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Repository Citation

Michael Plachta, *Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective*, 53 La. L. Rev. (1993)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol53/iss4/3>

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*Michael Plachta**

I. INTRODUCTION

Due to the fact that some international agreements are primarily national in character, their benefits are not "felt" directly by any particular citizen, but rather by the public in general. This is the case with treaties of peace and extradition. Other agreements, although beneficial to the nation as a whole, operate primarily through individuals, who serve as their direct beneficiaries. A prisoner transfer treaty is an unequal mixture of the two, with the individual benefit component far outweighing the public benefit component.

The United States Senate report accompanying the implementing legislation proclaimed that "this transfer of prisoners is a part of American concern about human rights, because it provides an opportunity to improve the status of the prisoners who come under it."¹

Since the society into which the offender is to be transferred is most probably the society in which he will later reside and into which he must be reintegrated, it would seem that the enforcing state has the greatest interest in the rehabilitation of the offender. Accordingly, the law of that state regarding the conduct and quality of the imprisonment, parole, and probation should be applied.

In general terms, the concern for the transferee is a humanitarian concern. It is the concern that he has choice, to some extent, as to where and in what sort of prison environment he serves his sentence. It is also the concern that the inmate can be given an opportunity to rehabilitate himself in an environment which he assumes is more conducive to such a goal. It is true, however, that the choice to be transferred is not entirely in the inmate's hands. This choice requires the approval of both the sentencing and enforcing states, as well as that of the province (state) to which the inmate is transferring, if he is going to a provincial (state) institution.

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1. S. Rep. No. 435, 95th Congress, 1st Sess. 10 (1977).

This study is aimed at discussing human rights issues arising in the context of a prisoner transfer scheme, that is, to examine to what extent the substantive and formal conditions imposed upon this form of international cooperation in criminal matters are consistent with humanitarian and rehabilitative goals of the transfer. Undoubtedly, the prisoner's consent is of paramount importance. And yet some other issues must not be overlooked, such as the scope of persons eligible for transfer. The question arises as to whether an offender may request his transfer to the country of his domicile (residence) or rather to the state of his citizenship. Furthermore, the procedure of transfer should not be viewed in merely technical terms as another way of rendition of fugitives. Instead, these proceedings will be analyzed in the light of a plea for procedural safeguards that ought to be granted to the transferee. Finally, some effects of transfer of vital significance to the offender also will be discussed.

The comparative analysis referred to in this study is based on both international instruments of prisoner transfer and the domestic legislation of several countries.² The set of the former instruments includes all multilateral conventions to that effect,³ the parallel legislation among the Nordic countries,⁴ and the vast majority of bilateral treaties, notably

2. See the following countries: Austria—Federal Law on Extradition and Legal Assistance in Criminal Matters, Dec. 4, 1978, BGBl No. 529/1979 [hereinafter ARHG]; Canada—Transfer of Offenders Act 1978; France—Code of Criminal Procedure, Article 713(1) to (8), as amended by Law of 1984; Germany—Law on International Legal Assistance in Criminal Matters, Dec. 23, 1982, BGBl I No. 57/1982 [hereinafter IRG]; The Netherlands—Law on the Transfer of Enforcement of Criminal Judgments, Sept. 10, 1986, Staatsblad No. 464/1986; Rumania—Code of Criminal Procedure, Articles 519 to 521; Switzerland—Law on International Legal Assistance in Criminal Matters, Mar. 20, 1981, Sammlung Eidgenössischer Gesetze 1982, p. 846; Turkey—Law No. 3002, May 8, 1984; United Kingdom—Repatriation of Prisoners Act 1984; United States—18 U.S.C. §§ 4100-4115 (1976).

3. See the Riyadh Arab Agreement on Judicial Cooperation of Apr. 6, 1983 [hereinafter the Arab Convention]; the Convention on the Transfer of Persons Sentenced to Imprisonment to Their Home Countries to Serve Their Sentence of May 19, 1978 [hereinafter the Berlin Convention]; the European Convention on the International Validity of Criminal Judgments of 1970, E.T.S. No. 70 [hereinafter the 1970 European Convention]; the Council of Europe Convention on the Transfer of Sentenced Persons of 1983, E.T.S. No. 112 [hereinafter the Council of Europe Convention]; the Benelux Convention on the Enforcement of Judicial Judgments in Criminal Matters of 1968 [hereinafter the Benelux Convention]; the Commonwealth Scheme for the Transfer of Convicted Offenders of 1986 [hereinafter the Commonwealth Scheme].

4. See the following laws enacted in the Nordic countries: Denmark—Law No. 214, May 3, 1963; Finland—Law No. 326, June 20, 1963; Iceland—Law No. 69, Dec. 12, 1963; Norway—Law of Nov. 15, 1963; Sweden—Law No. 193, May 22, 1963 (SFS 1963:193).

those concluded by the United States,⁵ Canada,⁶ Thailand,⁷ Greece,⁸ France with African countries,⁹ Poland with developing countries,¹⁰ Spain with Latin American states,¹¹ as well as those between Eastern European and Western countries.¹² Two draft agreements are also taken into consideration.¹³

II. SCOPE OF PERSONS ELIGIBLE FOR TRANSFER

The purpose of a transfer scheme is to enable prisoners to be returned to the country with which they have genuine ties—whether ties of nationality or of long residence strengthened by family or social ties. Determining which prisoners should be entitled to be repatriated with

5. See the United States prisoner transfer treaties concluded with the following countries: Mexico—Nov. 25, 1976, T.I.A.S. No. 8718; Canada—Mar. 2, 1977, T.I.A.S. No. 9552; Bolivia—Feb. 10, 1978, T.I.A.S. No. 9219; Peru—July 6, 1979, T.I.A.S. No. 9784; Panama—Jan. 11, 1979, T.I.A.S. No. 9787; Turkey—June 7, 1979, T.I.A.S. No. 9892; Thailand—Sen. Treaty Doc. No. 98-8, 98th Cong., 1st Sess 1 (1983); France—Jan. 25, 1983, T.I.A.S. No. 10823.

6. See the Canadian prisoner transfer treaties concluded with the following countries: United States—Mar. 2, 1977, T.S. 1978, No. 12; Mexico—Nov. 22, 1977, T.S. 1979, No. 3; France—Feb. 9, 1979; Bolivia—Mar. 6, 1980, T.S. 1985, No. 4; Peru—Apr. 22, 1980, T.S. 1980, No. 15; Thailand—Jan. 5, 1983.

7. See the Thai treaties concluded with the following countries: United States—Oct. 29, 1982; Canada—Jan. 5, 1983; France—Mar. 26, 1983; Spain—Dec. 7, 1983; Italy—Feb. 28, 1984; Portugal—Apr. 1, 1985; Sweden—Sept. 26, 1989; the United Kingdom—Jan. 22, 1990.

8. See the Greek-Egyptian treaty of Dec. 22, 1986, *Journal of Laws (Greece)*, 1988, No. 58.

9. See the French treaties concluded with the following African countries: Mauritania—*Journal Officiel [hereinafter J.O.]* 1962, at 1330; Ivory Coast—J.O. 1962, at 1299; Upper Volta—J.O. 1962, at 1311; Niger—J.O. 1962, at 1299; Mali—J.O. 1964, at 6129; Togo—J.O. 1964, at 4990; Gabon—J.O. 1965, at 1724; Central Africa—J.O. 1967, at 4916; Madagascar—J.O. 1975, at 7712; Cameroon—J.O. 1975, at 12903; Senegal—J.O. 1976, at 6260; Benin—J.O. 1978, at 261; Chad—J.O. 1978, at 1925; Congo—J.O. 1982, at 516; Morocco—J.O. 1986, at 650; Djibouti—September 27, 1986.

10. See the Polish treaties with the following countries: Iraq—*Dziennik Ustaw, Journal of Law, [hereinafter Dz.U.]* 1989, No. 70; Syria—Dz.U. 1986, No. 37; Libya—Dz.U. 1987, No. 13; North Korea—Dz.U. 1987, No. 24.

11. See the Spanish treaties with Argentina—BOCG III(C) 1980, No. 178; Mexico—BOCG III(C) 1987, No. 160; and Peru—BOE 1986, No. 186.

12. See the Polish treaties with Austria—Apr. 19, 1990, and Turkey—Jan. 9, 1989; the Hungarian treaties with Austria—May 6, 1985, Portugal—Oct. 21, 1988, Spain—Sept. 28, 1987, and Turkey—Sept. 5, 1986; and the Yugoslav treaties with Austria—Feb. 1, 1982, and Turkey—June 22, 1989.

13. See the Model Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence, elaborated by the ILA International Criminal Law Committee; see The International Law Association, Report of the Sixtieth Conference, Montreal 1982, 377ff. See also the United Nations Model Agreement on the Transfer of Foreign Offenders, A/CONF. 121/22, 57-60.

a given country by reason of their connection with it is a matter which at first looks deceptively simple. On closer inspection the determination is complicated by the special features of domestic nationality and immigration law in the various countries as reflected in international treaties and implementing legislation.

A review of international instruments of prisoner transfer reveals the four tests used in them to define the scope of persons eligible for transfer:

- (1) nationality test;
- (2) limited nationality test;
- (3) hybrid (nationality or domicile) test; and
- (4) domicile (residence) test.

However, only the first two tests are of great significance in treaty practice.

Two multilateral conventions adopt the nationality test without placing any restrictions on it, i.e., the 1983 Council of Europe Convention in Article 3(1)(a) and the Arab Convention in Article 58. The nationality test is adopted in at least thirty-eight of the more than fifty bilateral treaties under review, i.e., seventy-six percent. However, if we take into account another eleven treaties, in which the limited nationality test is applied, we can conclude that all but one treaty bases the criterion of a prisoner's eligibility for transfer on his nationality, even though the scope of its application varies. It may be said, therefore, that a prisoner's nationality of a country to which he is to be transferred has become the standard criterion in prisoner transfer schemes.

Unlike the nationality test in its basic and most common form, the domicile (or residence) test underlies the significance of substantive and meritorious qualifications based on a prisoner's social, family, and professional ties with the enforcing state. These considerations, as well as a prisoner's roots in a country, which are established through longer residence therein, rather than his nationality, should be decisive in determining the country in which he should serve his sentence. Since the fundamental objectives of the transfer of sentenced persons are to ease prison tensions and the problems experienced by foreigners and to contribute to a prisoner's social rehabilitation, it is the most familiar and closest environment for serving a sentence that should be sought rather than the state which issued the prisoner's passport.

The rationale behind prisoner transfer implies that not only foreign prisoners are eligible for outward transfer, and nationals of the enforcing state are eligible for inward transfer, but also a sentencing country's own citizens may have valid reasons to request their transfer to another country. Therefore, I do not share the opinion that a substantial argument can be made to the effect that a national or resident of the sentencing state should not be eligible under a prisoner transfer treaty

to serve his sentence in a foreign country.¹⁴ It is not convincing that diplomatic problems would arise from such transfer.

In addition, the frequent, albeit far from universal, practice of refusing to surrender a country's own nationals for extradition cannot be considered among the possible limitations of a prisoner transfer treaty. Penal transfer obviously addresses, in the majority of cases, enforcement by the prisoner's native country. Since the practice of non-extradition of nationals is usually justified in terms of distrust of the criminal justice systems of other states, non-enforcement for nationals would be clearly an undesirable limitation to place on such a treaty and, in fact, would render it virtually useless.

It should be borne in mind, however, that the nationality test has one great disadvantage. It is conceivable that a landed immigrant or permanent resident who has built up considerable ties with his new country might run afoul of the law while abroad. Then, by the provisions of treaties and conventions based on his formal qualification, such an individual is not eligible for transfer to the country in which he is domiciled in order to serve his sentence close to friends and relatives in an environment which is more familiar and beneficial to him.

An argument that such persons are not entitled to diplomatic protection abroad under traditional international law and practice does not address the very issue and idea behind the prisoner transfer scheme. Thus, for example, a permanent resident of the United States who has declared his or her intention to become a citizen, but has not yet been sworn as a citizen, and who is convicted of an offense while vacationing abroad is ineligible for transfer to the United States. This exclusion could be the basis of a challenge to the constitutionality of the relevant treaty and implementing statute on equal protection grounds.¹⁵ The exclusion is also in contravention of the underlying purposes of the treaties and domestic legislation.

