the European Convention in its article 3, paragraph 1 *(b)*, for example, refer only to a sentence being "final", but they should be understood in the same way.[59]

[57] See A/CONF.121/10, para. 21.

[58] See also art. 1, para. b, of the European Convention.

[59] In respect of the European Convention, see Schomburg and others, *Internationale Rechtshilfe in Strafsachen*, p. 706. See also the formulation in paragraph 10 of the Model Agreement: "A transfer shall be made only on the basis of a final and definitive sentence having executive force." A subtle variation is to be found in article 1, paragraph a, of framework decision 2008/909/JHA, which limits the definition of a judgement to "a final decision or order of a court of the issuing State imposing a sentence on a natural person". This seems to be an over-elaboration, for, while in many legal systems a legal person can be sentenced, such an entity could not be imprisoned. If the directors of a limited company, for example, were held responsible for the company's criminal activities, they would presumably be sentenced as individuals.

In practice, it may be problematic that some States take a long time to bring cases to finality. In such instances, the potential administering State may consider entering into negotiations with the sentencing State where their national is being held, encourage it to finalize the case as soon as possible and make it clear that it would be prepared to consider a transfer once the case has been finalized.

B. Term remaining to be served

Another common requirement, which is found in the Model Agreement and elsewhere, is that for a sentenced person to be transferred, there must be a minimum period of the sentence still to be served at the time of the request. In most multilateral instruments the minimum period is set at six months,[60] but it need not be that period. States may, however, agree between themselves to use a transfer instrument in cases where the rest of the enforceable sanction is less than six months.[61] Some bilateral agreements, such as those between the United Kingdom and Hong Kong, China, Lao People's Democratic Republic, Morocco, Thailand and Viet Nam, set a minimum period of a year and an indeterminate sentence will also meet the requirement.[62] The practical reason for setting a minimum period still to be served is that transfer procedures take time to complete. If there are fewer than six months left to serve, this may not be sufficient time to carry out the transfer procedure. It may also be difficult to initiate a process of rehabilitation that would lead to the social reintegration of the prisoner in such a short period. The minimum period is not a matter of principle; hence there is usually a provision for an exception to be made and a lesser period to be agreed between the two States parties in individual cases.[63]

C. Dual criminality

Another important condition for transfer is the requirement of dual criminality. It requires that the offence for which the sanction is imposed in the sentencing State must also be an offence according to the legislation of the administering State.[64] The underlying idea is that an administering State would be reluctant to implement a sentence for conduct that would not be regarded as criminal if committed in its territory. The condition is similar to that set for traditional extradition and mutual assistance, where it has been applied for many years.[65] Dual criminality is considered to be fulfilled irrespective of whether the laws of the two States place the offence within the same category of offence or use the same terminology, as long as the conduct underlying the offence is a criminal offence under the laws of both States.[66]

[60] Art. 3, para. 1 *(c)*, of the European Convention; art. III, para. 6, of the Inter-American Convention; para. 11, Model Agreement; and para. 4 (1)*(c)*, Scheme for the Transfer of Convicted Offenders within the Commonwealth. In the case of framework decision 2008/909/JHA, article 9, paragraph 1 *(h)*, gives the executing State the authority to refuse to recognize a judgement and enforce a sentence if less than six months of the sentence remains to be served. In this instance, it is not so much a pre-condition for transfer but rather a ground for non-recognition and non-enforcement.

[61] A/CONF.121/10, para. 22.

[62] See also, for example, art. 3, para. 1 *(c)*, European Convention and para. 11, Model Agreement.

[63] See art. 3, para. 2, European Convention; and para. 11, Model Agreement.

[64] Para. 3, Model Agreement; art. 3, para. 1 *(e)*, European Convention; and art. III, para. 3, Inter-American Convention on Serving Criminal Sentences Abroad.

[65] A/CONF.121/10, para. 10.

[66] Art. 43, para. 2, Convention against Corruption.

Similarly, in matters of the transfer of sentenced persons, for the condition of dual criminal liability to be fulfilled, it is not necessary that the criminal offence should be precisely the same under the law of both the administering State and the sentencing State. There may be differences in the wording and legal classification, but the basic idea is that the essential constituent elements of the offences should be comparable under the law of both States.[67] Some flexibility of interpretation is therefore required.

This is made explicit in the Inter-American Convention, article III, paragraph 3, of which provides that

> the act for which the person has been sentenced must also constitute a crime in the receiving State. For this purpose, no account shall be taken of differences of terminology or of those that have no bearing on the nature of the offence.

In framework decision 2008/909/JHA, an approach is adopted that is designed to make the dual criminality requirement less onerous. Article 7 contains list of offences (see box 4) for which dual criminality is not required, "if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State, shall, under the terms of this framework decision and without verification of the double criminality of the act, give rise to recognition of the judgement and enforcement of the sentence imposed."

Box 4. Exceptions to the principle of dual criminality

Framework decision 2008/909/JHA does not require that it be demonstrated that the following offences exist in both issuing and receiving States:

- Participation in a criminal organization
- Terrorism
- Trafficking in persons
- Sexual exploitation of children and child pornography
- Trafficking in narcotic drugs and psychotropic substances
- Trafficking in weapons, munitions and explosives
- Corruption
- Fraud
- Laundering of the proceeds of crime
- Counterfeiting currency, including the euro
- Computer-related crime
- Environmental crime, including trafficking in endangered animal species and in endangered plant species and varieties
- Facilitation of unauthorized entry and residence

[67] A/CONF.121/10, para. 11.

Box 4. (continued)

- Murder, grievous bodily injury
- Illicit trade in human organs and tissue
- Kidnapping, illegal restraint and hostage-taking
- Racism and xenophobia
- Organized or armed robbery
- Trafficking in cultural goods, including antiques and works of art
- Swindling
- Racketeering and extortion
- Counterfeiting and piracy of products
- Forgery of administrative documents and trafficking therein
- Forgery of means of payment
- Trafficking in stolen vehicles
- Trafficking in hormonal substances and other growth promoters
- Trafficking in nuclear or radioactive materials
- Rape
- Arson
- Crimes within the jurisdiction of the International Criminal Court
- Unlawful seizure of aircraft or ships
- Sabotage

The list is a long one and includes most forms of criminality that are likely to result in prison sentences for sentenced persons who may be transferred. Although using a list may expedite the transfer process, one difficulty is that it does not define offences in the same way as a criminal code, but rather defines certain areas of criminal conduct. The intention of the list is not to inhibit States parties but to assist them by dispensing with the requirement of establishing dual criminality. For offences not encompassed in the forms of conduct included in the list in framework decision 2008/909/JHA, administering States may still apply the dual criminality requirement to the transfer of sentenced persons, if they choose to do so. Moreover, there is a procedure whereby the Council of the European Union may amend the list, if it is necessary in the future to do so, and States may elect to opt out of applying the list.[68]

Bilateral agreements may also contain a dual criminality requirement. For instance, the prisoner transfer agreements between the United Kingdom and Ghana, Hong Kong, China, Morocco, Pakistan, Peru, Thailand and Viet Nam, require that the acts or omissions on account of which

[68] See article 7, paragraphs 2-4, of framework decision 2008/909/JHA.

the sentence has been imposed constitute a criminal offence according to the law of the administering State.

In some instances there may be a perceived need to waive the dual criminality requirement for humanitarian reasons. An administering State may decide that it would rather have a national serve his or her sentence in a "home" prison rather than leave him or her in the sentencing State, even though the conduct for which the sentence was passed is not a crime in the administering State. Therefore, national legislation in some States does not automatically require dual criminality, thus leaving scope for such exceptions. In other States, a departure from the dual criminality requirement would be impossible, as the prisoner would be entitled to release upon return to the administering State, as he or she could not be detained for conduct that was not an offence in that State.

The Model Agreement takes the principle of dual criminal liability further by indicating that the offence has to fall within the competence of judicial authorities. Thus, punishment imposed by administrative authorities would in no case, even if it amounted to deprivation of liberty, fall within the scope of such a transfer agreement.[69]

D. Ties to the administering State

A key requirement for an international transfer to take place at all is that the sentenced person to be transferred must have some link to the State to which he or she is to be transferred. Often this link is loosely described as requiring that the sentenced person be a "national" of the State concerned. As described above, different instruments use different terms to refer to the need to have a link to the administering State. Some even allow the State parties to define the term "national" themselves.[70]

Paragraph 1 of the Model Agreement refers to "the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence". The Model Agreement takes no position on whether a prisoner should be transferred to the country of nationality or to the country of residence, if they are different, but leaves it to the administering State to accept also non-nationals residing in its territory.[71]

In article 3, paragraph 1 *(a)*, of the European Convention, it is stipulated that the sentenced person must be "a national of the administering State". In article 3, paragraph 4, it then goes on to provide that any State may define, as far as it is concerned, the term "national" for the purposes of the Convention. In the declarations made with respect to the Convention, while some States refer to the definition of nationality under national constitutional law or legislation,[72] others prefer to define the term, for the purposes of the operation of the Convention, more specifically. Some extend the definition of the term to include spouses of citizens of the administering State,[73] persons with close ties to the State whom the relevant Government views it is appropriate to accept,[74] persons who were nationals at the time of the commission of the offence,[75] persons with dual

[69] A/CONF.121/10, para. 12.
[70] See chapter II, section D, above.
[71] A/CONF.121/10, para. 8.
[72] Andorra, Azerbaijan, Bolivia (Plurinational State of), Germany, Greece, Japan, Lithuania, Panama and Spain.
[73] Bahamas.
[74] Ireland, Norway and the United Kingdom.
[75] Armenia and Israel.

nationality if one nationality is that of the administering State,[76] persons who lost nationality as the result of a war[77] and stateless persons or aliens who ordinarily reside in the administering State.[78]

A particularly inclusionary definition is that put forward jointly by the 27 member States of the European Union, of which all are signatories to the Convention, in article 2 of the Agreement on the application among the member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons:

> For the purposes of applying article 3, paragraph 1 *(a)*, of the Convention on Transfer, each member State shall regard as its own nationals the nationals of another member State whose transfer is deemed to be appropriate and in the interest of the persons concerned, taking into account their habitual and lawful residence in its territory.

Other multilateral treaties use the term "national" in slightly different ways. Article II, paragraph *(a)*, of the Inter-American Convention on Serving Criminal Sentences Abroad refers only to "nationals" and no State party appears to have sought to establish a definition. Paragraph 4 (1)*(a)*, of the Scheme for the Transfer of Convicted Offenders within the Commonwealth provides that the Scheme applies both to nationals of the administering State and to persons who have close ties to it, although, under paragraph 4 (3), States are given the opportunity to define the term by way of declaration. Once again, there is no indication of how these terms are defined in practice by members of the Scheme.

Framework decision 2008/909/JHA refers to nationals and permanent residents, and to the State in which a person lives. The reference indicates the place to which that person is attached based on habitual residence and on elements such as family, social or professional ties (preamble, paragraph 17).