Therefore the domicile (residence) test offers a better and more flexible solution. First and foremost, it implies that the nationality of the convicted person has not the same paramount importance as in extradition matters. For the purposes of a prisoner transfer treaty, the basic consideration is that, whatever the offender's nationality, the judg-

14. Gregory Gelfand, *International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty*, 64 B.U. L. Rev. 600 (1984). However, the author is willing to allow the transfer of nationals of the sentencing state, if any, only under special circumstances delineated in a treaty. *Id.*

15. M. Cherif Bassiouni, *Transfer Between the United States and Mexico and the United States and Canada*, in Vol. II *International Criminal Law* 244 (M. Cherif Bassiouni, ed., 1986). The narrowness of the class of persons who can be transferred under the treaties signed by Canada is also criticized in that country. See Allan J. Nazarevich, *The Transfer of Offenders Act and Related Treaties: An Analysis*, 4 Crim. Rep. 226 (1978).

ment shall not only be enforced in the state which rendered it, but also where it can most advantageously be done. Indirectly, nationality may be relevant to the place of enforcement. For example, if the convicted person cannot be extradited because he is a national of the requested state, enforcement in that state of the judgment passed abroad is sometimes the only way justice can be done. At the same time, the enforcement of a judgment in a familiar milieu to the offender is more likely to facilitate his social rehabilitation.

The 1970 European Convention on the International Validity of Criminal Judgments expressed this idea. Under this Convention, a prisoner is eligible for transfer to another state to serve his sentence there only if he is "ordinarily resident" in that country (Article 5(a)) and that country is the "state of origin" of the sentenced person (Article 5(d)). In this context, "state of origin," irrespective of interpretative problems it may raise, does not necessarily mean the state of which the convicted person is a national. It can denote, for example, that state in which the prisoner has passed the greater part of his life, and in consequence, with whose way of life and general conditions he is most familiar.¹⁶ The same wording was retained in the International Law Association Model Convention on Expatriation of Accused Persons for Trial and Sentence and in one bilateral treaty.¹⁷ Also the Benelux Convention on the Enforcement of Criminal Judgments of 1968 seems to be based on the domicile (residence) test.

As far as domestic legislation is concerned, the domicile (residence) test is adopted in all three modern comprehensive laws on international legal cooperation (assistance) in criminal matters, namely in Austria, Switzerland, and Germany. However, unlike the Austrian ARHG and German IRG, the Swiss IRSG adopts this test for both inward and outward transfers, whereas the Austrian and German statutes limit the scope of their application to outward transfers only. The German IRG, for instance, provides that a foreigner convicted and incarcerated in German territory may be transferred to a foreign state if he is domiciled or has his residence there, if he is staying there, or if an enforcement in that state is in the interest of the person convicted or in the public interest (Section 71(1)). At the same time, a German citizen may be transferred abroad if he has his domicile or residence in a foreign state or is staying there (Section 71(2)).

Similarly, under the Austrian ARHG, an Austrian national is not eligible for transfer to a foreign state unless he has his domicile or residence there or has been found there (Section 76(3)(1)). It is note-

16. Explanatory Report on the European Convention on the International Validity of Criminal Judgments, Strasbourg 32 (1970).

17. See Spain-Denmark, Feb. 3, 1972 (BOE 1973, No. 99), Article 5(a) and (d).

worthy that the Swiss IRSG offers the broadest and most flexible solution. The only criterion for the prisoner's eligibility for inward transfer is his permanent residence in Switzerland or criminal proceedings pending against him in that country (Article 94 (1)(a)), while a person sentenced in Switzerland, whether a Swiss national or not, may be transferred to a foreign state if there are good reasons to expect that the transfer will contribute to a better social rehabilitation of that person (Article 100).

III. CONSENT OF THE PRISONER

A. *Rationale Behind the Requirement of Consent to Transfer*

A problem arises within the framework of prisoner transfer and reciprocal enforcement of criminal judgments concerning the role of the individual. The underlying but central thrust of such a concept is a humanitarian attempt to assist offenders in readapting to society. Individuals, not states, are primarily benefitted. Difficulties could arise where the sentencing state and the enforcing state agree to transfer an alien to his home country, but, for a valid reason, the prisoner refuses to be returned. Similar problems might arise where the sentencing state and the enforcing state refuse to recognize an agreement which provides for the return of the convicted person. Consideration of this problem may be tempered by the knowledge that individuals have always indirectly held certain rights in the international community. When an individual is harmed by another state, the state of the victim's nationality has a customary duty to champion his cause.¹⁸

The recent tendency, particularly in international criminal law, has been to extend the scope of public international law to cover matters concerning the individual. The Universal Declaration on Human Rights and the European Convention on Human Rights have bestowed a new status on individuals in the eyes of international law. The individual has become responsible for his acts under certain circumstances. Similarly, the individual has the status to complain to an international body that his rights have been violated.¹⁹ The emergence of humanitarian international law gave rise to a new legal status for the individual, thus

18. Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Research in International Law of the Harvard Law School, 23 Am. J. Int'l L. 1929, Suppl., 133.

19. Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 4 Brit. J. Int'l Stud. 1-19 (1978). See bibliography note on the status of individuals in international law by Louis B. Sohn & Thomas Buergenthal, International Protection of Human Rights, 19-21 (1973).

placing some limitations on the power of the respective sovereigns.²⁰

To require the prisoner's consent may, at first, seem a surprising conclusion since deportation and extradition, which have some analogy to transfer, obviously do not require the consent of the person concerned. It should be borne in mind that the differences between deportation and extradition, on the one hand, and transfer, on the other, are in this respect more significant than the similarities. Deportation and extradition are essentially acts of a state carried out in the public interest. Occasionally, they may coincide with the wishes of the person concerned; but more often, in the nature of the situation, they will run contrary to them. The exercise of both procedures is justified in the public interest. In the case of deportation, public interest justifies ridding the country of undesirable persons who have entered it and have no right to remain in it. In the case of extradition, the international public interest is in seeing fugitive criminals brought to justice.

Comparable considerations do not apply to the transfer of prisoners. Although there are significant arguments based on public interest in favour of prisoners serving sentences in their own countries, the public interest is not seriously damaged if an individual prisoner of overseas origin serves his sentence in that country. Indeed, that has always been the normal expectation of the courts and of offenders. The offender's consent, widely acknowledged as an integral part of the transfer of prisoners concept, is predicated on two bases. The first stems from the humanitarian purpose of the treaties. As was rightly noted by the Judiciary Committee of the U.S. Congress, "incarceration in one's own country is severe enough punishment. Service of a custodial term in a foreign jail creates special hardships upon the individual offender, and his family."²¹

To the extent that incarceration in the offender's own nation would promote rehabilitation, transfer would further the interests of the offender by hastening reintegration into society. Only voluntary transfer, however, would help achieve this goal. Since an important objective of transfer is to further the interests of the prisoner (with regard to treatment in prison and resettlement within his own community), it would be unsound in principle, and indeed anomalous, to force transfer upon an unwilling prisoner. The humanitarian concern for the inmate is the concern allowing him to have the choice—to some extent—as to where and in what sort of prison environment he serves his sentence. It is also the concern that the inmate can be given the opportunity to re-

20. M. Cherif Bassiouni, *International Extradition and World Public Order* 2 (1974); Otto Lagodny, *Die Rechtsstellung des Auszulieferenden in der Bundesrepublik Deutschland* 35 (1987).

21. H.R. Rep. No. 95-720, 95th Cong., 1st Sess. 26 (1977).

habilitate himself in an environment which he assumes to be more conducive to such a goal. It is true, however, that the choice to be transferred is not entirely in the inmate's hands but requires the approval of both the transferring and the receiving (administering) state, as well as that of the province to which the inmate is transferred, if he is going to a provincial institution.²²

The second rationale for requiring the offender's consent to a transfer is to insulate the transfer from constitutional attack. In deciding whether to consent to transfer, the offender must weigh competing considerations. It is worth stressing that many prisoners, in deciding whether to accept a transfer, will have some very difficult choices to make. Although they may find themselves in much better conditions if they return home to serve the remainder of their sentences, they will also return to face sentences of lengths of which they can be fairly certain. Normally, they will have a fairly clear idea of how long they will spend in prison. However, in many other countries where people will be serving sentences, there are irregular amnesties, and people may be freed on the whim of an individual. So they will have to gamble, as it were, on the likelihood of getting a fairly early release from very bad conditions as opposed to serving a slightly longer sentence in better conditions.

Obviously, one of the factors that will be important to the prisoners is to know not only whether they will, on return, have to serve the remainder of the sentence for the offense of which they have been convicted abroad but also whether they will face further, perhaps more serious, charges. These may be charges connected with the offense for which they have been convicted abroad and for which they may feel they already have been sufficiently sentenced. There are a number of situations one can see in which it would be important for the prisoner to have access to such information.²³

Many of the reasons an offender would desire a transfer are obvious. As noted, incarceration in one's own nation facilitates contact with family, friends, and legal counsel. Furthermore, rehabilitation may be enhanced within an institution in which an offender can obtain suitable vocational training and education in his or her own language and culture. Possibilities of work release and arrangements for post-release employment are greater where contact with prospective employers is possible. The possibility of discrimination against an offender because of "foreign" status would also be reduced.

Despite all of these reasons, however, an offender may opt to remain incarcerated in the foreign state. The offender may have family members

22. See, e.g., the Canadian Transfer of Offenders Act 1978, § 6(2); the United States-Canadian treaty, Article III(5); the Canadian-Mexican treaty, Article 4(6).

23. House of Lords, Hansard, Mar. 5, 1984, col. 50 (Lord Melchett).

or substantial economic interests and assets in that nation and thus may choose to serve the sentence there instead of returning to the state of his nationality. Moreover, correctional institutions in some countries permit conjugal visits, provide opportunities for in-prison business, and allow prisoners to abstain from prison labor.²⁴ For offenders with sufficient and available resources, spacious and comfortable cells, good food, and even fellow-prisoner servants are available.²⁵ In addition, such considerations as possible prosecution for offenses either associated with the crime for which the offender was incarcerated or for other offenses may deter the individual from returning to his home country.²⁶

It should not, therefore, be thought that, in all cases, prisoners want to be repatriated.²⁷ It should be borne in mind that the social consequences of conviction ("stigmatization") and the service of the custodial sentence in a prisoner's own country are much more severe than those produced by a notification coming from a foreign state.²⁸ Finally, an innocent person mistakenly apprehended for the possession of narcotics, which may even have been planted on him, and subsequently convicted on the basis of a torture-won confession may want to gather new evidence in order to challenge his conviction through re-opening the proceedings, re-trying the case, or bringing an extraordinary appeal against a judgment which has become final. It is conceivable that some offenders might resist transfer even when the transfer is in their own best interests. Even so, if abuses are to be avoided and a system established for humanitarian ends rather than government convenience, it is vital that transfer should be dependent on prisoner consent.

B. Possible Exceptions to and Arguments Against the Prisoner Consent Requirement

The more similarity there is between the criminal systems, traditions, and policies of the cooperating states, the less reason there might be to afford the person concerned an enforceable right to challenge a

24. On the situation in Mexican prisons, see *U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations* (pt. II), 94th Cong., 1st and 2nd Sess. 39 (1975-1976).

25. See *supra* note 24.

26. Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 *Iowa L. Rev.* 298 (1979).

27. House of Lords, Hansard, Dec. 21, 1983, col. 768 (Baroness Macleod of Borve).

28. Johann Ungern-Sternberg, *Verfolgungs- und Vollstreckungshindernisse als Rechtsfolge von Strafverfolgungersuchen*, 94 *ZStW* 89 (1982).

decision to transfer his case or sentence abroad.²⁹ If, however, the standards of justice and the criminal policies vary considerably from one state to the other, a fact which cannot simply be ignored, the only way to make the interstate cooperation possible in such cases is by hiding the fundamental differences under the cover of the consent of the person concerned, however questionable it may be that persons may consent to waive rights and freedoms to which they normally would have been entitled.

Although there seems to be consensus as to the rights and active role of an individual (a "subject" instead of an "object") in international criminal law as well as to the fact that his will and interests must not be ignored, these issues still raise controversies concerning the scope of legal relevancy and validity of his statement of consent. It is very much doubtful whether full binding force can be attributed to his consent, irrespective of the form of international cooperation in criminal matters. It is not unthinkable that the offender's veto might be detrimental to vital interests of criminal justice involved in a particular form of that cooperation. An offender must not, therefore, withhold his consent as long as his veto would inevitably lead to his unpunishability.³⁰ By the same token, the prisoner's consent should not be required in cases where his refusal would completely preclude the sanction from being enforced in either country. Such a situation may take place where an offender, after having been sentenced to imprisonment in the state of *loci delicti commissi*, managed to leave that territory and return to his home country. It seems reasonable, then, to expect that the consent of the defendant has no constitutive significance for the validity of the transfer; instead, the defendant should have a right to be heard and to have his opinion taken into account.³¹ As early as 1885, it was suggested that a "right of option" (*droit d'option*) should be guaranteed in an international treaty to a prisoner before he is transferred to another state, for he may have important reasons to serve his term in the sentencing state.³²

Nevertheless, it is controversial whether a concept of a "tripartite agreement" can validly be used in the context of prisoner transfer. It

29. *Expanding Scope of Extradition and Judicial Assistance and Cooperation in Penal Matters*, in *New Horizons in International Criminal Law*, 79, 82, International Institute of Higher Studies in Criminal Sciences (1985).