When it comes to bilateral agreements, States may of course use terms as they choose. Nevertheless, the terms also tend to contain variations on notions of nationality. The bilateral agreements entered into by the United Kingdom tend to refer to a "national" of the administering State. Under the bilateral agreements, a national is defined as a citizen or person with close ties to the relevant State. Dual citizenship is usually sufficient if one of them is of the administering State. However, it may be limited. The bilateral agreement between Antigua and Barbuda and the United Kingdom, for example, includes a provision stating that, if the prisoner was a national of both the United Kingdom and Antigua and Barbuda, renunciation of citizenship of the United Kingdom after sentencing in that country does not qualify the prisoner to be treated as a citizen of Antigua and Barbuda.[79]

National implementing legislation may also define the term "national". In some cases, this definition is found within the definition of the term "offender". For example, the Transfer of Offenders Act (14/1990) of Zimbabwe defines a foreign offender as any person who is not a citizen of Zimbabwe, and who is a citizen of or ordinarily resident in a specified country or a person who has close ties to a specified country. Article 2, paragraph 2, of the Act further states that, in determining whether or not a person has close ties with any country, several matters are taken into consideration, including whether or not the individual is a citizen of that country; whether or not the individual was born in that country or is descended from persons who were born in that

[76] Albania.

[77] Japan.

[78] Finland, Hungary, Netherlands, Portugal, Republic of Moldova and Slovakia.

[79] Art. 3, para. 3, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antigua and Barbuda on the Transfer of Prisoners.

country; whether or not the individual has resided in that country, and if so for how long; whether or not the individual has any relatives by birth or marriage in that country and the degree of the relationship; and any cultural or religious ties the individual may have with that country. The same approach is adopted in part I, paragraph 2 (2), of the Transfer of Prisoners Act 2001 of Mauritius.

Under Austrian legislation,[80] Austrian authorities can assume the enforcement of foreign judgements if the prisoner is an Austrian national who has his or her residence or domicile in the country. Austria does not accept the transfer of non-nationals, even if the sentenced person has been domiciled in Austria for many years and has his or her family there.[81]

E. Consent of States

The transfer of prisoners is based on an agreement between States. It relates to a single case and is based on mutual trust between the States concerned. No State has an obligation to request a transfer or to grant a transfer at the request of another State. If, however, two States agree to such a transfer, that agreement alone forms the basis for international cooperation.[82]

The decision concerning a transfer falls within the sole competence of the States concerned. How the individual States decide on whether they consent is generally an internal matter, for it depends on their constitutional structure. In many States, the final decision is that of the executive branch, while in others the judicial branch may have a key role to play. Since a transfer agreement is an international instrument, the only subjects with authority to take a decision on such an agreement are sovereign States, which have to agree on the means, requirements and circumstances for such cooperation. The States should, however, take into due consideration the wishes of the prisoners and their close relatives regarding transfer.[83]

Initially, the international transfer of sentenced persons required the consent of three parties: the sentencing State, the administering State and the sentenced person. The emphasis that was placed and, with some exceptions, continues to be placed, on State consent makes the transfer of prisoners different from other forms of international cooperation on criminal matters. For example, in extradition cases the duty is on States to act if certain conditions are met and, accordingly, there is little choice for the States involved.

The requirement of the consent of the sentencing State has remained in place in all circumstances. Although a potential administering State may request that a sentencing State transfer a sentenced person, no State is compelled by any international agreement to transfer someone sentenced within its borders: it can simply choose to carry out the sentence in full. Leaving aside the position of the sentenced person for the moment, the traditional view was that the two State parties had to agree in all cases as well. As stated in article 3, paragraph 1 *(f)*, of the European Convention, a sentenced person may be transferred only "if the sentencing and administering States agree to the transfer."[84]

[80] Austria, Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen (Auslieferungs- und Rechtshilfegesetz – ARHG), Federal Law Gazette, No. 529/1979.

[81] See Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, p. 259.

[82] A/CONF.121/10, para. 9.

[83] Ibid., para. 13.

[84] See also paragraph 4 (1)*(e)*, of the Scheme for the Transfer of Convicted Offenders within the Commonwealth: "A convicted offender may be transferred under the Scheme only on the following conditions: … if the sentencing and administering countries agree to the transfer."

States consider a range of factors before consenting to a transfer. In this regard, article V of the Inter-American Convention on Serving Criminal Sentences Abroad specifies:

> In taking a decision on the transfer of a sentenced person, the States parties may consider, among other factors, the possibility of contributing to the person's social rehabilitation; the gravity of the offence; the criminal record of the sentenced person, if any; the state of health of the sentenced person; and the family, social, or other ties the sentenced person may have in the sentencing State and the receiving State.

The language used ("may consider", "amongst other factors") shows that the article is meant to be for guidance only and does not appear to have been intended to be binding or directly limiting on State discretion in this regard. However, it may be argued that the various reasons for encouraging the transfer of sentenced persons must at least be borne in mind. A sentencing State could be challenged if it used the system to transfer sentenced persons for purposes other than those that can be deduced from the agreements in terms of which transfers are undertaken. Most purposes, however, are stated in very general terms: in the preamble to the European Convention, for example, it is stated that "cooperation should further the ends of justice and the social rehabilitation of sentenced persons".

A partial exception in this regard is framework decision 2008/909/JHA, which, although it drastically restricts the discretion of executing (administering) States and sentenced persons, requires that the issuing (sentencing) State exercise its discretion in a particular way. Article 4, paragraph 2, of the framework decision specifies that the transfer process may only be initiated when the issuing State "is satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person".[85] This is important, as it appears to require the sentencing State to adopt a principled approach to the transfer of sentenced persons, whether or not as a matter of practice the administering State or the sentenced person can enforce the adoption of such an approach (see box 5 below).[86]

The requirement of the consent of the administering State applies fully in all multilateral instruments, except for framework decision 2008/909/JHA. That framework decision limits the consent requirement by allowing a State party to withhold their consent only if the proposed transferee is a non-national who is habitually resident in that State. All States that have received judgements and certificates may also invoke grounds of non-recognition and enforcement from the list in article 9 of the framework decision. However, given the importance attached to the principle of mutual recognition, in articles 10 and 11 of the framework decision, States are urged to partially recognize or postpone the recognition of a sentence in instances where full and immediate recognition is not possible.

[85] See also article 3, paragraph 1, which states that "the purpose of this framework decision is to establish the rules under which a member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognize a judgment and enforce the sentence."

[86] For a critical view, see De Wree, Vander Beken and Vermeulen, "The transfer of sentenced persons in Europe: much ado about reintegration", pp. 111-128.

Box 5. Social rehabilitation under framework decision 2008/909/JHA[a]

The purpose of framework decision 2008/909/JHA is to establish the rules under which member States of the European Union can recognize judgements and enforce sentences imposed by other member States, with a view to facilitating the social rehabilitation of sentenced persons.

In other words, the enforcement of the sentence in the administering State should enhance the possibility of social rehabilitation of the sentenced person.

Accordingly, the State issuing the judgement and the proposed administering State should both be satisfied that the enforcement of a particular sentence in the administering State would facilitate the social rehabilitation of the sentenced person in question.

For member States that are not the State of nationality of the sentenced person, whether or not the transfer would facilitate the sentenced person's social rehabilitation may constitute the basis of their decision whether or not to consent to the forwarding of a judgement or certificate. A lack of consent from such States constitutes a ground for non-recognition of the judgement and therefore a refusal to enforce the sentence.

For all other States, whose consent is not required for the forwarding of a judgement and certificate, an opinion that a transfer would not facilitate the social rehabilitation of the sentenced person cannot be invoked as a ground for a refusal to enforce the sentence.

If the administering State feels that a transfer would not facilitate the rehabilitation and reintegration of sentenced persons, they should inform the sentencing State. The sentencing State must consider such opinions and decide whether or not to withdraw the certificate.

When deciding whether the enforcement of the sentence in an administering State would facilitate the social rehabilitation of the sentenced person, the sentencing State should take into account factors such as the sentenced person's family, linguistic, cultural, social, economic or other links to the administering State.

[a] See paras. 8-10 of the preamble and art. 3, para. 1; art. 4, paras. 2, 4 and 6; and art. 9, para. 1 *(b)*.

F. Consent of sentenced persons*

Historically, the consent of sentenced persons was a requirement for international transfers. It is still at the core of most international instruments in this area, including the Model Agreement, which is based on a system of voluntary transfer. The consent requirement is also a feature of several multilateral treaties. Article 3, paragraph 1 *(d)*, of the European Convention provides that a sentenced person may be transferred if, inter alia, the transfer is consented to by the sentenced person or, where in view of his or her age or physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative.

*The present section is based on Dirk van Zyl Smit, "Draft outline structure of the recommendation concerning foreign prisoners", Council of Europe, European Committee on Crime Problems, document PC-CP (2010) 14 (Strasbourg, September 2010). <?>A/CONF.121/10, para. 14.

The requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the transfer agreements on the consent requirement.[87] It is also usually the case that the social rehabilitation of a prisoner is better served by transferring those who consent to such transfer.[88]

Any sentenced person who may be eligible for a transfer should be informed of the possibilities and the legal consequences of such a transfer, or at least of where such information can be obtained, to enable him or her to decide whether to express interest in a transfer. Such information should be given in a language that the prisoner can understand. The prisoner should also be informed whether he or she might be prosecuted for offences committed before the transfer.[89] As this depends also on the domestic law of the administering State, that State should be involved in the information procedure.[90]

The Model Agreement leaves it to the discretion of the States concerned to decide whether a prisoner should be transferred to the country of his or her nationality or residence. In any case, in the Model Agreement it states that the transfer should take place only with the expressed consent of the prisoner. Such consent should refer to the transfer itself and also to the State to which the transfer is to be effected. As the sentenced person's consent is one of the basic elements of the transfer mechanism, it seems necessary that the sentencing State should not only ensure that the consent is given voluntarily, and with full knowledge of the legal consequences that the transfer would entail for the person concerned (see box 6 below), but also that the administering State should have an opportunity to verify that the consent is given in accordance with these conditions. Such verification can be effected with the assistance of the diplomatic or consular corps, or any other official agreed upon between the States concerned.[91]

The administering State must be given the opportunity to verify that the sentenced person has in fact consented to being transferred.[92] In the case of the European Convention, some States (Bulgaria, Germany, Republic of Korea and Switzerland) have made declarations stating that the consent of a sentenced person cannot be withdrawn after the relevant authorities have made the decision to transfer the prisoner. However, this is a practical limitation rather than a fundamental denial of the sentenced person's right to consent. In practice, where consent is a requirement for transfer, withdrawal of consent should be allowed wherever feasible, lest the principle be undermined.

Thinking on consent has changed in recent years. The previously universal requirement of consent by the sentenced person has been modified by some recent developments. One of these is the Additional Protocol to the European Convention, which provides for two instances when consent is required. The first is when the person has fled the sentencing State to avoid the further execution of the sentence to the territory of another State party, who may administer the sentence (article 2). The second is when a sentenced person would be subject to deportation or expulsion that would result in that person no longer being allowed to remain in the territory of the sentencing State once he or she is released from prison (article 3). In this latter case, although the sentenced person's consent is not required, the administering State must not give its agreement to the transfer

[87] A/CONF.121/10, para. 14.

[88] Ibid., para. 16.

[89] Para. 6, Model Agreement; art. 7, para. 1, European Convention; and art. III, para. 2, Inter-American Convention on Serving Criminal Sentences Abroad.

[90] A/CONF.121/10, para. 15.

[91] Ibid., para. 17.

[92] Art. 7, para. 2, European Convention; and art. V, Inter-American Convention on Serving Criminal Sentences Abroad.

without first having taken the sentenced person's opinion into consideration. These exceptions to the rule requiring the consent of the sentenced person are obviously limited to instances where the States that are involved have acceded to the Additional Protocol, and even those States may indicate that they will not take on the execution of the sentences of persons subject to deportation or expulsion (article 3, paragraph 6). As of 31 January 2012, Belgium, Ireland and the Russian Federation have made declarations to this effect.

Box 6. Legal consequences for sentenced persons

The importance of sentenced persons having the correct information is illustrated by the following example, which eventually led to a decision of the House of Lords, then the highest court in the United Kingdom.[a] The prisoner had been sentenced in Spain to 12 years' imprisonment for forging currency, the minimum term for that offence in that country. When being sentenced, the prisoner had been told that the court would recommend to the Government of Spain that the sentence be reduced to six years, but this had not yet taken place by the time the prisoner had applied to be transferred to England. In England, the maximum sentence for the same offence was 10 years. If sentenced in England, he would probably have received only about four years. However, the Government of the United Kingdom, when ratifying the European Convention, had agreed only to continue the enforcement of sentences imposed by the sentencing State. As an administering State, it had explicitly excluded the prospect of converting the sentence in terms of its own law. The House of Lords interpreted this aspect of the Convention strictly. It ruled that, where the court in a sentencing State imposed a sentence in excess of the maximum sentence prescribed by an English statute for a corresponding offence, the Home Secretary of the United Kingdom, adapting the sentence under article 10 of the Convention, had power to reduce the sentence to the English maximum of 10 years but no further. This was the case even where the foreign court had imposed the minimum sentence and indicated that the prisoner should serve less than the minimum. The key to the reasoning of the House of Lords was that it treated the words "similar offence" in article 10 of the Convention as referring to a legally similar offence and not to the particular facts of the case, which could only be considered if the more flexible provisions of conversion procedure laid down in article 11 had been followed. As the House of Lords itself recognized, the prisoner would have been much better off had he waited in Spain to have his sentence reduced to six years before requesting a transfer to his home country.

[a] *R v. Secretary of State for the Home Department, ex parte Read* [1988] 3 WLR 948.

Framework decision 2008/909/JHA 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 where they live. However, under article 6, paragraph 3, of the framework decision, when sentenced persons are still in the issuing (sentencing) State, they must always be consulted about their potential transfer, and their consent is still required in some other instances covered under the framework decision (see box 7),[93] such as when an individual is transferred to a State where that individual is not a national and does not live.

[93] See art. 4, para. 1, and art. 6, paras. 1-3.

Box 7. Prisoners' consent to transfers under framework decision 2008/909/JHA

Under framework decision 2008/909/JHA, a judgement and a certificate may be forwarded to one of the following member States of the European Union for the purposes of the recognition of the judgement and the enforcement of the sentence:

(a) The member State of nationality of the sentenced person in which he or she lives; or

(b) The member State of nationality, to which, while not being the member State where he or she lives, the sentenced person will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgement or in a judicial or administrative decision or any other measure taken consequential to the judgement; or

(c) Any member State other than a member State referred to in paragraphs *(a)* or *(b)* above, the competent authority of which consents to the forwarding of the judgement and the certificate to that member State.

For transfers involving the member States in paragraphs *(a)* and *(b)* above, the sentenced person's consent to the transfer is not required for a judgement and certificate to be forwarded to the executing State.

The sentenced person's consent is also not required if the proposed transfer involves a member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the sentencing State or following the conviction in that sentencing State.

If the sentenced person is still in the sentencing State, and his or her consent is not required, the sentenced person's opinion must be taken into account when deciding the issue of forwarding the judgement together with the certificate.

There are, however, cases in which the sentenced person's consent to the transfer is required before the judgement and a certificate can be forwarded to the administering State. They include transfers to member States that consent to the transfer under paragraph *(c)* above, 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.

The position as far as bilateral agreements are concerned is mixed. As noted above, the Model Agreement makes it clear that the consent of the prisoner is a key requirement for prisoner transfer (paragraph 5).[94] In paragraph 6 of the Model Agreement it also provides that prisoners should be fully informed about the consequences of transfer, and in paragraph 7 it states that the administering State should be given the opportunity to verify whether the consent of the prisoner was indeed given freely. States may, however, negotiate bilateral agreements that do not contain such a requirement. When this is done, careful thought must be given as to why the consent requirement is being excluded. Consideration should be given to limiting the types of cases in which consent is

[94] Paragraph 9 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."

not required. A stronger case may be made, for example, for excluding consent where the sentenced persons are fugitives from justice or potential deportees than for excluding it in other instances, where a transfer may mean that they will be imprisoned in countries where they are technically nationals but are far from their families or realistic opportunities for their rehabilitation. At the very least, all bilateral agreements should contain a provision on the important requirement that persons be consulted before being subjected to compulsory transfer, so that a requesting State can make an informed decision about the desirability of such a transfer.

Where consent is not a requirement, the protection of the human rights of persons who may have been transferred against their will becomes particularly important. This relates very strongly to the prison conditions that they may face in the administering State. Steps should also be taken to ensure that transfer without the consent of the sentenced persons is not used as an indirect form of extradition.

G. Human rights

One requirement that is not widely mentioned in the various instruments that govern the transfer of sentenced persons, but which may be present nevertheless as a matter of law and which should be present as a matter of policy, is that the human rights of the person to be transferred must be safeguarded.[95] States may be forbidden, as a matter of national law or of binding international law, to transfer a sentenced person whose fundamental human rights would be threatened by transferring him or her to another country in order to serve the sentence.

Most of the law in this regard has developed in cases where the question has related to expulsion, deportation or, according to more recent jurisprudence, extradition. A State cannot remove persons if there is a threat to their life, or if they are likely to be subject to torture or to inhuman or degrading treatment or punishment in the country to which they are being sent. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[96] prohibits removal of a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Further, in paragraph 12 of its general comment No. 31, the Human Rights Committee commented that article 2 of the International Covenant on Civil and Political Rights places an obligation on States "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant [risk to life, or of being exposed to torture or cruel, inhuman or degrading treatment or punishment, respectively], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."

The European Court of Human Rights has made similar rulings in respect of the extradition or expulsion of foreigners, as has the Committee against Torture. In certain circumstances, a foreigner may not be expelled if the expulsion would disproportionately undermine the individual's right to family or private life.[97] The same principles apply to the transfer of sentenced persons.

[95] Framework decision 2008/909/JHA must be operated in a manner that respects the fundamental rights contained in article 6 of the Treaty on European Union, and those contained in the Charter of Fundamental Rights of the European Union. See paragraph 13 of the preamble and article 3, paragraph 4, of the framework decision.

[96] United Nations, *Treaty Series,* vol. 1465, No. 24841.

[97] See article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The practical result is that, particularly where a sentencing State seeks to remove a sentenced person without the consent of that person, the sentencing State must ensure that the transfer will not infringe the basic human rights of the person concerned. This may entail obtaining assurances from the potential administering State that the person's fundamental human rights will not be infringed. In some instances, this may be specified directly in a bilateral agreement. For example, the bilateral agreement on the transfer of sentenced persons between Uganda and the United Kingdom provides:

> Each Party shall treat all sentenced persons transferred under the Agreement in accordance with their international human rights obligations.

In other instances the assurances may be more indirect. They may be contained in a general memorandum of understanding between two States, or even in a diplomatic exchange relating to an individual transfer. The result may even be achieved by the sentencing State providing aid targeted at assisting the administering State to improve its prisons in order for it to be able to provide credible assurances in that regard. Such assurances should also deal with prisoners with special needs, such as women or those who have mental health problems, who will need to be accommodated if they are transferred.

The protection of fundamental rights demands sound procedures. This is particularly the case where the consent of the sentenced person is not required. For example, the explanatory report to the Additional Protocol to the European Convention requires that the procedural safeguards relating to the expulsion of aliens under the European Convention for the Protection of Human Rights and Fundamental Freedoms apply, including the right to submit reasons against the expulsion and to be represented. An obvious basis for such a challenge could be that the prisons in the State to which transfer is sought might not meet acceptable human rights standards.

H. Mental health

The Model Agreement is applicable to measures involving persons detained in institutions for mentally disturbed offenders who cannot be held responsible for the commission of their offences. In addition, it applies to offenders who, after being sentenced, become mentally disturbed. Bilateral agreements may also apply to such groups of sentenced persons. For example, article 8, paragraph 2, of the Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences, which entered into force in 1977, provides that: "by special agreement between the parties, persons accused of an offence but determined to be of unsound mental condition, may be transferred for care in institutions in the country of nationality." These provisions are problematic as they seem to also include persons who may not have been convicted or sentenced. It is therefore important to check whether the persons concerned are covered under the precise wording of the multilateral or bilateral treaty under which the transfer is sought.

Mentally disturbed prisoners are similar to other prisoners with special needs whose transfer requests may require sympathetic consideration for humanitarian reasons. However, the issue raises in stark form the problem of prisoners who are unable to determine freely whether they wish to consent to being transferred. The instruments regulating the transfer of sentenced persons all require that the legal representatives of such persons consent to the transfer in cases where their mental condition prevents them from understanding the legal consequences of such a move.[98] The reference to the

[98] Article 6, paragraph 3, of framework decision 2008/909/JHA allows for the prisoner's legal representative to give his or her opinion about the transfer in place of the prisoner, if this is necessary given the mental condition of the prisoner.

person's legal representative is not meant to imply that the representative must be legally qualified; it includes any person duly authorized by the law of either the sentencing State or the administering State to represent the sentenced person, for example a parent. However, it should be required that the legal representative takes a decision after due contact with the sentenced person.[99]

Some instruments contain further provisions that relate to the process to be followed for the transfer of persons with psychiatric problems. The normal procedure may not be possible in cases where a person has been found to be not criminally responsible for the commission of a particular offence by reason of their mental condition. States may be willing, however, to accept such individuals for treatment. Accordingly, the European Convention (in article 9, paragraph 4) and the Scheme for the Transfer of Convicted Offenders within the Commonwealth (in paragraph 11 (3)) provide that such States can make declarations to that effect, indicating the procedure they will follow in such cases.

In its declarations to the European Convention, Israel has indicated that it would be prepared to receive persons who, for reasons of their mental condition, have been held not criminally responsible for the commission of the offence and keep them in a place where they will receive further medical treatment. Iceland and Norway have declared that they reserve the right to use preventive detention or hospitalization for persons of unsound mind. Ireland has indicated that it may apply the Convention to persons detained in hospitals or other institutions under orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction. Malta will apply national procedures for persons detained in custody in a hospital under a court order upon a plea of insanity. The Russian Federation, on the other hand, has declared that it will transfer persons who cannot be held criminally responsible by reason of their mental conditions under bilateral international treaties or on the basis of reciprocity.

A slightly different approach is taken in framework decision 2008/909/JHA. Rather than providing a means to facilitate the use of a particular transfer mechanism for this group of persons as the other instruments have done, it specifies (in article 9, paragraph 1 *(k)*) that States may opt to invoke a ground of non-recognition or non-enforcement if the sentence imposed includes a measure of psychiatric or health care that cannot be executed by the administering State in accordance with its legal or health-care system. This opt-out provision is qualified, however, by the administering State's ability to adapt sentences that are incompatible with its legal system (article 8, paragraph 3), and by the direction to consult with the sentencing State before deciding not to recognize a judgement and enforce a sentence (article 9, paragraph 3).