30. Some restrictions must be put on the offender's right to choose between the transfer of criminal proceedings and the transfer of penal sanctions. On the "droit d'option," see Peter Polt, *The Treatment of Foreigners in the Hungarian Criminal Justice System*, in *Papers on Crime Policy II*, HEUNI 164 (1986); Robert Linke, *Das neue Recht der Internationalen Rechtshilfe in Strafsachen*, 96 ZStW 594 (1984).

31. Thèo Vogler, General Report, 55 RIDP, No. 1-2, 50 (1984).

32. Edward Brusa, Report presented at the Third International Penal and Penitentiary Congress in Rome, *Actes du Congrès pénitentiaire international*, Rome 1887, vol. I, 467.

could be argued that the prisoner's consent should not be underestimated, as compared with that given by the states concerned, since the transfer is dependent on the consent of both the sentencing and enforcing states as well as on that of the prisoner.³³ On the other hand, it must not be ignored that a transfer is effected on the basis of an agreement between these states, provided that the requirements inserted into an international treaty and domestic law are met, e.g., that a prisoner consents to his transfer. It is, therefore, misleading to refer to individual transfer agreements as "tripartite agreements," because the prisoner himself cannot be a party in international relations. His consent is of minor significance in comparison with the sovereign state's agreement.³⁴

The concept of a "tripartite agreement" as applied to prisoner transfer would create a departure from the most fundamental principles underlying all forms of international cooperation in criminal matters, with no valid reason.³⁵ Since a transfer agreement is an international instrument, the only subjects with the authority to make a decision are the sovereign states, which have to agree on the means, requirements, and circumstances for such cooperation. Although the underlying principle of the prisoner transfer as adopted in the vast majority of bilateral treaties is the tripartite consent of the states concerned and the prisoner, these instruments cannot be regarded as tripartite (individual) agreements, as only states are parties to international treaties.

The opponents of the idea of the prisoner's consent consider it an unprecedented requirement and a "strange body" in the system of law governing international legal assistance.³⁶ The main arguments against this idea are threefold:

- (1) The general requirement of the prisoner's consent is undesirable from a practical point of view as it is detrimental to the whole prisoner transfer scheme.³⁷ Since any transfer might be stopped by an offender, this form of international cooperation would be put in jeopardy. Furthermore, since both states con-

33. The resolution of the European Preparatory Meeting does not distinguish between the agreement of the states concerned and the consent of the prisoner. See Report of the European Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders, A/CONF. 121/RPM/1, para. 100 (June 6-10, 1983).

34. Helmut Epp, Transfer of Prisoners: The European Convention, in Vol. II International Criminal Law 263 (M. Cherif Bassiouni, ed., 1986); *id.*, Der Ausländer im Strafvollzug, OJZ 1982, 121.

35. Peter Wilkitzki, Rechtshilfe durch Vollstreckung §§ 48ff, 71 IRG. Zur praktischen Anwendung des neuen Rechtsinstituts, JR 235 (1983).

36. Thèo Vogler, Zur Rechtshilfe durch Vollstreckung ausländischer Strafurteile, in Festschrift für H.H. Jescheck 1383 (Thèo Vogler, ed., 1985).

37. Friedrich Christian Schroeder, *Übertragung der Strafvollstreckung*, 96 ZStW 460 (1986).

cerned are entitled to grant amnesty and/or pardon, the reasons of criminal policy in either state may have an idle bearing on a prisoner's willingness to give or to withhold his consent.

(2) The consent of an offender has only internal and procedural significance in the framework of international legal assistance.³⁸

Unlike a simplified extradition, in the context of a prisoner transfer, the consent of the sentenced person does not exclude the *exequatur* proceedings and does not make them superfluous.³⁹

This argument is somewhat confusing, as the main issue in this framework is not that the prisoner's consent might create sufficient grounds for his transfer, even though the substantial requirements are not met, but rather an assumption that the prisoner should be entrusted with the right to withhold his consent, thereby avoiding a compulsory transfer against his will.

(3) The sentenced person is transferred in order to serve, or to continue serving, his sentence in his home country. As between a prisoner seeking transfer and the prison authorities of the sentencing state, transfer could be seen to be analogous with other discretionary acts of the authorities, such as transfer to another prison or early release on parole. Since these acts undertaken in the course of execution of penal sanctions are coercive measures which are being applied against the will of the person concerned, nobody can require his consent to justify their use.⁴⁰

Last, but not least, it is the enforcing state which is empowered to agree to the transfer, and its requirement was imposed in the interest of the protection of the sovereign, not the individual. Therefore, a prisoner may not benefit from the internationally recognized prohibition to enforce foreign penal judgments without the consent of the state concerned.⁴¹

The question arises as to whether there should be any exceptions to the rule that a transfer can take place only with the consent of the prisoner. The most obvious case in which the consent might be considered unnecessary is that where a deportation order has been made against the prisoner. Since he will be returned to his own country at the end of his sentence (normal practice where a prisoner is made the subject

38. Vogler, *supra* note 36, 1384.

39. Hans Heinrich Jescheck, Die Vollstreckung ausländischer Straferkenntnisse in der Bundesrepublik Deutschland, in *Festschrift für H. von Weber* 338 (1963).

40. Annemarie Hammerstein, Die Wirkung ausländischer Strafurteile im Inland 62, 279 (1964).

41. Judgment of the German Federal Constitutional Court, Mar. 22, 1983, 2 BvR 475/78, 63 BVerfGE, 363, 373 (1983).

of a deportation order), there are clearly grounds for arguing that he should go as soon as possible, provided that the sending state is satisfied that he will serve his full sentence.

On the other hand, there is a distinct difference between requiring someone to leave a country without any restriction on him after his departure and requiring him to serve a sentence in conditions which may be different, and perhaps worse, than those of anyone else sentenced to the same sentence for the same offense in the same country. Therefore, the normal consent requirement should apply, while recognizing that, in practice, there may be little if any issue here—if a prisoner knows that he is compelled to leave the country at the end of his sentence, he may be more inclined to seek early transfer. If, on the other hand, the consent requirement were to be dispensed with in cases where there was a susceptibility to deportation, a natural corollary would be an appeal procedure similar to that provided for deportation.

Another situation in which consent should not be necessary is the one where a visitor from abroad, who has been in the country for a very short time—perhaps as a tourist or student, has committed a crime serious enough to receive a custodial sentence. The arguments here, as in the case where a deportation order has been made, are fairly evenly balanced. But, if the consent of the prisoner is to be a normal precondition, there should be no exception. It is doubtful whether the time and expense involved in an unavoidable special appeal procedure could really be justified, especially since a prisoner who has no ties with this country is unlikely to withhold consent to transfer without good cause.

C. *Approaches to the Prisoner's Consent: A Comparative Overview*

The diversity of doctrinal views on the role of an individual within the framework of international cooperation in criminal matters is reflected in the variety of solutions adopted in international instruments of transfer. Generally, two models have been developed in this area. Under one system, the transfer is based on the consent of a prisoner, and this requirement is of utmost importance for various reasons. In the other model, the offender's consent is not mentioned among the conditions for transfer. Therefore, this model is based on mandatory transfer. Surprisingly enough, the latter system is adopted in the vast majority of multilateral conventions and uniform legislation, with only two out of the total of seven instruments following the former system.⁴²

42. Epp erroneously believes that only the 1970 European Convention and the Berlin Convention do not require the prisoner's consent. See Epp, *supra* note 34, at 264. The authors of the Explanatory Notes on the U.N. Model Agreement on the Transfer of Foreign Prisoners are also not correct in saying that the system of voluntary transfer is embodied in most regional arrangements. See A/CONF. 121/10, para. 14.

Those two are the 1983 Council of Europe Convention and the 1986 Commonwealth Scheme. At the same time, the proportion between bilateral treaties, which adopted the consent system and those which adopted the mandatory system, is inverse as compared to such proportion between multilateral conventions.

A review of international instruments and domestic legislation from historical perspective reveals a departure from a mandatory transfer, on the one hand, and a tendency towards making it dependent on the prisoner's consent, on the other. None of the multilateral agreements on the enforcement of foreign penal judgments and no domestic laws in the nineteenth century ever mentioned the consent of an offender. This attitude was still very common in the sixties. The two 1964 conventions and the 1970 Convention elaborated within the Council of Europe disregarded the consent of the person concerned. The same system was adopted in the uniform legislation of the Nordic countries in 1963 and in the 1968 Benelux Convention. Domestic laws, too, such as the 1965 Turkish Law on Enforcement of Sanctions and the 1969 Rumanian Code of Criminal Procedure, followed this pattern.

The first instrument which broke with that traditional ideology and introduced the prisoner's consent into international practice was the 1974 treaty between France and Cameroon.⁴³ However, another treaty proved to be more influential and to have a much greater bearing on the development of that idea in the international arena, that is the United States-Mexican Treaty on the Execution of Penal Sentences of 1976.⁴⁴ It was followed by the United States-Canadian treaty of 1977 and several agreements signed by each of these states with other countries. The requirement of the offender's consent is, therefore, a relatively new condition in the framework of prisoner transfer and has gained an understanding and broader acceptance in both treaty practice and domestic legislation over the last ten to fourteen years. The Turkish Law of 1965 ceased to have effect, and the new law of 1984 is based on the system of voluntary transfer.⁴⁵ All modern domestic legislation on international legal assistance, such as the American, Canadian, French, English, and Dutch laws, affirm the idea of the prisoner's consent.

It must, however, be borne in mind that there are still international instruments, both multilateral and bilateral, concluded in the late seventies and eighties which are based on mandatory transfer. This group includes the 1978 Berlin Convention and the 1983 Arab Convention, on the one hand, and some bilateral treaties, particularly those modeled

43. See the French-Cameroon treaty, Article 27.

44. See the United States-Mexico treaty, Article IV(2).

45. See Turkish Law No. 3002 of 1984, Article 3(1)(b).

after the 1970 European Convention⁴⁶ and the Berlin Convention, on the other. The Berlin Convention is clearly based on two grounds:

- (1) a belief that the transfer of penal judgments is an instrument for the prevention of possible conflicts of jurisdiction between states and an instrument of international cooperation in criminal matters, and, therefore, such an instrument should not depend on the offender's particular views; and
- (2) a general assumption that a transfer of the sentenced person to his home state is always more profitable for him than serving the sentence abroad.⁴⁷

The system of mandatory transfer was adopted in all the treaties concluded by Poland and the former G.D.R. with the developing countries. Interestingly enough, the treaties between Eastern European and Western countries adhere to the idea of consented transfer. As far as French agreements with African states are concerned, nearly one-third of them are based on the system of voluntary transfer. It is noteworthy that all French treaties concluded after February 1974 explicitly require the offender's consent.⁴⁸

The modern and overwhelming tendency toward making the prisoner transfer scheme dependent on the consent of the sentenced person can be traced within the International Association of Penal Law and the United Nations. Resolution IIIB of section four, adopted at the Ninth International Congress of Penal Law, mentioned the restricted role of an offender only in the context of extradition, while saying that, when it is possible either to extradite a convicted person to the sentencing state or to enforce the penalty in the state of residence, the person concerned should at least be heard before a decision is made.⁴⁹ Over a decade later, the participants to the Thirteenth Congress emphasized that as long as the offender is imprisoned in the sentencing state, such a transfer should be effected only with the prisoner's consent.⁵⁰

Similarly, Resolution Thirteen of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders allowed the transfer to take place in the prisoner's interest but without his

46. See the Spanish-Danish treaty of 1972.

47. Michael Plachta, *Transfer of Proceedings and Transfer of Prisoners: New Instruments of Cooperation in Criminal Matters among the Socialist Countries of Eastern Europe*, 3 Conn. J. Int'l L. 329 (1988).

48. See the French treaties with the following countries: Cameroon—Article 27; Benin—Article 72; Chad—Article 29; Morocco—Article 4(a); Djibouti—Article 4(d).