National implementing legislation may also be used to define the circumstances in which a person suffering from a mental illness may be transferred. For instance, Mauritius will consider requests for the transfer of persons charged with an offence in a sentencing State if the person has been either ordered by a court in the sentencing State to be detained because they were found to be insane and unfit to stand trial or to be mentally disordered or mentally defective; or found guilty of an offence but were insane at the time of its commission (part II, paragraph 4 (4), Transfer of Prisoners Act 2001).

I. Exercising discretion

Even where all the formal requirements for transfer have been met, States still have considerable discretion in deciding whether to go ahead with a transfer or not. A key fact in exercising this

[99] A/CONF.121/10, para. 19.

discretion is deciding whether a particular transfer will in fact assist the social rehabilitation of the sentenced person who potentially may be transferred (see box 8).

Box 8. Social rehabilitation

The United States of America has published "Guidelines for the evaluation of transfer applications of federal prisoners" (available from www.justice.gov/criminal/oeo/iptu/guidelines.html), which contain a list of factors that will be considered when deciding on whether social rehabilitation will be facilitated by transferring a prisoner. Other States may consider other factors. According to the Guidelines:

> "In evaluating whether social rehabilitation really will be furthered by transferring a prisoner, a number of factors are considered:
>
> *"(a)* Acceptance of responsibility. The acceptance of responsibility is a condition precedent for rehabilitation. Acceptance of responsibility is a positive factor for transfer, and is demonstrated by cooperation with the authorities, providing complete and candid information as to involvement in the offense, and/or the timely entry of a guilty plea.
>
> *"(b)* Criminal history. For purposes of evaluating rehabilitative potential, there is a difference between a low-level, minor, first-time or infrequent offender, and a career criminal. Contrast, for example, the rehabilitative potential of an offender who was paid a few hundred dollars to drive drugs into the United States, with that of a drug kingpin.
>
> *"(c)* Seriousness of the offense. The seriousness of the offense, the critical factor in any sentencing decision, is equally important in evaluating whether serving out all or most of his sentence in the United States will do more for the prisoner's rehabilitation than transferring him to what may be a less punitive and possibly less lengthy incarceration.
>
> *"(d)* Criminal ties to the sending and receiving countries. If a prisoner has criminal ties to the receiving country, transferring him could well be more likely to facilitate reintegration into his criminal milieu than to facilitate rehabilitation into civil society.
>
> *"(e)* Family and other social ties to the sending and receiving countries. This is a critical factor for two reasons. First, it is an important assumption of the prisoner transfer program that social rehabilitation is most likely near the prisoner's family, and least likely far away. Second, the most likely prediction about the prisoner's behavior upon release is that he will reunite with his family. If the prisoner's family is in the receiving country, it is far more likely that he will stay there. If, however, that family is in the sending country, one must assume that the released prisoner will try to return to the sending country, not only negating any social rehabilitation benefits from transfer but also negating the prisoner's deportation as well.

Box 8. (continued)

There are obviously any number of family situations, and no one rule can control every case. Set out below is the general approach of the International Prisoner Transfer Unit when the prisoner has family members residing in the United States:

"(i) Prisoner is single and childless. Where his parents and siblings live will be controlling for this category (except in the unusual case where the prisoner was raised by others in the receiving country);

"(ii) Prisoner is ceremonially married. The location of the spouse is controlling. The presumption is that the prisoner should be in the same country as his spouse;

"(iii) Prisoner has a common-law spouse.[a] The location of the common-law spouse can be very important, depending on the apparent longevity and stability of the common-law relationship (that is, how close in practice the common-law spouse is to a legal spouse) and whether any children, particularly still minor children, have issued from it (that is, how close the common-law situation is to a traditional family);

"(iv) Prisoner is either single or separated and has children. The prisoner's relation to the children is critical. For example, adult children living on their own in the United States would normally be less of a factor against transfer than minor children in the United States. Minor children in the United States who have always lived with the other parent and never, or almost never, with the prisoner would be less of a factor against transfer than minor children for whom the prisoner had been the custodial parent or to whom the prisoner had otherwise been very close; in these cases, it is generally assumed that transferring the prisoner away from the children would not accomplish the social goals of transfer, and that the prisoner would attempt to return to the children upon release.

"(f) The United States can only transfer a prisoner to a country with which it has a prisoner transfer treaty relationship and of which the prisoner is a citizen. … [There are limited exceptions to this rule.]

"(g) Humanitarian concerns. By this, we usually mean the terminal illness of the prisoner or a member of his immediate family. Occasionally, humanitarian concerns justify a transfer which would otherwise not be approved, so long as the transfer would not violate the treaty; an example of this would be the terminal illness of the prisoner himself. Other times, humanitarian concerns are simply treated as another factor supporting transfer; an example of this would be the grave illness of a parent or child. Illnesses for which the prisoner is being or could be treated in the United States, or the advanced age of parents, do not justify a transfer on humanitarian grounds.

Box 8. (continued)

"(h) Length of time in the United States. Beyond the legal requirements in the treaties with a domiciliary clause, length of time in the sending country is an important social factor. If the prisoner has been in the United States for such a long time that he has in fact become a member of this society, his social rehabilitation will not be facilitated by sending him to a different one."

[a]A common-law marriage is a relationship created by agreement and cohabitation rather than by a formal marriage ceremony.

The social rehabilitation of the prisoner and other human rights concerns must always be prominent in the minds of officials considering whether the requirements for transfer have been met. However, it should also always be borne in mind that wider criminal justice and law enforcement policy concerns may legitimately play a role when officials exercise discretion in deciding whether or not to transfer a sentenced person. Some may be general, such as concern for public sensibilities and the political climate. These concerns may be shaped by a desire to ensure that victims' rights are taken into account, or that the process should not result in a significant disparity between the sentence that would have been served in the sentencing State and that actually served in the administering State. In other instances the issue may be more practical: a potential transferee may be required as a witness in another case; criminal intelligence may suggest that transferring the person will lead to a return to the headquarters of the criminal group he or she leads; transfer may preclude the offender from making restitution or it may even be the case that the offender has been transferred before and has returned to the State where he or she offended previously.

J. Cumulative effect

It is important to remember that the requirements set out in the various legal instruments for the transfer of sentenced persons are cumulative. In the case of a particular transfer, all the requirements of the instrument that is used for the transfer must be met.

The variations between the legal instruments relate primarily to whether the consent of the sentenced person is required or, less frequently, to whether the consent of the administering State is necessary. It should be emphasized that, whatever transfer instruments are used, respect for the human rights of the sentenced person is a factor that can never be overlooked. Facilitating the social rehabilitation of the sentenced person remains an overarching requirement, even where, as in framework decision 2008/909/JHA, its operational significance is played down to some extent.

VI. Transfer process

In many respects, the success of arrangements for the transfer of sentenced persons depends on the skills of the officials involved with regard to making the process operate smoothly and promptly. This requires that attention be paid to detailed process questions. This chapter will highlight some of the key issues in that regard.

A. Requests and replies

The first step in the transfer process is often an expression of interest from a sentenced person in being transferred. Such an expression of interest may also come from a close relative of the sentenced person (paragraph 4 of the Model Agreement). Sentenced persons should be informed of their right to ask to be transferred, the substance of what a transfer involves and the procedure for making transfer wishes clear to the authorities (article 2, paragraph 2, and article 4 of the European Convention).

In practice, while sentenced persons may begin the process by expressing an interest in being transferred, the main communication must be between the potential sentencing State and the potential administering State, either of whom can request a transfer for a sentenced person. As a sentenced person may express an interest in being transferred to both sentencing and administering States, both States (under the European Convention, the Scheme for the Transfer of Convicted Offenders within the Commonwealth and framework decision 2008/909/JHA) have a duty to communicate requests from such persons for transfer to the other State potentially involved and (under article 4, paragraph 5, of the European Convention) to keep the sentenced person informed in writing of developments in this regard. As either State may initiate the process, it is important that there are clear lines of communication. The Model Agreement has a number of clear rules in this regard that are largely replicated in other international instruments.

Under article 5 of the European Convention, requests to initiate a transfer process and replies should be made in writing and requests should be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State.

These simple rules hide considerable practical complexities, some of which may be related to State structure. The Ministry of Justice may seem a logical place to start, but not all countries have ministries operating under that name.[100] Often there needs to be an involvement at the diplomatic or consular level in the first instance, while in some counties a separate ministry of correctional services or prisons may be the key player. As specified in paragraph 4 of the Model Agreement, it is important that the sentenced persons involved are fully informed about who the relevant authorities are.

[100] Article 5, paragraph 3, of the European Convention provides that parties may indicate that they will use channels of communication other than the Ministry of Justice, while article XI of the Inter-American Convention on Serving Criminal Sentences Abroad allows States parties to indicate which of their central authorities should receive communications.

If the country concerned has a federal structure, special procedures are required. This is recognized explicitly by article V of the Inter-American Convention on Serving Criminal Sentences Abroad, which provides that, "if the sentence was handed down by a state or province with criminal jurisdiction independent from that of the federal Government, the approval of the authorities of that state or province shall be required for the application of this transfer procedure." In practice, the same procedure is required by the national laws of many federal States (see box 9).

Box 9. Decision-making in a federal State: the process in Australia

Australia comprises six states and two territories (Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia). When deciding whether or not to transfer a prisoner into, or out of, Australia, the Minister for Home Affairs must first seek and obtain the consent of the relevant state or territorial government to the transfer on the terms proposed.

This requirement is demonstrated by the process for transferring prisoners serving sentences abroad to Australia. Once the individual's citizenship has been certified and the relevant documentation from the sentencing State has been received, the Minister determines proposed terms for the transfer and grants provisional consent for the transfer to proceed on those terms. However, before the transfer procedure can begin, the Minister must seek the relevant state minister's consent. If the state minister consents, the Attorney-General's Department seeks the consent of the sentencing country and the prisoner to the transfer on the proposed terms. Only then can the federal Minister grant final consent to the transfer and issue a warrant that enables arrangements for the prisoner's physical transfer to be put in place. If, however, the state minister (or any other party) does not consent to the transfer, the process does not continue and the transfer does not take place.

A similar process is followed for the transfer of prisoners from Australia to another country. Once the Attorney-General's Department receives an application for transfer to another country, it requests the relevant documentation from the relevant state or territory's correctional authorities. It also requests the proposed terms of transfer and consent to the transfer from the proposed administering State. If the proposed transferee is a state offender (convicted of an offence at the state level) the federal minister gives provisional consent to the transfer before seeking the state minister's consent. If the state minister consents, the Attorney-General's Department seeks the prisoner's consent to the transfer on the agreed terms. Only then can the federal Minister grant final consent to the transfer and issue a warrant that enables arrangements for the prisoner's physical transfer to be put in place. If the state minister does not consent to the transfer on the proposed terms, the transfer process will not continue and the transfer will not occur.

If, however, the proposed transferee is a federal offender (convicted of an offence at the federal level), the state minister's consent is not required.

The formalities that need to accompany a transfer request must be studied carefully for each of the multilateral instruments or the relevant bilateral agreements. Some of the provisions are relatively simple. Article V of the Inter-American Convention merely provides that:

> The sentencing State shall provide the receiving State with a certified copy of the sentence, including information on the amount of time already served by the sentenced person and on the time off that could be credited for reasons such as work, good behaviour, or pretrial detention. The receiving State may request such other information as it deems necessary.