49. Ninth International Congress on Penal Law. Resolutions, The Hague 489 (1964).

50. XIII Congres International de Droit Penal. Resolutions, 56 Revue internationale de droit penal No. 3-4, 548 (1985).

consent,⁵¹ whereas the Model Agreement on the Transfer of Foreign Prisoners adopted at the Seventh Congress requires the indispensable consent of the prisoner for any transfer.⁵² It was argued that the requirement of consent ensures that transfers are not used as a method of expelling prisoners or as a means of disguised extradition.⁵³ However, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides that, if an extradition requested for purposes of enforcing a sentence is refused because the person sought is a national of the requested state, the enforcement of such a sentence may take place in the requested state even without the consent of an offender (Article 6(10)).

D. Obligation to Provide a Prisoner with Information: An Indispensable Constituent of His Consent

1. Solutions Adopted in International Instruments

Any sentenced person who may be eligible for transfer, especially those of foreign origin, should be informed of the possibilities as well as the requirements and the legal consequences of such a transfer. If all relevant information is not furnished to the prisoner, his consent cannot be considered to be knowingly and intelligently given. The drafters of the United Nations Model Agreement proposed that the offender be fully informed of the possible legal consequences of a transfer, in particular, whether he might be prosecuted because of other offenses committed before his transfer (Section I(6)). As this depends also on the domestic law of the enforcing state, that state should be involved in the information procedure.

Typically, a convention or treaty provides that a convicted offender to whom this instrument may apply shall be informed by competent authorities of the sentencing state of the substance of the agreement. However, only three multilateral conventions contain provisions to that effect. They are the Commonwealth Scheme, the 1983 Council of Europe Convention, and the Berlin Convention. The first imposes a duty on the sentencing state to furnish the enforcing state with any information

51. Resolution 13(1) reads as follows: "[Congress] urges Member States to consider the establishment of procedures whereby such transfers of offenders may be effected, recognizing that any such procedures can only be undertaken with the consent of both the sending and receiving countries and *either with the consent of the prisoner or in his interest.*" A/CONF. 87/14/Rev. 1 (emphasis added).

52. See Model Agreement, § I(5), A/CONF. 121/22, p. 58. The need for the consent of a prisoner as a precondition for transfer was emphasized at the European and Asian Preparatory Meetings, A/CONF. 121/RPM/1, para. 93, 100.

53. See Explanatory Notes on the Model Agreement, *supra* note 42, para. 14.

which that country may specify as required in all cases to enable it to inform the prisoner of the full consequences of transfer for him under the law of the sentencing state (Section 5(1)(g)).

The Berlin Convention is even more laconic at this point. Pursuant to Article 5(3), the convicted person shall be informed of the possibility of applying to either state for the formal request. This provision is extremely vague, as it fails to answer several basic questions: who should furnish the information to the person concerned; and when and how should this task be accomplished? Moreover, the Convention should also refer to an "accused" rather than merely a "convicted person" in order to make the respective provision applicable to the entire criminal proceedings.⁵⁴ It is conceivable that a foreign offender, having been informed of the possibility of being transferred to his home country, will not care to appeal the judgment and try instead to make the judgment valid and final as soon as possible and then seek a transfer. Regrettably, neither Polish⁵⁵ nor Russian⁵⁶ domestic legislation ensures that authorized, competent authorities furnish the information nor specify the way for doing so.

As far as bilateral treaties are concerned, nearly half of them oblige the sentencing state, or in some instances both states involved, to provide a foreign offender with all appropriate information specified therein.⁵⁷ Of thirteen bilateral treaties signed by the United States and Canada, six contain provisions to that effect.⁵⁸ Oddly enough, the "model treaty" between the United States and Mexico does not provide for such an obligation, whereas the duty to furnish information exists under other treaties concluded subsequently by Mexico.⁵⁹ All Thai treaties provide that either party may inform, or shall have the right to inform, an offender who is within the scope of the treaty of the substance of the respective agreement.⁶⁰ All but one Spanish treaty follow the same pattern.⁶¹

54. Plachta, *supra* note 47, at 332.

55. See Decree issued by the Minister of Justice and the Minister of National Defense, Apr. 16, 1980, Dziennik Urzędowy Ministerstwa Sprawiedliwości No. 3, item 11 (1980).

56. See Decree issued by the Presidium of the Supreme Council of the USSR, Aug. 10, 1979, Vedomosti Verchovnogo Soveta SSSR, No. 33, item 540 (1979).

57. See, e.g., the Greek-Egyptian treaty, Article 5.

58. See the United States and Canadian treaties with France—Articles 8 and XII, respectively, and Thailand—Article III(1) as well as the Canadian treaties with the United States—Article III(2), and Mexico—Article IV(1).

59. See the Mexican treaties with Canada—Article IV(1), and Spain—Article 6.

60. The wording of the Thai-Swedish treaty differs from other treaties in that it provides that either party shall endeavour to inform an offender, Article IV(1).

61. See the Spanish treaties with Argentina—Article 5(1); Peru—Article 5(2); and Mexico—Article 6.

It is noteworthy that the obligation to keep foreign offenders informed of the substance of prisoner transfer agreements is provided for in the vast majority of treaties concluded by the Eastern European countries with both Western states⁶² and developing countries.⁶³ Interestingly enough, in one treaty, the emphasis has been shifted from the obligation of a state to furnish the relevant information, to the right of a prisoner to be informed of the possibilities under the agreement.⁶⁴ It should be noted that only two treaties signed by France with African countries impose such a duty on either state involved.⁶⁵

2. *Recommendation No. R(84)11 of the Committee of Ministers of the Council of Europe*

To make a prisoner aware of the possibilities for transfer offered by the 1983 Convention and the legal consequences which a transfer to his home country would have, Article 4(1) provides that any sentenced person who may be eligible shall be informed, by the sentencing state, of the convention's substance. The information will enable him to decide whether to express an interest in being transferred.

Recommendation R(84)11—which was adopted by the Committee of Ministers on June 21, 1984—is intended to assist contracting states in fulfilling their obligations under Article 4(1) of the Convention. Considering it essential to provide the information on the Convention's substance in a language which the prisoner understands, the Recommendation sets out a standard text to be used for conveying that information to potential transferees. Governments are advised to provide an authoritative translation of this standard text in their official language or languages, taking into account any reservations or declarations to the Convention of which potential transferees would need to be aware. They are to deposit the translation with the Secretary General of the Council of Europe who will forward copies of all the translations so received to each of the contracting states for use by their prison authorities.

The standard text annexed to the Recommendation gives a brief description of the transfer mechanism. In particular, it explains the conditions under which persons who have received a custodial sentence

62. See the Hungarian treaties with Austria—Article 2, Portugal—Article 4(1), and Turkey—Article 2; the Polish treaties with Austria—Article 3, and Turkey—Article 30; as well as the Yugoslav-Turkish treaty—Article 8(3).

63. See the Polish treaties with Libya—Article 43(3), and Syria—Article 51(3). See also treaties signed by the G.D.R. with Congo—Article 62(3), Angola—Article 47(3), and Rumania—Article 79(3).

64. See the Hungarian-Portuguese treaty—Article 4(1).

65. See the French treaties with Morocco—Article 5, and Djibouti—Article 5.

in a country other than their own may be transferred to their home country to serve the sentence there. The standard text gives answers to such questions as:

- Who has to agree to the transfer?
- Who may benefit from a transfer?
- What sentence would need to be served following a transfer?

In addition, it provides information on such matters as prosecution for other offenses, pardon, amnesty, commutation of sentence, review of the original judgment, termination of enforcement, and the transfer procedure.

The proposed exchange of translations will greatly facilitate the practical application of the Convention: it enables prison authorities in contracting states to inform foreign prisoners about the possibilities of transfer under the Convention without the need to translate this information into the prisoner's language. At the same time, the information contained in the standard text helps the prisoner to decide, with full knowledge of the legal consequences, whether he should express an interest in being transferred and, later on, whether he should consent to his transfer.

3. *Domestic Legislation*

Since there are countries that are willing to develop international cooperation in criminal matters on the basis of their domestic laws, even though they are not signatories to agreements, and since some multilateral conventions and bilateral treaties are silent on making foreign offenders aware of the possibilities under the prisoner transfer arrangements, one could reasonably expect that domestic legislation would specify an authority obliged to furnish the information and prescribe the procedure to be followed in such instances. The information is of particular importance where the transfer is to be commenced on the request of the sentenced person. Surprisingly enough, very few legal systems contain provisions to that effect.

Although none of the three comprehensive laws on international (legal) assistance in criminal matters, (the ARHG, the IRG, and the IRSG) impose such an obligation, they all provide for a hearing before a magistrate before the decision to transfer a prisoner to a foreign country is taken. The judge shall, therefore, inform the person concerned of the substance requirements and legal consequences of his transfer.⁶⁶

66. It should be noted, however, that the information on the substance and legal consequences of the transfer is of much less significance to the prisoner in the system, such as that under the Austrian ARHG, Section 76(8), where the role of the transferee is limited to being heard, as the transfer can be effected even without his consent and against his will.

It is the usual practice of the Dutch authorities to provide all foreign prisoners who are eligible for transfer with a booklet, in a language they understand, containing information on the procedure and conditions of the transfer.

Pursuant to the Canadian Transfer of Offenders Act 1978, the Solicitor General shall, on the request of a foreign offender, provide him with a copy of the treaty on the transfer of offenders entered into between Canada and the foreign state designated in the request (Section 20). Furthermore, Canada, desiring that the transfer procedure be carried out in a swift and efficient manner, concluded administrative arrangements on the transfer of sentenced persons with several countries—signatories of the 1983 Council of Europe Convention. Under these agreements, the Correctional Service of Canada is obligated to furnish the following documents to convicted foreign citizens to whom the Convention may apply:

- (1) standard text providing information on the Convention (see the preceding paragraph),
- (2) copy of the Convention,
- (3) copy of the Transfer of Offenders Act,
- (4) application for transfer form; and
- (5) any other document as may be prescribed by either party (Article 3(1) and Annex B).

A similar set of documents should be forwarded to Canadian citizens sentenced and incarcerated in foreign countries who may fall within the scope of the 1983 Convention (Article 4(1) and Annex D). Both Canada and the United States have developed a system of information booklets prepared by the Solicitor General and the Department of Justice, respectively, which are given over to Canadians and Americans incarcerated abroad. Such question and answer booklets contain information on the respective bilateral treaty and its operation, the operation of Canadian and United States parole laws, and the regulations of the Canadian and United States Federal Prison Systems. The United States booklets provide American prisoners in foreign countries with sufficient information to estimate the customary range of months they would serve in American prisons before release on parole.

The most exhaustive regulation of the matters relating to the “informative” aspects of the prisoner’s consent appears in the English Repatriation of Prisoners Act 1984. Under this Act, the Secretary of State shall not issue a warrant, other than one superseding an earlier warrant, unless he is satisfied that all reasonable steps have been taken to inform the prisoner in writing in his own language of the following:

- (a) of the substance, so far as it is relevant to the prisoner’s case, of the international arrangements in accordance with which it is proposed to transfer him;

- (b) of the effect in relation to the prisoner of the warrant which is proposed to issue in respect of him under this Act;
- (c) in the case of a transfer into the United Kingdom, of the effect in relation to the prisoner of the law relating to his detention under that warrant (including the effect of any enactment or instrument under which he may be released earlier than provided for by the terms of the warrant);
- (d) in the case of a transfer out of the United Kingdom, of the effect in relation to the prisoner of so much of the law of the country or territory to which he is to be transferred as has effect with respect to transfers under those arrangements; and
- (e) of the powers of the Secretary of State under section six of this Act (revocation of a warrant).⁶⁷

During the Parliamentary debates, it was emphasized that the prisoner's "consent" should truly mean consent.⁶⁸ This implies that a person who gives consent really knows all the material facts that he needs to know to make up his mind, whether he agrees or disagrees with the transfer. It was urged that express reference should be made to the effects of remission and parole on the length of the sentence the prisoner could expect to serve after transfer as well as details of his earliest possible release date, since these are perhaps the most crucial factors influencing a prisoner's decision to consent. But the Government argued that the wording of Section 1(4)(6) implied the effects of remission and parole on the length of the sentence anyway.⁶⁹ It was also considered important to inform the prisoner, prior to his consent, not only whether any warrants are outstanding against him, but whether any charges are to be brought against him. Where the governments are aware of further charges outstanding, they should normally and routinely inform the prisoner of them. It would require the government to take all reasonable steps to ascertain whether any charges are intended to be brought against him. The only way the courts could ever see that this was done would be to see that the Secretary of State had inquired of every police force that could do this. Such an operation would be, therefore, extremely difficult from technical and bureaucratic points of view.⁷⁰

It should be noted that the Home Office and the Foreign and Commonwealth Office produced a guidance leaflet which gives a brief outline of how British prisoners abroad may be able to transfer home

67. Repatriation of Prisoners Act 1984, § 1(4).

68. House of Lords, Hansard, Apr. 3, 1984, col. 622 (Lord Mishcon).

69. House of Lords, Hansard, Apr. 3, 1984, col. 623 (Lord Denning).

70. House of Lords, Hansard, Apr. 3, 1984, col. 629 (Lord Elton); col. 631 (Lord Lloyd of Kilgerran); col. 632 (Lord Elton).

to serve the rest of their sentences in a prison in the United Kingdom.⁷¹ Unlike the Canadian and American booklets, the leaflet gives only a short explanation of the arrangements to help British prisoners abroad and their relatives at home.

By providing offenders with counselling and with the various information booklets or leaflets they have prepared, the authorities of several states have found the optimal way of ensuring that the offender can make an informed decision. That the decision be an informed one is made only more important when it is borne in mind that there is no provision in either of the treaties or the domestic laws for the prisoner to transfer back to the sentencing state if he finds himself dissatisfied with his new prison environment. It would be optimal if the convicted person had the possibility of consulting independent counsel, that is, counsel not attached to the executive branch of the government, before giving his consent to a transfer.⁷²

Regrettably, in some countries, neither domestic legislation⁷³ nor the respective information booklets mention a right to counsel. There is some indication given that this role might be at least partially fulfilled by consular officers of the prisoner's country of residence.⁷⁴ However, the role of these officials will have to be limited to providing information to prospective transferees, because it is beyond their scope to provide legal counsel. By the same token, Justice or State Department attorneys, or officials of the ministry of justice or foreign affairs, respectively, will be less than satisfactory for this purpose because of a possible conflict of interest that may arise should the prisoner later challenge the validity of his waiver. Thus, domestic legislation should provide for private attorneys to be made available to those prisoners who are without independent access to counsel.

E. Verification of Consent

As the sentenced person's consent to his transfer 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, but that the enforcing state also should

71. British Prisoners Abroad: Can I Be Transferred Home?, Guidance Leaflet, Home Office and Foreign Commonwealth Office (London 1988).

72. See, e.g., 18 U.S.C. §§ 4108(c) and 4109 (1978).

73. See, e.g., the British Repatriation of Prisoners Act and the Canadian Transfer of Offenders Act.

74. See, e.g., the U.K. Information Leaflet, *supra* note 71, at Q. 11; Solicitor General of Canada, Treaty Between Canada and the United States of America on the Transfer of Offenders, at Pt. IV, Q. 2.

have an opportunity to verify that the consent is given in accordance with these conditions. The procedure of verification, along with other issues, such as the competent authority, should be agreed upon between the states concerned. The United Nations Model Agreement briefly states that the administering state should be given the opportunity to verify the free consent of the prisoner (Section 8).

Under the 1983 Council of Europe Convention, the sentencing state shall ensure that the sentenced person who is required to give consent to a transfer does so voluntarily and with full knowledge of the legal consequences thereof (Article 7). The procedure for giving such consent shall be governed by the law of the sentencing state. At the same time, the sentencing state shall afford the enforcing state an opportunity to verify, through a consular or other official agreed upon with the enforcing state, that the consent is given in accordance with these conditions. Provisions to that effect are also adopted in the 1986 Commonwealth Scheme (Section 8).

Oddly enough, of five French treaties with African countries which require the prisoner's consent, only one, that with Djibouti, provides for its verification.⁷⁵ Contrary to this, all but two bilateral treaties concluded by the United States and Canada with other countries emphasize the verification procedure.⁷⁶ Typically, these treaties specify that the sentencing country shall afford an opportunity to the enforcing country, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the enforcing country.⁷⁷ All Thai treaties follow this pattern. It is noteworthy that of over twenty bilateral treaties concluded by European countries, only those signed by Spain with Argentina, Peru, and Mexico provide for the procedure of verification. Except for the Hungarian-Portuguese treaty,⁷⁸ no treaty between Eastern European and Western countries contain provisions to that effect. Instead, they require that the minutes of the proceedings before the magistrate be appended to the request submitted by the sentencing state, which would confirm the prisoner's consent.⁷⁹

75. France-Djibouti, Article 8. It is noteworthy that this provision was literally retained from the 1983 Council of Europe Convention. Under the treaty between France and Morocco, the sentencing state is obliged to furnish a copy of a statement made by the magistrate, specifically demonstrating the consent given by the prisoner, Article 16.

76. Only the United States-Mexico and the Canada-France treaties do not regulate the verification procedure. Instead the latter provides that the consent of the sentenced person shall be in writing and shall be appended to the request for transfer, Article XXIV.

77. Only the American-French treaty specifies that the verifying officer shall be a consul of the enforcing state, Article 12(2).

78. Hungary-Portugal treaty, Article 14.

79. See, e.g., the Austrian treaties with Yugoslavia—Article 28(2), and Hungary—Article 24(2).

Surprisingly enough, the procedure of verification was adopted in very few European domestic legislation. It is not provided for in the Eastern European states, Nordic countries, France, nor the United Kingdom. Of the three comprehensive laws on international (legal) assistance in criminal matters, only the German IRG explicitly states that the transfer, both inward and outward, shall be effected only if the sentenced person, after being advised, consented to it and his consent has been inserted into the court records, or he consented to it before a consular officer who is empowered to authenticate expressions of will.⁸⁰ This regulation was retained by the Turkish Law No. 3002 of 1984.⁸¹ Similar procedure is provided for by the Dutch Law on the Transfer of Enforcement of Criminal Judgments. The consent is given at the hearing before the magistrate. The prisoner may be assisted by a counsel and a consular or diplomatic officer of his home country. A copy of the hearing record is furnished to the enforcing state.

Notwithstanding an absence of legislation governing the verification of consent, it is a usual practice of the Home Office that where a British citizen incarcerated abroad wishes to transfer to his home country, the Ministry of Justice of the sentencing state is requested to provide the Home Office with a written statement in English signed by the prisoner recording his consent and witnessed by the prisoner's lawyer, a local notary under arrangements made by the British consul, or by the consul himself.⁸²

Neither in the Canadian Transfer of Offenders Act, nor in the booklet is it provided that the fullness and voluntariness of the offender's consent to the transfer must be verified. This is unfortunate⁸³ as the Act purports to exhaust the procedure of transfer by its mandatory language: a Canadian offender "shall be dealt with in accordance with this Act" (Section 3). Except to the extent that the Solicitor General supervises the verification of the offender's consent before approving or disapproving a transfer, the Act does not contain a procedure designed to verify the consent of the prisoner, especially that given or refused on behalf of a minor. As no mention is made in Canadian bilateral treaties, the Act, or the Canadian booklet as to how the officer designated under these treaties is to satisfy himself that the consent is voluntary, it appears that Canada can take the word of the offender given before the verifying officer in a foreign country as verification of the prisoner's consent.⁸⁴

80. IRG, § 49(5) and 71(2).

81. Turkey: Law No. 3002 of May 8, 1984, Articles 3(1) and 11(1).

82. Information provided by Mr. G.J.O. Phillpotts, Home Office, Criminal Policy Department.

83. Sharon Williams, *Canadian Criminal Law: International and Transnational Aspects* 459 (1981).

84. Nazarevich, *supra* note 15, at 232.

It goes without saying that such a designated officer should be present at the verification proceedings carried out in that country if such procedure is intended to suffice as an attestation of the voluntariness of the offender's consent for Canadian purposes. Under the administrative arrangements concluded with several Western European countries to the 1983 Council of Europe Convention, the Correctional Service of Canada shall ensure that the foreign offender's consent is given voluntarily and with full knowledge of the consequences thereof (Article 3(8)). To that end, the applicant is asked to complete the prescribed form⁸⁵ as appended to the arrangement, and have it witnessed by a duly authorized officer. This measure does not in any way preclude a foreign country from verifying in its own manner the prisoner's consent.

The offender's consent must not be left to an administrative organ to be verified upon his discretionary request. The proof of consent by its very nature should be required automatically or else its verification may be overlooked or waived at the discretion of the designated authorities. Thus, the legislation must prevent the authorities' arbitrariness and susceptibility to abuse or corruption.

Consent is meaningless unless its verification by a judicial hearing is automatic. Verification upon the prisoner's request, in this context, bearing in mind the reach of his vulnerability to coercion, also would be inadequate. Finally, without a verification hearing before transfer, there is no sufficient basis for review of this aspect of the transfer process upon *habeas corpus* application to a court in the enforcing state where such a verification is not authorized or required by implementing legislation.

Given these considerations and the competing considerations facing an offender in the determination of whether to grant consent to transfer under the treaty and the necessity that any such consent meet consti-

85. See Annex "C": Verification of Consent to Transfer to (*foreign country*):

I, (*name of applicant*) being a person under sentence desirous of returning to (*foreign country*) to serve the remainder of my sentence certify that:

1. I have been advised in writing, of the legal consequences of a transfer to (*foreign country*); and

2. I understand and agree with the said consequences, namely that upon transfer, the completion of my sentence will be carried out in accordance with the laws and procedures of (*foreign country*).

I further certify that my consent to transfer is wholly voluntary and not the result of any promises, threats, coercion or other improper inducements.

I hereby consent to my transfer to (*foreign country*) to serve the remainder of my sentence.

Signature of Transfer Applicant

Signature of Witness

tutional standards for voluntariness, the United States Congress, in the treaty's implementing legislation, provided an intricate mechanism for the verification of an offender's consent to transfer.⁸⁶ The purpose of this procedure is to ensure that offenders are acquainted with the basic provisions of the treaty and do not consent on the basis of immediate pressures.

To minimize the litigation problems which may arise, it has been deemed desirable for the United States to verify the consent in each case and to have the verification procedure included in the implementing legislation.⁸⁷ The verification proceedings require that the offender personally appear before the verifying officer in the country in which the sentence was imposed. In cases of outward transfers, the verifying officer must be a United States magistrate or a judge of the United States as defined in Section 451 of Title 28, United States Code,⁸⁸ whereas the consent given by an American in the sentencing state shall be verified by a United States magistrate, or by a citizen specifically designated by a judge of the United States.⁸⁹

Some concerns were expressed, however, whether the statute satisfactorily accomplishes its purposes.⁹⁰ The brutal treatment, lack of nourishment, and substandard medical care to which an offender could be exposed were he or she not to transfer in a foreign prison may by themselves constitute "threats, or other improper inducements" within the meaning of the statute.⁹¹ Moreover, there is no provision in the enabling legislation for the offender to be advised of the applicable parole statutes.⁹² Nor is information provided as to whether prosecution for any other offenses, either state or federal, will occur on the offender's return. Finally, no definite statement need be provided the offender concerning educational, vocational, or other rehabilitative plans that may be utilized.⁹³

F. *Withdrawal of Consent*

A prisoner's application can neither be seen as a "request," nor can it be identified with his consent. The treaty regulation obligating

86. See Act of Oct. 28, 1977, Pub. L. No. 95-144, codified at 18 U.S.C. §§ 4101-4115 (1985).

87. See H.R. Rep. No. 95-720, 95th Cong., 1st Sess. (1977) reprinted in U.S.C.C.A.N. 1977, 3160.

88. 18 U.S.C. § 4107(a) (1978).

89. 18 U.S.C. § 4108(a) (1978).

90. Abramovsky & Eagle, *supra* note 26, at 299.

91. 18 U.S.C. § 4108(d) (1978).

92. It should be noted, however, that information on the operation of the United States parole laws is routinely contained in Part II of the booklet prepared by the Department of Justice.

93. Questions and answers concerning the operation and the rules and regulations of the United States federal prison system constitute Part III of the United States booklet.

an offender to submit an application to get his transfer commenced concerns technical and procedural matters and does not interfere with fundamental conditions for transfer. There are no convincing grounds to hold that, since the offender must apply for his transfer, as is required under the American-Canadian treaty (Article III(3)), his consent is implicitly set up in the treaty.⁹⁴ The fact that a prisoner expressed his interest in being transferred cannot be considered proof that he gave his consent. It should be borne in mind that under some treaties, such as, for instance, the Berlin Convention, an offender is allowed to apply to either state, even though his consent is not a condition for transfer.

The initial application that an inmate submits before he is transferred, whether it is required or not, is not binding on him as a formal consent to his transfer. The question then arises whether the prisoner's consent may be withdrawn, and if so, until when. As it is the sentenced person who should benefit from the transfer and because this form of international cooperation in criminal matters is intended to serve primarily humanitarian and rehabilitative purposes, the prisoner should remain the ultimate judge in the matters concerning transfer until he is effectively delivered to the authorities of the enforcing state. However, for administrative reasons, it might be conceivable to put some limitations on the prisoner's right to withdraw his consent, such as only until the time that escort personnel have actually been dispatched to effect the transfer.