The European Convention requires more detail. Article 6 states, for example, that the sentencing State must provide: *(a)* a certified copy of the judgement 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 pretrial detention, remission and any other factor relevant to the enforcement of the sentence; *(c)* a declaration containing the sentenced person's consent to the transfer; and *(d)* whenever appropriate, any medical or social reports on the sentenced person, information about his or her treatment in the sentencing State, and any recommendation for his or her further treatment in the administering State.

Under article 6, the administering State, if requested by the sentencing State, must 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;

(c) Whether it proposes to continue to enforce the existing sentence or to convert it, through a judicial or administrative procedure, into a decision of that State.

If a sentenced person has fled to the administering State, or stands to be deported or expelled to it, further information is required to establish those facts, as in some instances they may be grounds for transferring persons without their consent. Where a sentenced person has fled and is in the administering State, the sentencing State may also ask that such person be detained (or otherwise kept in the administering State) prior to the arrival of documents supporting a request for a transfer of the power to implement the sentence in that State. In such a case, detailed information is required both about the sentenced person concerned and the initial sentence (see article 2, paragraph 2, of the Additional Protocol to the European Convention).

Framework decision 2008/909/JHA provides for a process that differs somewhat from that of the other multilateral instruments discussed in the *Handbook*. Rather than submit a formal request, the sentencing State forwards a judgement and certificate to a member State to which it wishes to transfer a sentenced person. To expedite the process, the framework decision introduces a standardized certificate, which includes the information necessary for the transfer (article 4, paragraph 1, and annex I). The States in question should try to consult about the proposed transfer before the judgement and certificate are forwarded. This consultation, which in some instances is compulsory, should deal with whether the transfer would facilitate the prisoner's social rehabilitation (article 4, paragraphs 2 and 4).

B. Time frame

Ideally, a transfer should take place as soon as possible after sentencing. For this to happen and for transfers to function effectively, decisions have to be taken promptly at various stages in the transfer process, which may be difficult to achieve in practice. One solution would be to set clear time limits in the instruments themselves. In that regard, framework decision 2008/909/JHA is

exemplary as, in article 12, paragraph 2, a limit of 90 days is set for a potential administering State to decide whether it will recognize a judgement of the sentencing State.[101] This 90-day period is intended to include time for an appeal procedure and, as specified in article 12, paragraph 3, a failure to act within the time period must be explained immediately. Whether this will prove to be an effective sanction remains to be seen.

Avoiding delay has much to do with sound administrative practices. In this regard, it is important for officials to develop good contacts with their counterparts in other States to and from which they transfer prisoners regularly. Standardized forms and procedures can assist greatly in avoiding delays.

C. Transit

The transfer of sentenced persons from sentencing States to administering States might involve transit through the territory of a third State. In principle, the permission of the third State is always required for such transit. However, the various international instruments contain provisions that are designed to facilitate transits.

Article 16, paragraph 1, of the European Convention provides, for example, that a party to the Convention should grant a request to transit, if it is made by another party.[102] However, there are exceptions to this rule. Article 16, paragraph 2, of the Convention provides that a State party may refuse to grant transit if the sentenced person is one of its nationals or if the offence for which the sentence was imposed is not an offence under its own law. Even in these instances, the matter is still open to negotiation. Under article 6, the State party requested to allow the transit may be asked to give an assurance that the sentenced person will not be prosecuted, or otherwise subjected to any restriction on his or her liberty in the territory of the transit State for any offence committed or sentence imposed prior to departure from the territory of the sentencing State. A request for transit is usually not required if transport is by air over the territory of a State and no landing there is scheduled.[103]

There are even fewer restrictions on the transit of sentenced persons within the European Union, where the general rule of framework decision 2008/909/JHA is that transit should be allowed if the administrative formalities are met (article 16, paragraph 1). However, under article 16, paragraph 2 of the framework decision, when a member State of the European Union receives a request to permit transit, it must inform the requesting State if it is unable to guarantee that the sentenced person will not be prosecuted or otherwise subjected to any restriction of his or her liberty in its territory for any offence committed or sentence imposed before his or her departure from the territory of the requesting State. In such a case, the requesting State may withdraw its request.

National legislation may add more detailed provisions about the actual procedure for transit, for example, outlining which national laws are applicable. In this regard, section 14, paragraph 1, of the Transfer of Offenders Act (14/1990) of Zimbabwe states that a transferee is subject to the

[101] However, an exception can be made (under article 11) if there are problems with the accompanying certificate or if there are linguistic difficulties (article 23).

[102] See also article X of the Inter-American Convention on Serving Criminal Sentences Abroad and paragraph 16 of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.

[103] Article 16, paragraph 7, of the Convention. However, article 16, paragraph 7, adds that a State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature of the Convention or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory. See also article 16, paragraph 5, of framework decision 2008/909/JHA.

"same restraint and, in the event of misbehaviour, to the same punishment, as if he were in Zimbabwe or the specified country to which he is being transferred".

In practice, however, national legislation may also contain hindrances to transfers. Steps should be taken to ensure that national legislation is flexible enough to allow transfers in appropriate cases. Effective transit arrangements also depend on sound relationships between the officials responsible for the transfer of sentenced persons from a sentencing to an administering State and their counterparts in the State through which the sentenced person must transit.

D. Costs

The question of the costs of transfer may be delicate. Paragraph 20 of the Model Agreement provides that "any costs incurred because of a transfer and related to transportation should be borne by the administering State, unless otherwise decided by both the sentencing and administering States." Article 17, paragraph 5, of the European Convention is slightly more specific; it provides that "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." In apparent contrast to this, article V of the Inter-American Convention specifies that "all expenses that arise in connection with the transfer of the sentenced person until that person is placed in the custody of the receiving State shall be borne by the sentencing State."

In practice, the difference between these provisions is not as great as it may appear. Normally, the administering State will send an escort to the sentencing State and the sentenced person will be handed over to the representative of the administering State, often at the airport. The administering State will then be responsible for costs from that point onwards. There may also be an agreement between the States on how to share costs. This form of cost-splitting is provided for in paragraph 17 of the Scheme for the Transfer of Convicted Offenders within the Commonwealth and in paragraph 20 of the Model Agreement. Those provisions demonstrate that the question of costs can be dealt with in bilateral agreements or accompanying memorandums of understanding. This may be particularly relevant where a relatively wealthy sentencing State wishes to have prisoners or other sentenced persons transferred to a less wealthy administering State, which may consider refusing the request because it could not absorb the additional costs.

A further delicate issue is whether the sentenced person should be held responsible for the costs that they incur. National practice varies on this point. It is important to emphasize that the States are responsible for the costs in the first instance. While States may choose to recover costs from sentenced persons after they have been transferred, this should only be done if the sentenced persons can afford to pay them (see box 10). No person whose transfer is otherwise justified should be denied transfer because he or she cannot pay the costs in advance.

Box 10. Prisoners' financial liability for transfers to and from the United Republic of Tanzania

Under section 18 of the Transfer of Prisoners Act 2004 of the United Republic of Tanzania, the cost of transferring prisoners is borne by the United Republic of Tanzania and the other country involved in the transfer in such proportions as the two States agree. The cost may then be recovered from the transferred sentenced person. In normal circumstances, the relevant

Box 10. (continued)

Government Minister of the United Republic of Tanzania has the power to require the transferred prisoner, with or without a surety, to undertake to pay the expenses incurred. The undertaking is regarded as a civil debt owed to the Government. However, the Minister will not seek to recover the expenses incurred during the transfer from the sentenced persons if it would be unreasonable to do either because of the exceptional circumstances of the case, or because the sentenced person's means are insufficient to meet the expenses involved and the recovery of those expenses, whether immediately or at some future time, would be impracticable.

E. Recognition of the sentence

Perhaps the most crucial stage of the transfer of the sentence is the formal recognition of the sentence by the administering State. In chapter II, section C, above, it was explained that there are two primary ways in which this could be done; namely the administering State can either continue to enforce the sentence or it can convert the sentence into a sentence of the national system by imposing a fresh sentence based on the facts found in the sentencing State. These two possibilities are clearly set out in the Model Agreement, as well as in other instruments, such as the European Convention.

As will become apparent, however, these two possibilities are not always available. They may be limited by the particular international agreement under which a transfer is undertaken, by the national law of the administering State, or even by the negotiations surrounding the transfer of an individual. The potential complexity is illustrated by the declarations that States parties have made to the European Convention in which they set out their approach to continued enforcement or conversion. Some make relatively simple declarations, explaining clearly how the State will treat transferred sentenced persons. For example, 17 States have declared that they will only administer sentences by continuing to enforce them and three have declared that they will only enforce sentences by converting them.

In other instances, the declarations are more complex. Austria, for example, has declared that, in principle, it will apply the conversion process referred to in article 9, paragraph 1 *(b)*, of the European Convention. However, in cases where the other State party insists on continued enforcement, Austria does not exclude the possibility of transfer entirely. When, in its view, "an interest of transfer prevails", it may accept continued enforcement.

Some States parties to the Convention have not made formal declarations of the choices that they would exercise in terms of article 9. This does not mean that they are indifferent to which model will be adopted. One State that has not made a declaration is Germany. However, it must be noted that, in terms of German domestic law, sentences can only be carried out following a decision by a German court.[104] This means in practice that Germany will normally follow a conversion process when it is the administering State. However, if a sentencing State will only allow a transfer if Germany agrees to the continued enforcement of its sentence, the sentence will need to be

[104] Schomburg and others, p. 708.

confirmed by a German court to give it the necessary legal force. If the sentence has to be adapted, that is, modified to the limited extent necessary to ensure that it does not exceed the maximum available in German law for the same crime, it will be a German court that undertakes this process. In practice, the need to have some flexibility is most likely to arise where the administering State has a preference for conversion of sentences, because the sentencing State is more likely to accept the continued enforcement of the sentence its courts imposed in the first instance. This is also reflected in the German policy, which indicates that, where Germany is the sentencing State, it may require a declaration from a potential administering State about how it will implement the sentence before deciding whether to agree to a transfer (see box 11).

Box 11. Continued enforcement versus conversion

The practical differences between continued enforcement and conversion and the importance of judicial control in this respect are well illustrated in a judgement by the European Court of Human Rights in the case *Buijen v. Germany* (Application No. 27804/05, Judgement of 9 March 2010). In this case the applicant, a citizen of the Netherlands, had been charged with drug dealing in Germany. Subsequently, he had been given assurances by the prosecutor that, if he pleaded guilty, he would be transferred to the Netherlands and that Germany, the sentencing State, would accept that the Netherlands, the administering State, would be able to convert the sentence (in accordance with article 11 of the European Convention). On this basis, the applicant made a full confession and pleaded guilty. He was duly convicted and sentenced to eight years' imprisonment and chose immediately to forfeit his right to appeal. However, the German authorities subsequently changed their mind. They announced that they would only consent to his transfer if the Netherlands agreed to the continued enforcement of the sentence and to keep the applicant in prison for at least two thirds of his term. The applicant objected but was not able to persuade a German court to reopen his case. The European Court of Human Rights disagreed and ruled that the applicant's right to a fair hearing had been infringed, for his actions at the trial had been materially influenced by the assurances he had been given by the prosecutor. Although it was not made explicit, it is clear that both the applicant and the German authorities were working on the assumption that in this instance the sentence that would have resulted from the conversion process would have been significantly less severe than that imposed by the German court.

The potential difficulties caused by the concern that a conversion process, in particular, may produce an outcome that differs from that which the sentencing State would find acceptable could be resolved in other ways. The Scheme for the Transfer of Convicted Offenders within the Commonwealth, for example, allows only for continued enforcement (paragraph 11 (1)) and States that use the Scheme will therefore have a clear idea of what will follow in that regard from a transfer. States may also of course negotiate bilateral agreements that have the effect of excluding one option or another.

The conversion option is excluded by framework decision 2008/909/JHA. Article 8 of the framework decision provides that the administering State must recognize a judgement that has been forwarded in accordance with the procedures set out in the framework decision and take the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds

for non-recognition and non-enforcement provided in the framework decision itself.[105] Under article 8, paragraphs 2 and 3, the executing State also has the discretion to adapt the sentence in cases where the sentence is incompatible with its law in terms of duration and nature.

Whether the recognition and enforcement of sentences will eventually become the most commonly used approach in transfers outside the European Union remains to be seen. It should be noted that the model of direct enforcement operates within an integrated legal and political system. Accordingly, it may not be possible to directly replicate it in parts of the world where regional links between States are not as close. To some extent, mutual recognition is also based on an acceptance that sentences imposed by the sentencing State will not be grossly disproportionate to what would have been imposed in the administering State. If this is not the case, administering States may be tempted to continue to keep the conversion option open to avoid what may be perceived in their country as disproportionate sentences.

[105] The grounds for non-recognition are set out in article 9 of the framework decision, as amended by framework decision 2009/299/JHA of 26 February 2009, enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. Article 10 of framework decision 2008/909/JHA allows for partial recognition and enforcement of a sentence and article 11 for the postponement of recognition of the judgment where certain technical issues arise.

VII. Post-transfer considerations

The successful completion of the transfer process to the point where the sentenced person begins serving a sentence of imprisonment in the administering State does not signal the end of the legal and practical issues that result from the transfer. Although the person who has been transferred is generally to be treated as an "ordinary" prisoner of the administering State, there are some different rules that are applicable in such a case. The present chapter sets out the considerations that apply during the post-transfer phase: when the sentence is being served in the administering State and also when the prisoner is released.

A. Laws governing enforcement

The general principle is that the law governing the enforcement of the sentence is the law of the administering State. This principle is contained in paragraph 21 of the Model Agreement and in most other legal instruments governing the transfer of sentenced persons. It should be understood in a wide sense and includes regulation of treatment and the prison regime and also refers to rules concerning eligibility for conditional release.[106]

Article 8 of the European Convention suspends the power of the sentencing State to enforce a sentence once it has transferred the sentenced person to the administering State. Once the administering State considers enforcement of the sentence to have been completed, the sentencing State is no longer allowed to enforce the sentence at all.

The Convention goes on to emphasize, in article 9, paragraph 3, that the administering State alone will be competent to take all appropriate decisions relating to enforcement. This includes both decisions that are internal to the prison system and decisions that relate to the early or conditional release of the sentenced person. Both may result in conditions that sentenced persons perceive as substantively unfair.

Conditions of enforcement, in prisons in particular, may be much harsher in the State to which the person is sent, and the enforcement may result in the individual spending a longer period in prison than he or she would have had the transfer not occurred. However, the European Court of Human Rights has not ruled in favour of such persons. It has ruled that sentenced persons who had been transferred legally and were now being held in the administering State should bring actions for an infringement of their rights under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that is, that their treatment in prison was inhuman or degrading, against the administering State if that is where he or she was allegedly being ill-treated. The responsibility of the sentencing State could also be engaged under article 3 of the Convention if there were an identifiable, real risk of the person being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she stood to be removed, and his or her removal were nevertheless to be ordered.[107]

[106] A/CONF.121/10, para. 31.

[107] *M.S.S. v. Belgium and Greece,* Application No. 30696/09, Judgement of 21 January 2011.

B. Laws governing release

The enforcement of a sentence relates also to release from it. The general rule, subject to important exceptions for pardons and amnesties discussed below, is that release is also governed by the law of the administering State. The Model Agreement contains a further provision in this regard: in paragraph 18 it stipulates that the period of deprivation of liberty already served by the sentenced person in either State should be fully deducted from the final sentence. This is good practice. If the law of the administering State does not allow for such deduction, it should be amended to provide for it.

Paragraph 31 of the note by the Secretariat on the Model Agreement (A/CONF.121/10) suggests that, in respect of conditional release, the competent authorities in the administering State should take into consideration any more favourable conditions in the sentencing State so as to avoid the aggravation of the prisoner's situation. In practice, this does not always happen. The failure to consider the conditional release practice of the sentencing State has been challenged by prisoners who have argued that it resulted in excessively long post-transfer sentences because release procedures in the administering State were less generous than in the sentencing State. In Europe, the challenge has been based on the argument that the longer sentence infringed the right to liberty as set out in article 5 of European Convention for the Protection of Human Rights and Fundamental Freedoms.

Such arguments have been rejected by the European Court of Human Rights in, for example, *Veermäe v. Finland*, Application No. 38704/03, Decision of 15 March 2005 (see also box 12). The narrow legal ground for that ruling was that the initial sentence of imprisonment remained a lawful deprivation of liberty and that the change in possibility for conditional release did not mean that there was a new sentence that required a new legal basis. The underlying reason for adopting this approach to what could have been regarded as a new and heavier sentence was explained by the Court in the above-mentioned Decision as follows:

> To lay down a strict requirement that the sentence served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is reflected in the Transfer Convention and is in principle in the interests of the persons concerned.

Box 12. Transfer and time actually served

In the case *Szabó v. Sweden* (Application No. 28578/03), Final Decision 27 June 2006), a prisoner who had been sentenced to 10 years' imprisonment in Sweden was transferred against his will to serve his sentence in Hungary. The decision was taken on the basis of the European Convention and its Additional Protocol, which allows transfer against the will of a sentenced person who may be deported from the sentencing State. A Hungarian court had confirmed the 10-year sentence imposed in Sweden. In Sweden, however, the prisoner would probably have been released after having served two thirds of the sentence, while in Hungary he would have to serve four fifths. In practical terms this meant that, following the applicant's transfer to Hungary, he was likely to serve 8 of his 10-year prison sentence, whereas he could have expected to serve 6 years and eight months of that sentence in Sweden.

Box 12. (continued)

In response to the prisoner's complaint about the additional period that he would have to serve, the European Court of Human Rights reiterated what it saw as the positive aspect of prisoner transfers. The Court warned, however, that it did not "exclude the possibility that a flagrantly longer de facto term of imprisonment in the administering State could … engage the responsibility of the sentencing State". The responsibility in question was that of the sentencing State to ensure that the prisoner's detention in the administering State was not unlawful. It would be unlawful if it infringed article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits loss of liberty except on a few specific grounds, including the enforcement of a lawful sentence.

The cases discussed above concerned sentenced persons who may be released later by the administering State than would have been the case had they remained in the sentencing State. But earlier release in the administering State may also raise concerns in the sentencing State. A factor that may influence the period that the sentenced person may actually serve in the administering State is the power of amnesty, pardon or commutation.

Unless an international agreement specifies differently, there is no legal reason why the sentenced person should not benefit from powers of this kind exercised by both the sentencing and administering States (see box 13). This is the position taken in paragraph 22 of the Model Agreement and the European Convention, article 12 of which states that: "each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws." The same approach to pardons and amnesties is followed in article 19, paragraph 1, of framework decision 2008/909/JHA. However, allowing both States unfettered discretion with regard to pardons and amnesties is not universal. For example, the Government of Azerbaijan has made a declaration under the Convention that decisions regarding the pardons and amnesties of sentenced persons transferred by Azerbaijan should be agreed with its relevant competent authorities.[108]

In other instances, the emphasis is on ensuring that the sentencing State can continue to exercise its powers in respect of pardons and amnesties. Article VIII of the Inter-American Convention on Serving Criminal Sentences Abroad provides that:

> The sentencing State shall … retain the power to grant pardon, amnesty or mercy to the sentenced person. The receiving State, upon receiving notice of any decision in this regard, must take the corresponding measures immediately.

There is a similar emphasis in paragraph 13 (1), of the Scheme for the Transfer of Convicted Offenders within the Commonwealth, which holds that:

> Unless the sentencing and the administering countries otherwise agree, the sentencing country alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.

[108] Germany has made a similar reservation, which allows it to require, on a case-by-case basis, that pardons and amnesties not be granted by administering States without consulting it as the sentencing State. This allows it to involve the Länder, which in Germany have the power to pardon, in the process.

This approach has been mirrored in domestic legislation. Both the Transfer of Offenders Act (14/1990) of Zimbabwe and the Transfer of Prisoners Act 2004 of the United Republic of Tanzania state that nothing in the Acts should be construed as limiting, in any way, the President's prerogative of mercy. Moreover, they both explicitly promise to give effect to any pardons granted by sentencing States.

Box 13. The operation of pardons and amnesties granted by the sentencing State

In 2003, a British citizen living in Thailand was convicted of drug offences in that country and sentenced to 33 years and 6 months in prison. In June 2007, he sought transfer to England to serve the remainder of his sentence under the provisions of the 1990 bilateral agreement between Thailand and the United Kingdom for the transfer of prisoners. The two Governments agreed to his transfer and, in November 2007, he was transferred to England, where he is still in prison. In June 2008, a Thai royal decree reduced his sentence to 29 years and 3 months. This means that his release date, at the half way point in his sentence, will be in December 2017. This takes into account the period served and any remission earned in Thailand. He will also benefit from any further royal amnesties, whether general or personal. He has yet to hear the result of his application for a royal pardon from the King of Thailand. On his return to England, the prisoner challenged his sentence on the grounds that it was so severe that it was grossly disproportionate and therefore breached the prohibition on inhuman and degrading punishment contained in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The English court that heard his case disagreed (see *Willcox v. Secretary of State for Justice* [2009] EWHC 1483 (Admin.)). It pointed out that not only was he transferred at his own request under an agreement that provided for the continued enforcement of sentences, but that he would benefit both from English release procedures, which allow conditional release after half the sentence has been served, and from Thai royal pardons. It was therefore not prepared to find that the Thai sentence, even though it was much heavier than would have been imposed in England for the same offence, breached his human rights.

The relatively flexible position in respect of pardons and amnesties can be contrasted with that in respect of the review of the judgement or the sentence imposed on a person who has been transferred. All the major instruments agree that only the sentencing State has jurisdiction in this respect. This clear rule may sometimes come into tension with the power to pardon (see box 14).

Box 14. Pardon or review: who decides?

The complex interplay between the right of the administering State to pardon and the prohibition on it reviewing the initial conviction may lead to public controversy. Such controversy has arisen in the case of a British citizen who was convicted of attempted murder in Bulgaria in 2005 and transferred to England to serve his sentence. After failing in his attempts to have his Bulgarian conviction reviewed, he submitted an application to the Government of the United Kingdom for a free pardon.