Since international treaties and conventions do not address this issue, an answer can be found in domestic legislation. Typically, where there is provision for the verification of consent, the only consent which is binding on the transferring offender is the consent which he must give at a formal verification proceeding held before the competent authorities of the sentencing and/or enforcing states just before the actual transfer takes place.⁹⁵ Under the United States legislation, whether the offender is transferring into or out of that country,⁹⁶ the consent given at such proceedings is irrevocable as between the United States and the particular offender involved. Although the Canadian Transfer of Offenders Act

94. Williams, *supra* note 83, at 447: "This condition [the offenders's consent] is implicit in the American treaty since the offender must apply for his transfer." *Id.* It seems, however, that this conclusion—that the requirement of the prisoner's consent which is not explicitly specified in the United States-Canadian treaty—could and should be drawn from Article III(10) (verification of consent) rather than from Article III(3) (initiation of transfer).

95. United States booklets anticipate that the actual transfer will take place within one week of the holding of verification proceedings. See, e.g., United States Department of Justice: Information Booklet for United States Citizens Incarcerated in Canadian Prisons, at 17, Q. 63.

96. 18 U.S.C. §§ 4107(b) and 4108(b) (1978).

does not contain any provision to that effect, Canada recognizes that a Canadian offender transferring home may withdraw his consent so long as the withdrawal is effected before his request and consent are verified at the transfer location.⁹⁷

The English Repatriation of Prisoners Act 1984 provides that a consent given by an offender may not be withdrawn after a warrant has been issued in respect of the prisoner (Section 1(6)); and, accordingly, a purported withdrawal of that consent after that time shall not affect the validity of the warrant. If the prisoner were to withdraw his consent before the issuance of the Secretary of State's warrant, as a matter of law, the warrant would already be invalid, because one of the requirements for the issuance of the warrant would not have been met. Even if notification of withdrawal of consent reached the Secretary of State several days after the issuance of the warrant, this would not affect the position in law, and the warrant would still be invalid. The same solution was adopted by Cyprus in its implementing legislation to the 1983 Council of Europe Convention.⁹⁸

Of the three comprehensive laws on international (legal) assistance in criminal matters, only the German IRG explicitly provides that once the prisoner, after being advised, consented to the transfer and his statement to that effect has been inserted into the court records, or he consented to it before the competent consular officer, his consent cannot be withdrawn (Section 49(2)).

Absent an explicit legislative regulation in some countries, the withdrawal of consent is a matter of internal policy and practice in each of them. Given the various approaches manifested among member states of the Council of Europe,⁹⁹ a prisoner may validly revoke his consent until an order to transfer is issued (Austria, Spain, and Switzerland); until the movement of the actual transfer (Denmark, France, Luxembourg, and Turkey); until the competent authorities of both sentencing and enforcing states undertake "practical measures" for the transfer (Finland); until it is given before a competent authority (Greece and

97. Canadian Booklet, Pt. II, Q. 13. Under administrative arrangements, a transfer shall be cancelled if, *inter alia*, at any time prior to verification of consent, a transfer applicant withdraws his/her application in writing, Articles 3(11) and 4(11).

98. See the Convention on the Transfer of Sentenced Persons (Ratification) Law, § 3(2) (1986).

99. The following paragraph is based on replies to a questionnaire on the implementation of the 1983 Convention on the Transfer of Sentenced Persons from member states of the Council of Europe, signatories to this Convention. The questionnaire was prepared and sent out by the European Committee on Crime Problems in 1988. Information provided by the Directorate of Legal Affairs, Council of Europe, Strasbourg.

The Netherlands);¹⁰⁰ or as long as the prisoner is still in the territory of the sentencing state (Sweden).

IV. PROCEDURE OF TRANSFER

Due to the growing tendency within the international community towards the ratification of existing multilateral instruments of prisoner transfer and the conclusion of new bilateral treaties to that effect, on the one hand, and the dissemination of information on this form of international cooperation in criminal matters, on the other, foreign prisoners have become increasingly aware of the possibility of serving their terms in their home countries. In the majority of cases, the very stimulus for the formal initiation of transfer will be an application of the sentenced person to either state. However, as the international public law does not obligate a state to comply with the inmate's wish to be transferred, any such initiative of the prisoner must be considered under the addressed state's domestic legislation and not at the international level. Nevertheless, a transferee should be regarded as a subject, not as an object of the transfer proceedings. Any resemblance to the "surrender of objects" within the meaning of extradition or judicial assistance must be avoided.

In particular, the sentenced person who has expressed an interest in being transferred, should be kept informed, in writing, of the follow-up action in his case. He must, for instance, be told whether the necessary information has been sent by the sentencing state to his home country, whether a request for transfer has been made and by which state, and whether a decision has been made on the request. Regrettably, only two multilateral instruments, i.e., the 1983 Council of Europe Convention (Article 4(5)) and the 1986 Commonwealth Scheme (Section 9), require that the convicted offender be informed, in writing, of any action taken by the sentencing country or the enforcing country on a request for his transfer. Surprisingly enough, only three bilateral treaties, and no domestic legislation, contain provisions to that effect.¹⁰¹

Even in the "best case scenario," where an inmate applies directly to the sentencing state which, without consulting the prisoner's home country, submits the formal request to that state, it cannot be denied

100. If a prisoner has not been transferred from the Netherlands to a foreign country within four months of giving his consent, he is entitled to make a new statement to the effect that he may withdraw his previous consent and decide to serve his sentence in a Dutch prison.

101. See the Hungarian-Portuguese treaty—Article 4(5); the Spanish-Argentinian treaty—Article 8; and the Spanish-Mexican treaty—Article 9. It is noteworthy that the Spanish treaties obligate the consular and diplomatic officials of the prisoner's home country to provide him with the respective information. *Id.*

that transfer of prisoners is a lengthy procedure. However, instead of warning the potential transferees not to be "overly optimistic,"¹⁰² both states involved should make every effort to speed up the transfer proceedings and to ensure that this procedure is carried out in a swift and efficient manner. Considering that such a goal can best be accomplished by facilitating and expediting the processing of transfer requests and the subsequent transfer of applicants, Canada has developed a set of procedural arrangements complementary to the 1983 Council of Europe Convention.¹⁰³ The Convention imposes an obligation on the requested state to inform promptly the requesting state of its decision whether it agrees to the requested transfer (Article 5(4)). The majority of other international instruments contain similar provisions.¹⁰⁴ It does not seem appropriate, however, to specify any time limit for such action.¹⁰⁵

The question arises as to whether it is desirable to have the decision to refuse transfer and to enforce a foreign sentence challenged in the receiving state. It is noteworthy that two different systems developed in the practical application of the prisoner transfer scheme. In one of them, no appeal procedure is laid down either against a refusal by the competent authority to consent to a transfer in or out, or against a prisoner's continued detention in the enforcing state after he has been transferred there. Such a solution is expressly adopted in the Repatriation of Prisoner's Act 1984, Section 3(6), which is peppered with discretionary powers vested in the Secretary of State, dependent on his being satisfied that a measure would be "appropriate," "inappropriate," "consistent," "unreasonable," or "reasonable." Although the Howard League for Penal Reform considered that there should be an appeal to the courts against administrative decisions and arrangements for the transfer,¹⁰⁶ both the Interdepartmental Working Party and the Parliament opposed an idea of conferring any "rights of appeal" on a transferee.¹⁰⁷

102. British citizens incarcerated abroad are advised not to expect a speedy transfer. See the Home Office Guidance Leaflet, *supra* note 71, at 5, Q. 14: "The length of time varies from case to case—there is no rule. Arrangements for transfer can sometimes be a long process and might take up to 18 months in some cases." *Id.*

103. Information provided by the Directorate of Legal Affairs, Council of Europe, Strasbourg.

104. See, e.g., the American-Turkish treaty—Article 17(1); the Canadian-Mexican treaty—Article IV(4); the Spanish-Argentinian treaty—Article 6(2).

105. Canadian administrative arrangements are unique in requiring that transfer requests normally be processed within three months from date of receipt, Article 2(3). However, no sanction is provided for non-compliance with this provision. Interestingly enough, the Soviet legislation stipulates an even shorter time limit of one month. See Decree of the Supreme Council of the USSR, *supra* note 56, at § 6.

106. Prisoners in Foreign Jails, Howard League for Penal Reform, para. 2(V) (London 1979).

107. The Repatriation of Prisoners: Report of an Interdepartmental Working Party, para. 42 (London 1980).

The transfer is deemed to be a discretionary act, on the part of both the sending and the receiving states, and it would be as well for the enabling legislation to make the point clear: prisoners could neither be liable to compulsory repatriation nor be endowed with a right of repatriation. As between a prisoner in the United Kingdom seeking repatriation and the prison authorities, repatriation would be analogous to other discretionary acts of the authorities, such as transfer to another prison or early release on parole. A refusal could be the subject of a petition to the Secretary of State, could be challenged in Parliament or might be grounds for an action in the civil courts or even an application to the European Human Rights Commission.

The decision by virtue of which a foreign sentence is to be enforced and an offender is to be incarcerated in the administering state should be singled out and made the subject of a statutory right of appeal. A judicial authority rather than an administrative one, entrusted with the right to transform a foreign judgment along with the power to legitimize the deprivation of liberty of an offender convicted abroad is more appropriate to assure the convicted person that enforcement of the sanction imposed on him and adaptation of the foreign sanction will be carried out in accordance with the provisions of both a treaty or Convention and domestic law.

It should be noted that the "right of appeal," although inherent in the conversion of sentence procedure carried out by a judicial authority in the enforcing state, is not limited to domestic legislation under which a court is designated to take a decision on the execution of the sanction imposed in a foreign country.¹⁰⁸ In Nordic countries, where the authority to carry out enforcement proceedings is vested in administrative organs, a transferee may appeal such decision in a court.¹⁰⁹ Notwithstanding the fact that decisions in matters concerning enforcement of penal sentences are subject to statutory conditions to a very limited extent, and consequently the possibility to challenge such decisions is not likely to be of any great practical importance, it was considered necessary to confer the right of appeal, particularly in light of the Danish legislation pro-

108. Nearly all continental domestic legislations provide for an appeal against the decision taken at the exequatur procedure. *See, e.g.*, the Dutch Law of 1986, § 32; ARHG, § 67(1); IRSG, Article 106(3); the French Code of Criminal Procedure, Article 713-1 (as amended by Law No. 84-1150 of Dec. 21, 1984); the Italian Code of Criminal Procedure of 1989, Article 734(2); the Luxemburgian Law of July 31, 1987, Article 5; the Turkish Law No. 3002, Article 7; the Polish Code of Criminal Procedure, Article 412.

109. *See, e.g.*, the Norwegian Law of Nov. 15, 1963, § 15. The Swedish Law No. 193 of 1963 provides that an appeal against the decision taken by the general prison administration may be brought before the King, Article 26.

viding for the judicial control over administrative decisions involving deprivation of liberty.¹¹⁰

V. EXEQUATUR PROCEDURE

The exequatur is commonly perceived as a two-pronged analysis and a procedure which serves two purposes:¹¹¹ first, to examine conditions of transfer and foreign judgment in view of its compatibility with the domestic system of constitutional and criminal law as well as criminal justice; second, to adapt the sanction imposed abroad. In some countries, the latter process takes the form of the "conversion of sentence." German commentators hold that, notwithstanding the intricate nature of the exequatur procedure, both declaration of enforceability of a foreign judgment and necessary transformation of a sanction are made *uno acto* in these proceedings.¹¹² The exequatur decision is, therefore, a unilateral and homogenous decision.

At the same time, it should not be ignored that the exequatur proceedings are instituted also in order to give the convicted person the assurance that enforcement of the sanction imposed upon him and adaptation of the foreign sanction will be carried out in accordance with the provisions of both international conventions and implementing legislation. To that end, under legislation of several countries,¹¹³ a court is the only competent authority to deal with exequatur,¹¹⁴ and the transferred person has the right to defense counsel, or if he cannot afford one, to have counsel appointed by a court.¹¹⁵

Given the idea behind exequatur and the nature of exequatur procedure, the exequatur proceedings should be governed by some funda-

110. Denmark, Law No. 214 of 1963, § 19.

111. See, e.g., Hans Schultz, Les formes nouvelles de la collaboration des Etats dans l'administration de la justice pénale, in *L'amélioration de la justice répressive par le droit européen* 102 (Vander ed. 1970); Jescheck, *supra* note 39, at 339; Walter Hasler, Die Wirkung ausländischer Strafurteile im Inland 128 (1939); Ruth Esther Maag-Wydler, Die Vollstreckung ausländischer Straferkenntnisse im Inland 130 (1978).