Box 14. (continued)

The Secretary of State for Justice of the United Kingdom initially argued that he was unable to recommend that the Queen grant a pardon, as to do so would amount to a review of the conviction, something which only the sentencing State could do. However, an English Court (see *R. (On the Application of Michael Shields) v. Secretary of State for Justice* [2008] EWHC 3102 (Admin.)) ruled that, under article 12 of the European Convention, the Secretary of State did have the power to consider a pardon and to advise the Queen accordingly. Although the Court explained that the scope of this power was very limited under modern English law, the prisoner was eventually given the free pardon he and his supporters had requested in a highly publicized campaign, thus effectively setting aside the original Bulgarian conviction.

It is important to have clear legal rules governing the enforcement of sentences in the administering State as, in high-profile cases, observers in the sentencing State may also follow the process closely. A failure to respond to this may place in jeopardy the whole process of transferring a sentenced person.

C. Double jeopardy and speciality

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

The requirement of speciality, in its traditional sense that has been developed in extradition law, is designed to ensure that someone is not sent to a foreign country for the sole purpose of facing prosecution on an unrelated charge that was not included in the extradition request. There is a potential danger that transfer agreements could be used in the same way. This is addressed in the context of the transfer of sentenced persons by a declaration made by Germany to the European Convention. In the declaration, Germany makes it clear that it will only transfer sentenced persons to an administering State if that State agrees not to prosecute the transferred person for an offence other than that underlying the transfer and committed before the surrender unless Germany agrees to it doing so, or if the transferred person has not left the territory of the administering State within 45 days of his or her final discharge despite having had the opportunity to do so. Some bilateral agreements contain a similar provision. For example, the United Kingdom specifies, in its transfer agreements with Cuba, Egypt and Morocco, that transferred persons cannot be arrested, tried or sentenced in the administering State for the same offence for which they were transferred.

Framework decision 2008/909/JHA includes an explicit speciality requirement. Article 18, paragraph 1, provides that, subject to a number of exceptions, a person transferred[109] to an administering State must not "be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence

[109] This rule does not apply to persons who have fled to the executing State. See paragraph 23 of the preamble.

committed before his or her transfer other than that for which he or she was transferred". The exceptions to this prohibition are found in article 18, paragraph 2, and include that an executing State may act if the transferred person has not left the State 45 days after discharge or has returned to the territory of the State after having left it, if the offence or criminal proceedings will not result in a custodial sanction or restriction of personal liberty, or if the sentenced person has consented to the transfer, or if, post-transfer, he or she renounces entitlement to the speciality rule. In other cases, the sentencing State can give its consent to a waiver of speciality.

D. Termination of enforcement

Some instruments provide for the termination of enforcement in the administering State in instances when it is informed by the sentencing State of any decision or measure that results in the sentence ceasing to be enforceable.[110] This includes situations in which the sentence is considered to be completed or if the convicted offender escapes from custody before the enforcement of the sentence has been completed.[111] Under article 22, paragraph 2, of framework decision 2008/909/JHA, the right to enforce the sentence reverts to the sentencing State if the transferred prisoner escapes from the administering State, effectively terminating the administering State's right to enforce the sentence.

E. Information

The successful completion of the post-transfer phase depends on a continued flow of information between the administering State and the sentencing State. In this regard, article 15 of the European Convention stipulates that the administering State must provide information to the sentencing State concerning the enforcement of the sentence when it considers enforcement of the sentence to have been completed; if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or if the sentencing State requests a special report (see also paragraph 15 of the Scheme for the Transfer of Convicted Offenders within the Commonwealth). Under article 14 of the Convention, the sentencing State, in turn, must inform the administering State of any decision or measure, such as a pardon or amnesty, that will impact on the sentence being carried out in the administering State. Finally, it is important that the information flow continues as release approaches. This is not only good practice as an element of mutual cooperation but may also be of practical significance in cases where, for example, victims need to be told about the impending release of an offender in another State.

[110] Art. 14, European Convention; para. 14, Scheme for the Transfer of Convicted Offenders within the Commonwealth.
[111] See para. 15, Scheme for the Transfer of Convicted Offenders within the Commonwealth.

VIII. Conclusion

The present *Handbook* is designed to support those States that wish to create a system for facilitating the international transfer of sentenced persons and to help those States that already have such a system in place to use it more effectively. Although systems for the international transfer of sentenced persons are increasingly being employed as a tool for international cooperation to combat transnational and international crime, it should be emphasized that there are a range of other benefits to adopting and maximizing their use. Such systems enable States to alleviate the hardships faced by their nationals imprisoned abroad as well as those faced by foreigners imprisoned in their own prisons. By transferring a foreign national back to his or her State of origin to serve a sentence, a State can contribute to the rehabilitation, resocialization and reintegration of the prisoner and thereby protect public safety. Given the large number of foreign nationals in many prison systems, transfer arrangements can bring reciprocal benefits to participating States. By moving foreign prisoners, cells are freed up in national prisons and the cost of providing consular services to prisoners abroad is reduced.

This concluding section summarizes the key issues and problems highlighted in the *Handbook* and sets out advice for both States wishing to enact laws that implement international prisoner transfer regimes and States that already have such a regime in place.

A. Choosing an appropriate transfer regime

As demonstrated in chapter IV, there are various legal instruments that make it possible for prisoners to be transferred from one State to another. States interested in transferring sentenced persons can accede to multilateral agreements or adopt bilateral agreements with other States. They may also adopt a law covering all the issues related to the transfer of prisoners.

The existence of a bilateral or multilateral convention or treaty provides a sound legal basis for this form of international cooperation, as such instruments preclude any objections based on infringement of State sovereignty. Treaties are preferable, as unilateral action does not create any incentive for other States to consent to transfers. Reciprocal arrangements assist with the conclusion of agreements and ensure that, once they are in place, the transfer process is used more frequently.

It may be necessary to adopt national legislation to give effect to bilateral or multilateral treaties. Alternatively or additionally, a State may use national legislation to facilitate transfers with States in its region. This may have the benefit of entailing fewer formalities. Domestic legislation may also enable ad hoc transfers in the absence of an international treaty or arrangement.

When deciding which approach to adopt, States should consider how they will use the instrument or instruments they have chosen. They should also bear in mind the models used by the States to or from which they wish to transfer prisoners, and whether there are any domestic legal requirements or political preferences that will affect the model or models they can select.

Some States feel it is preferable to accede to multilateral schemes, as this reduces the time and cost involved in negotiating bilateral agreements and provides access to an effective and standardized system. However, not all States are parties to multilateral schemes. It may therefore be necessary to conclude bilateral agreements. Bilateral agreements may provide access to a more diverse range of States. They have the added advantage that their provisions can be tailored to meet the needs of the State involved. Moreover, these provisions may deviate from both multilateral agreements and other bilateral agreements. In other words, they can be tailored to reflect domestic requirements and policy. Bilateral agreements also enable States to respond to emergency situations of individuals imprisoned abroad.

It should be noted that these various legal models are not mutually exclusive and that using a combination of them may be beneficial. The Model Agreement provides a structured framework for the negotiation of both bilateral and multilateral arrangements.

Whichever model is chosen, there are often important policy choices to be made about the substance of the agreement or the procedure that will facilitate transfers. For example, States may have to decide whether to use continued enforcement or conversion, the type of prisoner the instrument will relate to (national, resident, person with close ties, etc.) and whether the consent of the administering State and/or the prisoner is required. In sum, States can choose from a range of instruments and procedural options to create an international prisoner transfer regime that meets their practical, political and legal requirements.

B. Improving existing transfer processes

Many States have already acceded to multilateral schemes, concluded bilateral agreements and adopted domestic legislation that facilitate the transfer of sentenced persons. There are several ways in which the transfer processes created by these instruments can be improved.

To ensure communications between States are clear and simple, States may consider appointing a competent authority for the administration of transfers. The authority should maintain a directory of contacts—competent authorities and officials in other States that work in this area—and should ensure that the directory is updated regularly.

The transfer process can be expedited by simplifying and standardizing procedures. The use of standardized forms provides a recognizable and uniform process, introduces clarity of interpretation of terms, and creates fewer translation issues. Standardized forms can be used to request transfers, to approve or deny a request for a transfer, to request documentation from domestic or foreign law enforcement or correctional authorities and to obtain the consent of the administering State or the prisoner. States should also ensure that information requested by other States is sent in a clear and concise manner and in an agreed language. For example, rather than simply sending long or multiple documents, the sending State could attach a summary of the relevant information.

The implementation of national legislation can also assist in creating an effective transfer regime. A domestic statutory framework assigns authority, ensures clarity in relation to the principles behind the transfers and gives legality to the transfer process. However, it is vital to ensure that the procedure created by domestic legislation does not prolong the transfer process unnecessarily. Domestic procedures should be assessed to ascertain if all steps in the domestic decision-making process are essential and they should be revised accordingly. Moreover, domestic procedures could be amended to enable the fast-tracking of particular cases that meet predetermined criteria.

C. Increasing the use of existing transfer systems

To increase the use of existing prisoner transfer schemes, it is essential that the key people involved in the process are aware of them. It is therefore critical that all national prisons train personnel to inform incoming prisoners of the existence of prisoner transfer schemes and provide information on how they work. To ensure nationals imprisoned abroad are aware of prisoner transfer agreements that are in place, consular services must be trained on the subject and protocols introduced to share this information with the prisons and prisoners in the State in which they operate. Legal aid providers must also be aware of issues relating to transfers in order to provide appropriate advice to prisoners and to ensure that informed consent is given.

Increasing the use of prisoner transfer systems may also involve providing assistance. Some States offer prisoners financial assistance to help with meeting the reintegration costs that will be incurred after their release in the administering State. Some States provide technical and financial assistance to potential administering States. For instance, a State may help a developing State establish the systems and processes necessary to facilitate transfers or it may provide States with financial assistance to improve conditions in their prisons.

In addition to raising awareness and providing assistance where necessary, transfers may also be maximized by adopting a flexible approach to the decision-making process. Rather than strictly adopting rigid criteria, States should bear in mind humanitarian considerations and the desire to facilitate the social rehabilitation of sentenced persons.

D. Safeguarding sentenced prisoners

States should make sentenced persons considering transfers aware of the terms of the transfer and any consequences of consenting to it. In addition to providing this information, States should also recommend that prisoners seek independent legal advice. Moreover, procedures should be put in place to ensure that consent to transfers is given voluntarily. By ensuring that a prisoner's consent to a transfer is both informed and voluntary, States respect the prisoner's autonomy and ensure that the transfer will facilitate the prisoner's social rehabilitation (see box 15 for an example of how one State has put this into practice).

Box 15. Voluntary and informed consent: Australian practice

Prisoners who may be transferred to and from Australia under the country's International Transfer of Prisoners Scheme are sent a letter by the International Crime Cooperation Division of the Attorney-General's Department outlining the transfer process, the proposed terms of the transfer and the legal consequences and effect of the transfer.

The letter received by prisoners who may be transferred to Australia from another country explicitly states how the sentence would be enforced in Australia and the date the prisoner would become eligible for release under Australian law. For example, it states that, if transferred, the prisoner would be deemed to be a federal prisoner and, upon release, he or she may be subject to parole conditions and/or supervision. Potential transferees are also notified of the fact that Australia will recognize and implement any remissions, amnesties or pardons granted by the sentencing State.