112. For the opinion of drafters of the German IRG, see *Begründung des Entwurfs eines Gesetzes über die internationale Rechtshilfe in Strafsachen*, BT-Drucks. 9/1338, 74. See also Théo Vogler, in *Gesetz über die internationale Rechtshilfe in Strafsachen. Kommentar*, § 54, para. 2 (Vogler/Walter/Wilkitzki eds.) [hereinafter IRG-Kommentar].

113. See countries quoted *supra* note 108, and Italy, Code of Criminal Procedure, Article 734.

114. The Interdepartmental Working Party opposed entrusting courts with authority to carry out exequatur proceedings as it was considered to be "an unnecessary complication, since the function is administrative rather than judicial." See *The Repatriation of Prisoners*, *supra* note 107, at para. 47.

115. See, e.g., the Norwegian Law of Nov. 15, 1963, § 19; the Swedish Law No. 193 of 1963, Article 26; the Dutch Law of 1986, §§ 25 and 27; IRG, § 53.

mental principles. These have developed in treaty practice and domestic legislation and are independent from whether the enforcing state applies the "continued enforcement" or "conversion of sentence" procedure.

- (a) The examination of a foreign judgment must not lead to the "*revision au fond*" and resentencing of the transferee in any form.
- (b) The exequatur authority shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing state.
- (c) The sanction stipulated in the exequatur decision should, as far as possible, correspond with that imposed in a foreign judgment.
- (d) The penal position of the transferred offender must not be aggravated.
- (e) The competent authority of the enforcing state shall deduct the full period of deprivation of liberty served by the transferred offender in the sentencing state.
- (f) The sanction determined in the exequatur decision must not exceed the maximum prescribed by the law of the enforcing state.

Examination of a foreign judgment should be confined to the procedural aspects; consequently there should be no "review of the merits."¹¹⁶ Resentencing must be excluded notwithstanding the form it might take, e.g., summary proceedings. The principle under (a) seems to be so commonly accepted that it is universally and tacitly recognized. The drafters of international conventions and treaties neglect including it in the respective instruments. The principle derives from the need to respect a foreign state's sovereignty and is rooted in the rule of equality of all states.¹¹⁷ The "*revision au fond*" would not only clearly contradict the idea behind this form of international cooperation in criminal matters but also might undesirably indicate a priority of the enforcing state's jurisdictional power over that of the sentencing state.

There is a more pragmatic justification of this principle. It would be difficult to provide the court responsible for resentencing with relevant and adequate evidence to enable a valid sentencing decision to be made; yet the fact of conviction alone would hardly be sufficient information on which a court could determine sentence. Both the obtaining of the necessary evidence and the process of resentencing itself would be a time-consuming and expensive operation, and it is questionable whether

116. See Resolution IV(2) of the Ninth International Congress on Penal Law, *supra* note 49, at 491.

117. Henry Donnedieu de Vabres, *Les principes modernes du droit pénal international* 334 (1928).

the resources of the enforcing state's criminal justice system should be used for this purpose. In addition, the sending state might not be willing to agree to repatriation if its sentence were subject, in effect, to review by the receiving state. A further practical consideration is that if the consent of the prisoner is required before transfer can take place, it would hardly be reasonable to expect him to consent before he knows what sentence he will be subject to; but it would be equally unreasonable to spend time and effort in resentencing a prisoner who could then refuse to be repatriated.

In some international instruments, it is expressly provided that the competent authority of the administering state, while deciding on the enforcement of a foreign sentence, shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing state.¹¹⁸ The reason for this condition (principle (b) *supra*) is that the substitution by a sanction of a different nature or duration does not imply any modification of the original judgment; it merely serves to obtain an enforceable sentence in the administering state.

Although one could concede that the judge or an administrative organ of the enforcing country is authorized under the *exequatur* procedure to examine to a certain extent the content of the judgment with regard to proof of the facts and to legal evaluation,¹¹⁹ it must not be overlooked that the competent authority has no freedom to evaluate differently the "factual" aspect on which the judgment of the sentencing state is based. More difficult is the case of facts found by implication in the judgment, for instance, the absence of justifying or exonerating facts. Such findings bind the court or authority in the enforcing state insofar as it can deduce them from the judgment.¹²⁰

If there is a difference between the legal systems to the effect that a certain fact constitutes a legitimate defense in the enforcing but not in the sentencing state, the enforcing state might feel compelled to refuse enforcement if it finds that such a fact was present. Thus it may be necessary for the court or authority in the enforcing state to conduct a supplementary investigation into the facts, not determined by the judgment of the sentencing state. Such an investigation may appear necessary to make possible the legal evaluation and subsumption of the

118. See, e.g., the 1970 European Convention, Article 42; the 1983 Council of Europe Convention, Article 11(1); and the Austrian treaties with Yugoslavia, Article 19(1), and Hungary, Article 17(1).

119. See the opinions to that effect by Dietrich Oehler, *Internationales Strafrecht*, Köln/München 594 (1983), and Peter Wilkitzki, *Der Regierungsentwurf eines Gesetzes über die internationale Rechtshilfe in Strafsachen (IRG)*, *Goldammer's Archiv für Strafrecht* 376 (1981).

120. Explanatory Report on the 1970 European Convention, *supra* note 16, at 63.

properly established facts in light of the domestic legislation of the enforcing state.

However, the court of the enforcing state is not allowed to proceed to the hearing of new evidence in respect of facts contained in the judgment of the sentencing state. This need might arise if under the law of the enforcing country certain facts must be examined which were not relevant under the law of the enforcing state. It follows then, that the court of the enforcing state cannot make any independent assessment of evidence bearing upon the guilt of the person convicted and contained in the judgment of the sentencing state.

Due to the principles mentioned above, such as those under (b) and (e), the judge carrying out the *exequatur* proceedings is not acting like a trial judge who hears the case and imposes a sanction. Nor is the *exequatur* proceeding a regular criminal procedure. Part of the reasons for shaping this procedure in such a specific way lies in the fact that the competent authority of the enforcing state is bound by the prohibition of *reformatio in peius*. Under the vast majority of treaties and conventions,¹²¹ in determining the sanction, the court shall not aggravate the penal situation of the sentenced person as it results from the judgment pronounced in the sentencing state.¹²² Some of them specifically stipulate that no sentence of confinement shall be enforced by the administering state in such a way as to extend its duration beyond the date at which it would be terminated according to the sentence of the court of the sentencing state.¹²³

The wording of the Austrian-Hungarian treaty is worth mentioning in this context: "By the enforcement of the sentence in the administering state, the prisoner's penal situation in its entirety must not be aggravated compared to the situation as given in case of the further enforcement in the sentencing state."¹²⁴

The prohibition under principle (d) refers not only to prolongation of incarceration, but also to application of a harsher kind of sanction than that imposed by the sentencing state. If, for instance, under the law of the enforcing state, the offense carries a more severe form of deprivation of liberty than that specified in the judgment, e.g., penal servitude or forced labour instead of (simple) imprisonment, the enforcing state is precluded from executing this harsher kind of sanction.¹²⁵

121. Exceptions are the Berlin Convention, the Arab Convention, the French treaties with African countries (except Morocco and Djibouti), and the Polish treaties with developing countries.

122. See, e.g., the 1970 European Convention, Article 44(2); the 1983 Council of Europe Convention, Article 11(1), and the 1986 Commonwealth Scheme, § 12(2).

123. See, e.g., the United States-Mexican treaty—Article III(3).

124. See the Austrian-Hungarian treaty—Article 17(2).

125. See the Explanatory Report on the Convention on the Transfer of Sentenced Persons, Council of Europe 26 (1983).

Such aggravation would also occur if enforcement of part of a composite sanction were to be deferred because there was no double criminality in respect of part of the facts underlying the judgment whose enforcement was requested, thus making enforcement by the administering state impossible. On the other hand, it would not be contrary to this principle for an administrative authority to attach a disqualification or forfeiture to the sanction, whether or not they are inflicted in the judgment to be enforced.

VI. ENFORCEMENT OF THE SANCTION

All international instruments of prisoner transfer unanimously provide that the sentencing state alone shall have the right to decide on the application for review of the judgment. This competence of the sentencing state should not be interpreted as discharging the enforcing state from the duty to enable the sentenced person to seek a review of the judgment. Both states involved should take all appropriate steps to guarantee the effective exercise of the convicted person's right to apply for a review. It should be remembered, however, that the appeal proceedings may have an adverse bearing on the prisoner's interest and right to a speedy transfer. They may cause a substantial delay of his surrender as the vast majority of treaties and conventions specify that transfer can only be effected if no appeal proceedings are pending in the sentencing state.¹²⁶

Although international agreements specifically prevent the prisoner's use of an enforcing state's court to attack the sentence or conviction rendered by a foreign court, this does not preclude a challenge in this court that is not based on the foreign conviction or sentence. Therefore, in a petition for a writ of *habeas corpus*, the prisoner transferred to the United States may challenge the procedure utilized in his transfer as not satisfying the statutory requirements and may challenge the constitutionality of the respective treaty or its implementing legislation.¹²⁷ During the ratification hearings, it was pointed out that the legislative history of the treaties and the implementing legislation showed Senate concern for the quality of the foreign proceedings rendering the prisoner's contentions groundless.¹²⁸ The Supreme Court's rulings to date have substantiated this conviction.

The prisoner transfer scheme is based on a commonly accepted understanding that once the convicted person is transferred, the admin-

126. See, e.g., the United States treaties with Mexico—Article II(6); Peru—Article II(3); Bolivia—Article III(5); Panama—Article III(5); and Canada—Article II(e).

127. See, e.g., 18 U.S.C. § 3244(5) (1979).

128. *Hearings on Nine United States Treaties on Law Enforcement and Related Matters Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 17 (1979).

istering state, that is, the country of his residence or nationality, is responsible for enforcement of the sentence underlying a transfer. It is assumed that, through an international agreement, the sentencing state expressly relinquishes its right of execution in its territory of a sanction imposed by its court. As the receiving country assumes enforcement of the judgment, execution of the sanction shall be governed by the provisions which would have been applicable if the sanction had been imposed in that state.¹²⁹ Signatories of all prisoner transfer instruments have unanimously agreed that the enforcement shall be governed by the law of the administering state, and that state alone shall be competent to make all appropriate decisions.

The service of imprisonment in the home country, regardless of its numerous advantages for the transferred prisoner, may result in an aggravation of the penal situation of this person who, had the sanction been enforced in the sentencing state, might have benefited not only from pardon and amnesty, but possibly also from more favourable provisions of the latter state governing, *inter alia*, conditional release and parole. Therefore, it could be argued that any development in the sentencing state favourable to the convicted person should have effect also in the enforcing state. The principle of non-aggravation¹³⁰ should be applied not only in exequatur proceedings, but also in executing the enforcement of a foreign judgment. A question arises as to whether regulations concerning conditional release or parole in the sentencing state which are more favourable for the transferred prisoner than the provisions of the enforcing state should be taken into consideration. By the same token, does the application of harsher conditions for parole or for conditional release in the enforcing state violate this principle?

Neither the two basic considerations underlying the prisoner transfer scheme, that is, humanitarian and rehabilitative ones, nor the main idea behind this form of international cooperation in criminal matters, that is, the enforcement of a foreign penal judgment, necessarily require that the execution of the sanction be carried out in accordance with the legislation of the sentencing state, or even that the law governing the service of imprisonment of transferred offenders be a kind of mixture of provisions from the sentencing and the administering states, whichever are more favourable for him. It should be borne in mind that one of the fundamental principles of the prisoner transfer scheme is that enforcement of the sentence is governed by the law of the administering country.

In accordance with this rule, the Canadian Transfer of Offenders Act explicitly provides that a Canadian offender transferred to Canada

129. A provision to that effect is adopted in the German IRG, § 57(5).

130. See text *supra* part V.

becomes eligible for parole at a date determined by the National Parole Board as being the date, so far as can be ascertained by the Board, at which he would have been eligible for parole had he been convicted and his sentence imposed by a court in Canada (Section 8).

It is not surprising, therefore, that, in 1988, the French Court of Appeal in Paris refused to recognize the binding force of the decision on conditional release made by the competent Swedish authority which set out an earlier date of release than would be possible according to French rules.¹³¹ The court reasoned that the Swedish authorities alone were bound by this decision and that the convicted person, by having consented to his transfer, relinquished some benefits that he would have enjoyed had he served his term in the sentencing state. The court did not, however, make any inquiry into whether the prisoner was provided with the relevant information and whether he was aware of the privileges he would have to give up once he consented to transfer.