Box 15. (continued)

The terms and legal consequences of the transfer are again stated in an attached consent form. If the prisoner consents to the terms, he or she must sign the consent form, which contains a provision which states that his or her consent to the transfer is entirely voluntary and given of his or her own free will, and has not been obtained by any promise, threat, inducement or coercion. In a further bid to ensure that the prisoner's consent is voluntary, his or her signature must be witnessed, usually by an Australian Government official.

Prisoners who may be transferred from Australia to another State receive similar information. One notable addition to this consent form is a warning in that the transfer may result in prosecutions for any outstanding warrants or charges in the administering State.

In addition to the letter and consent form sent by the Australian Attorney-General's Department, prisoners may receive information directly from the proposed administering State. For example, prisoners who may be transferred from Australia to the United Kingdom also receive four separate documents from the National Offender Management Service of the United Kingdom. One contains information about transfers to the United Kingdom. The other three require the prisoner's signature to signify he or she understands the legal and financial consequences of such a transfer and that he or she consents to it.

The United Kingdom also requests that the prisoner's signature of its consent form be witnessed by the prisoner's lawyer, by a local notary under arrangements made by the British Consul, by the British Consul or by the prison manager.

The Australian process therefore aims to ensure that the prisoner is aware of the key terms of the transfer, and accordingly of the legal consequences of consenting to it. Although the Government of Australia does not provide prisoners with legal advice about whether to consent to the transfer on the terms given, it does recommend that prisoners seek independent legal advice. It also aims to ensure that the prisoner does not feel forced into agreeing to the terms. Overall, this process ensures the prisoner's consent is both informed and voluntary.

Post-transfer, the sentencing State will remain concerned about the manner in which the sentence is being implemented in the administering State. This is why it is essential to establish the terms of the transfer, particularly in relation to the manner in which the sentence will be enforced (continued or conversion) and the point at which the prisoner will become eligible for release, from the outset.

States are also increasingly concerned about the conditions in which the prisoner will serve the sentence in the State to which they have been transferred. This has been demonstrated by the inclusion of provisions on prison conditions in agreements and the provision of financial assistance to improve conditions in prisons in potential administering States.

E. Development of transfer systems by the United Nations

The United Nations advocacy of international prisoner transfers was originally influenced by the special situation of foreign national prisoners. To avoid the difficulties faced by this category of

prisoners, the United Nations made recommendations both for their special treatment while imprisoned abroad and also for their return to their State of nationality or residence to serve their sentence. To facilitate the latter option, the United Nations provided States with the Model Agreement, on which bilateral or multilateral agreements could be negotiated. Such agreements would enable not only the social resettlement of prisoners but also the development of mutual cooperation between States in the field of criminal justice.

The majority of prisoner transfer arrangements, and indeed those that have been the focus of the *Handbook*, deal with the transfer of persons convicted of offences criminalized under national law. However, the prisoner transfer mechanism has evolved and is now used as a tool to promote criminal justice cooperation to deal with transnational and international crime. The United Nations recommends that States conclude bilateral or multilateral agreements to facilitate the transfer of persons convicted and sentenced to terms of imprisonment for organized crime, drug trafficking and corruption offences, back to their State of origin. Moreover, international criminal tribunals also rely on prisoner transfer agreements to enforce sentences imposed for convictions made in international courts and tribunals for crimes such as genocide, crimes against humanity and war crimes.

While those international prisoner transfer arrangements vary in some respects from the arrangements outlined in the *Handbook*, they are often based on the same principles and follow similar procedures. As those examples show, systems for the international transfer of sentenced persons have evolved from a tool for the inter-State movement of foreign prisoners to a tool for international cooperation in criminal justice matters.

Annex I. Model Agreement on the Transfer of Foreign Prisoners[a] and recommendations on the treatment of foreign prisoners[b]

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling resolution 13 adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,[c] in which States Members of the United Nations were urged to consider the establishment of procedures whereby transfers of offenders might be effected,

Recognizing the difficulties of foreigners detained in prison establishments abroad owing to such factors as differences in language, culture, customs and religion,

Considering that the aim of social resettlement of offenders could best be achieved by giving foreign prisoners the opportunity to serve their sentence within their country of nationality or residence,

Convinced that the establishment of procedures for the transfer of prisoners, on either a bilateral or a multilateral basis, would be highly desirable,

Taking note of the existing multilateral and bilateral international agreements on the transfer of foreign prisoners,

1. *Adopts* the Model Agreement on the Transfer of Foreign Prisoners contained in annex I to the present resolution;

2. *Approves* the recommendations on the treatment of foreign prisoners contained in annex II below;

3. *Invites* Member States, if they have not yet established treaty relations with other Member States in the matter of the transfer of foreign prisoners to their own countries, or if they wish to revise existing treaty relations, to take into account, whenever doing so, the Model Agreement on the Transfer of Foreign Prisoners annexed hereto;

4. *Requests* the Secretary-General to assist Member States, at their request, in the development of agreements on the transfer of foreign prisoners and to report regularly thereon to the Committee on Crime Prevention and Control.

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[a] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.1, annex I.

[b] Ibid., annex II.

[c] See *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August-5 September 1980: report prepared by the Secretariat* (United Nations publication, Sales No. E.81.IV.4), chap. I, sect. B.

Annex I

Model Agreement on the Transfer of Foreign Prisoners

PREAMBLE

The _____ and the _____

Desirous of further developing mutual cooperation in the field of criminal justice,

Believing that such cooperation should further the ends of justice and the social resettlement of sentenced persons,

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

Convinced that this aim can best be achieved by transferring foreign prisoners to their own countries,

Bearing in mind that the full respect for human rights, as laid down in universally recognized principles, should be ensured,

Have agreed on the following:

I. GENERAL PRINCIPLES

1. The social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of cooperation.

2. A transfer of prisoners should be effected on the basis of mutual respect for national sovereignty and jurisdiction.

3. A transfer of prisoners should be effected in cases where the offence giving rise to conviction is punishable by deprivation of liberty by the judicial authorities of both the sending (sentencing) State and the State to which the transfer is to be effected (administering State) according to their national laws.

4. A transfer may be requested by either the sentencing or the administering State. The prisoner, as well as close relatives, may express to either State their interest in the transfer. To that end, the contracting State shall inform the prisoner of their competent authorities.

5. A transfer shall be dependent on the agreement of both the sentencing and the administering State, and should also be based on the consent of the prisoner.

6. The prisoner shall be fully informed of the possibility and of the legal consequences of a transfer, in particular whether or not he might be prosecuted because of other offences committed before his transfer.

7. The administering State should be given the opportunity to verify the free consent of the prisoner.

8. Any regulation concerning the transfer of prisoners shall be applicable to sentences of imprisonment as well as to sentences imposing measures involving deprivation of liberty because of the commission of a criminal act.

9. In cases of the person's incapability of freely determining his will, his legal representative shall be competent to consent to the transfer.

II. OTHER REQUIREMENTS

10. A transfer shall be made only on the basis of a final and definitive sentence having executive force.

11. At the time of the request for a transfer, the prisoner shall, as a general rule, still have to serve at least six months of the sentence; a transfer should, however, be granted also in cases of indeterminate sentences.

12. The decision whether to transfer a prisoner shall be taken without any delay.

13. The person transferred for the enforcement of a sentence passed in the sentencing State may not be tried again in the administering State for the same act upon which the sentence to be executed is based.

III. PROCEDURAL REGULATIONS

14. The competent authorities of the administering State shall: *(a)* continue the enforcement of the sentence immediately or through a court or administrative order; or *(b)* convert the sentence, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for a corresponding offence.

15. 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. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, this State may adapt the sanction to the punishment or measure prescribed by its own law for a corresponding offence.

16. In the case of conversion of sentence, the administering State shall be entitled to adapt the sanction as to its nature or duration according to its national law, taking into due consideration the sentence passed in the sentencing State. A sanction involving deprivation of liberty shall, however, not be converted to a pecuniary sanction.

17. The administering State shall be bound by the findings as to the facts insofar as they appear from the judgement imposed in the sentencing State. Thus the sentencing State has the sole competence for a review of the sentence.

18. The period of deprivation of liberty already served by the sentenced person in either State shall be fully deducted from the final sentence.

19. A transfer shall in no case lead to an aggravation of the situation of the prisoner.

20. Any costs incurred because of a transfer and related to transportation should be borne by the administering State, unless otherwise decided by both the sentencing and administering States.

IV. ENFORCEMENT AND PARDON

21. The enforcement of the sentence shall be governed by the law of the administering State.

22. Both the sentencing and the administering State shall be competent to grant pardon and amnesty.

V. FINAL CLAUSES

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

24. This agreement is subject to ratification. The instruments of ratification shall be deposited as soon as possible in _____.

25. This agreement shall enter into force on the thirtieth day after the day on which the instruments of ratification are exchanged.

26. Either Contracting Party may denounce this agreement in writing to the _____. Denunciation shall take effect six months following the date on which the notification is received by the _____.

In witness whereof the undersigned, being duly authorized thereto by the respective Governments, have signed this treaty.

Annex II

Recommendations on the treatment of foreign prisoners

1. The allocation of a foreign prisoner to a prison establishment should not be effected on the grounds of his nationality alone.

2. Foreign prisoners should have the same access as national prisoners to education, work and vocational training.

3. Foreign prisoners should in principle be eligible for measures alternative to imprisonment, as well as for prison leave and other authorized exits from prison according to the same principles as nationals.

4. Foreign prisoners should be informed promptly after reception into a prison, in a language which they understand and generally in writing, of the main features of the prison regime, including relevant rules and regulations.

5. The religious precepts and customs of foreign prisoners should be respected.

6. Foreign prisoners should be informed without delay of their right to request contacts with their consular authorities, as well as of any other relevant information regarding their status. If a foreign prisoner wishes to receive assistance from a diplomatic or consular authority, the latter should be contacted promptly.

7. Foreign prisoners should be given proper assistance, in a language they can understand, when dealing with medical or programme staff and in such matters as complaints, special accommodation, special diets and religious representation and counselling.

8. Contacts of foreign prisoners with families and community agencies should be facilitated, by providing all necessary opportunities for visits and correspondence, with the consent of the prisoner. Humanitarian international organizations, such as the International Committee of the Red Cross, should be given the opportunity to assist foreign prisoners.

9. The conclusion of bilateral and multilateral agreements on supervision of and assistance to offenders given suspended sentences or granted parole could further contribute to the solution of the problems faced by foreign offenders.

Annex II. Flowchart showing the procedure under the Model Agreement on the Transfer of Foreign Prisoners

Request
Either administering State or sentencing State
[para. 4]

Transfer conditions
Nationality or residence, dual criminality, final judgment, six months remaining to be served or indeterminate sentence. [paras. 1, 3, 10, 11]

Administering State consent
[para. 5]

Prisoner consent
The consent must be informed, given by a person capable of understanding the consequences of doing so and the administering State must be given the opportunity to verify it.
[paras. 5-7, 9]

Recognition of sentence
The administering State can opt to either convert the sentence or continue to enforce the sentence imposed by the sentencing State with the option of limited adaptation. [paras. 14-16]

Enforcement of sentence
The enforcement of the sentence must be governed by the law of the administering State.
[para. 21]

Pardon, commutation, amnesty
Both the sentencing and the administering State are competent to grant pardon and amnesty.
[para. 22]

Review
The administering State is bound by the findings as to the facts insofar as they appear from the judgment imposed in the sentencing State. Thus, the sentencing State has the sole competence for a review of the sentence. [para. 17]

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