Nevertheless, some efforts are being made towards granting the "most favoured clause" to the transferred offender. It is argued that, since prisoner transfer is a form of "legal assistance," the most favourable provisions should be applied to the conditional release of the transferee.¹³² The Austrian ARHG expressly provides that, through the enforcement of the sanction imposed in the sentencing state, the penal situation of the prisoner must not be aggravated as compared with his situation had he served his term in the sentencing state (Section 65(2)). Along the line of the domestic legislation and the 1970 European Convention, Austrian courts ruled that more favourable conditions in the sentencing state for a conditional release should be taken into consideration.¹³³ It is noteworthy that provisions to this effect are adopted in two Austrian treaties,¹³⁴ in the Portuguese-Hungarian treaty (Article 21(2)), and in the verbal notes exchanged between Germany and Denmark.¹³⁵

VII. EFFECTS OF TRANSFER

A. Protection Against Double Jeopardy

Notwithstanding numerous efforts by governments, supranational bodies, and scholars aimed at universalization of the principle *ne bis in idem*, there are still two dimensions of this maxim, domestic and international, that do not coincide with each other. The scope of appli-

131. Cour d'Appel de Paris, judgment of Mar. 9, 1988, No. 8821/87 (unpublished).

132. See Vogler, *supra* note 112, at § 57, para. 15.

133. Epp, *supra* note 34, at 268.

134. See the Austrian treaties with Hungary—Article 17(2), and Poland—Article 15(2).

135. See the Danish verbal note of Aug. 19, 1983, and the German reply of Sept. 5, 1983, reprinted in IRG-Kommentar, *supra* note 112, at § 48, para. 11.

cation of the *ne bis in idem* rule is generally limited to the state's territory. The recurring question is whether and to what extent *ne bis in idem* is a principle of international criminal law.¹³⁶ At the national level, this maxim is considered one of the fundamental principles of the domestic legal system. However, the *ne bis in idem* is not commonly recognized at the international level for the *res judicata* rule is not generally attached to a foreign penal judgment. It might be expected that the new form of international cooperation in criminal matters, the transfer of sentenced persons, would contribute to further development and acceptance of this principle in interstate relations.

The *ne bis in idem* rule is one of the essential conditions of the prisoner transfer scheme. It highlights the most important effect of a transfer on the jurisdiction of the enforcing state: that the state shall be bound by the conviction in the sentencing state and may not try the transferred person again for the act for which the sentence underlying the transfer was imposed. At the same time, this rule is in accord with the basic perception of fairness which requires that an offender not be put in jeopardy twice for the same offense (*double jeopardy*). Given the constitutional safeguard underlying the *ne bis in idem* rule, prisoner transfer instruments should *expressis verbis* provide the transferee with the same protection against double jeopardy that he would have had if he had been sentenced by a court of the jurisdiction seeking to prosecute him.

This safeguard is of paramount importance where an offender is not required to give his consent to a transfer and may, therefore, have no say as to whether he is exposed to a risk of double jeopardy. Such a guarantee should protect the transferred prisoner from both being exposed to further prosecution and further punishment for the same offense.¹³⁷

The need for the inclusion of the *ne bis in idem* principle can be justified by the fact that the administering state assumes nothing but enforcement of the sentence pronounced by a court of the other country, while the judgment itself remains a foreign one. It follows logically that, without a specific provision to that effect, no legal consequences can be drawn from the judgment, as such consequences are normally attributed exclusively to judgments delivered by domestic courts. These effects include *res judicata* and double jeopardy.

Out of seven multilateral prisoner transfer instruments, four conventions do not contain provisions to that effect.¹³⁸ It should be noted

136. Oehler, *supra* note 119, at 578.

137. See Resolution IIIA of the Ninth International Congress on Penal Law held in Hague in 1964, *supra* note 49.

138. The 1983 Council of Europe Convention, the 1983 Arab Convention, the 1968 Benelux Convention, and the 1986 Commonwealth Scheme.

that under two of them, the Arab Convention and the Benelux Convention, the prisoner's consent is not required. The 1983 Council of Europe Convention merely specifies the effects of transfer for the sentencing state. It provides that the taking into charge of the sentenced person by the authorities of the enforcing state shall have the effect of suspending the enforcement of the sentencing state (Article 8). A similar provision is included in the 1986 Commonwealth Scheme (Section 10).

The protection against double jeopardy is provided by the Berlin Convention (Article 3)¹³⁹ and the Nordic legislation.¹⁴⁰ Under the 1970 European Convention, the criminal judgment has the effect of *ne bis in idem* in relation to other signatory states in the event of an acquittal or a conviction where the sanction imposed was enforced in the normal manner, or of the court that convicted the offender where no sanction was imposed (Article 53(1)). However, the Convention placed two restrictions on this principle. First, the criminal judgment never has the effect of *ne bis in idem* in relation to the state in which the offense was committed (Article 53(3)). Moreover, a signatory state is not obliged to recognize this effect if the act which gave rise to the judgment was directed against either a person or an institution or any other thing having public status in that state, or if the offender himself had a public status in that state (Article 53(2)).

It is noteworthy that out of all bilateral treaties under review, only thirteen expressly provide for the protection to the transferred offender against double jeopardy. Again, out of sixteen agreements concluded by France with African countries, only one, that with Cameroon (Article 28), contains specific provision to that effect. Interestingly enough, the only European treaties which have provisions concerning *ne bis in idem* are those concluded with non-European countries,¹⁴¹ while the agreements signed within Europe, such as those between Eastern European and Western countries, do not address this issue.

It is noteworthy that the Austrian-Yugoslav treaty (Article 9(3)) and Hungarian treaties,¹⁴² while directly stipulating the *ne bis in idem* rule,

139. Under the Berlin Convention, the transferred offender may be prosecuted in the enforcing state if a sentencing state's court set aside the judgment and re-trial is ordered, provided, however, that the competent authorities of the sentencing state requested the enforcing state to institute criminal proceedings, Article 15.

140. See, e.g., the Danish Law No. 214 of 1963, § 21, and the Swedish Law No. 193 of 1963, § 29.

141. See the Greek-Egyptian treaty—Article 15, and the Spanish treaties with Argentina—Article 13(1); Peru—Article 7, and Mexico—Article 18. It should be noted, however, that neither the treaties with Thailand nor those with the United States and Canada mention the *ne bis in idem* rule. The Polish treaties with developing countries also belong to this group.

142. See the Hungarian treaties with Austria—Article 19(5); Portugal—Article 28; Spain—Article 19(5); and Turkey—Article 17(5).

provide that if at the time of transfer the criminal proceedings for the same offense are pending against the prisoner in the enforcing state, the criminal proceedings shall be temporarily discontinued (suspended). The competence of that state to prosecute the transferee is terminated when the sanction imposed has been fully enforced or when the offender has been pardoned.

Under the United States-Canada treaty (Article VI) and Mexican treaties with the United States (Article VII) and Canada (Article VII), prosecution for the same offense is barred in the enforcing state. In addition, that state may not prosecute offenses in which the prosecution would have been barred if the sentence had been imposed by one of its courts, federal or state. Under the treaties concluded by the United States¹⁴³ and Canada¹⁴⁴ with some Latin American countries, the enforcing state is prohibited from detaining, trying, or sentencing a transferred offender for the same offense for which the sentence was imposed by the transferring state.

The French treaties with the United States (Article 5(b) and (c)) and Canada (Article V (a) and (b)) provide that a transfer may be refused if the facts upon which the conviction is based have resulted in proceedings in the enforcing state or if the enforcing state has decided to abandon or not to initiate proceedings based on the same facts.

There is a group of agreements in which the *ne bis in idem* rule is considered, not in terms of the effect the transfer has for the enforcing state, but rather in the context of refusal of transfer. Accordingly, a transfer may¹⁴⁵ or must¹⁴⁶ be refused if the offender has been convicted and sentenced for the same offense in the enforcing state.

Not only international treaty or convention, but also domestic law of the enforcing country, may grant protection against double jeopardy to the transferred prisoner. The United States' legislation, for instance, prohibits detention, prosecution, trial, or sentence of a transferred offender by the United States or any state thereof in two instances: if such action would be barred, when the sentence upon which the transfer was based had been issued by a court of the jurisdiction seeking to prosecute the transferred offender; or if prosecution would have been barred by the laws of the jurisdiction seeking to prosecute the transferred offender, when the sentence had been issued by a court of the United

143. See the United States treaties with Panama—Article VI(1), Bolivia—Article VI(1), and Peru—Article VI(1).

144. See the Canadian treaties with Bolivia—Article VI(1), and Peru—Article VI(1).

145. See the United States-Turkish treaty—Article V(j).

146. See the Turkish treaties with Yugoslavia—Article 6(6), and Hungary—Article 9; the Hungarian-Portuguese treaty—Article 12(1); and the 1968 Benelux Convention—Article 5(2).

States or another state.¹⁴⁷ Provisions to that effect are adopted in the domestic law of several other countries.¹⁴⁸ In Germany, it is pointed out that, in the case of inward transfers, the effect of *ne bis in idem* should be attributed to a foreign judgment from the moment when the competent authority makes a decision to agree to the requested transfer and not when the *exequatur* decision is delivered or execution of the sanction begins.¹⁴⁹

B. Rule of Speciality

1. Possible Retention of Speciality From the Framework of Extradition

Since the prisoner transfer scheme attempts to create no added advantages or disadvantages for the transferred person as a result of his transfer, it may be argued that speciality should be carried forward from the experience of extradition. Consider, hypothetically, state A's citizen who is imprisoned in state B for an ordinary crime. Assume that the prisoner is also being sought by state A's authorities for a political crime committed in the territory of or against that state. In the absence of prisoner transfer, state A could not obtain control over the offender. Even if states A and B have an extradition agreement, it is very likely that the latter state would not extradite the prisoner, even at the conclusion of his sentence, because of the political offense exception. If the prisoner transfer scheme is simply intended to mitigate the harshness of being imprisoned in a foreign country, the prisoner should be able to serve out his sentence in his home country (state A), and then be free to return to state B or to move to any other country as he would have been in the absence of transfer.

This raises the question whether there are compelling reasons for retention of the rule of speciality in the prisoner transfer scheme. The provision imposing the limitation upon the requesting state to the effect that this state cannot prosecute the offender for any offense other than for which the accused was surrendered is commonly adopted in the framework of extradition.

While considering his consent to transfer, the offender is likely to conclude that there are more compelling and important reasons for serving his sentence in his home country, thereby avoiding hardships

147. 18 U.S.C. § 4111 (1978).

148. See, e.g., Austria—ARHG, § 67(3); France—Code of Criminal Procedure, Article 713-8; Italy—Code of Criminal Procedure, Article 739; Luxembourg—Law of July 31, 1987 (Memorial of Aug. 26, 1987), Article 8; Germany—IRG, § 56(3); Switzerland—IRSG, Article 98.

149. Vogler, *supra* note 112, at § 56, para. 3.

and substandard conditions of prisons in the sentencing state, than for avoiding other charges in the enforcing state that he would have to face, in any event, should he return home. The humanitarian and rehabilitative premises upon which the prisoner transfer scheme is based may prevail over considerations underlying the rule of speciality. It should be also kept in mind that, to the extent that the prisoner's transfer to his home country will permit a pending warrant for his arrest to be disposed of at an earlier date, it may be advantageous for him to transfer. If he is convicted of the charges pending against him in the enforcing state, there may be a possibility that his sentence for those charges may be made to run concurrently with the remainder of his foreign sentence.

As long as the decision to extradite lies entirely in the hands of the requested state, the rule of speciality seems to have firm and unquestionable grounds. The attitude towards this principle changes, however, when the wanted offender can have a bearing on the decision concerning the extradition request by consenting to his surrender in a simplified manner. Although no convincing evidence has been produced to justify the relinquishment of the speciality protection in such a case, there is a temptation to apply the same analysis in the context of prisoner transfer to the extent that the transferee be deprived of this protection.

It could be argued that the duty to protect the extradited person from prosecution on other counts arises in circumstances entirely different from those in prisoner transfer. While the person being extradited is travelling under duress, the person being transferred is doing so voluntarily and, in the vast majority of cases, at his own request. Such contrasting of the legal position of the extraditee with that of the transferee inevitably leads to the conclusion that the protection under the speciality rule need not be granted to the latter. The choice that the convicted person faces is either to consent to transfer to his home country where he may be prosecuted and punished for other offenses as well as extradited to a third state or to waive the benefits of serving his term at home in exchange for avoiding further charges in the enforcing state.

Such a system is commonly adopted in international instruments of prisoner transfer. On the one hand, multilateral conventions, such as the 1983 Council of Europe Convention and the 1986 Commonwealth Scheme, and bilateral treaties, such as all French, Thai, and Canadian treaties, as well as all but one United States treaty, which make transfer dependent on the prisoner's consent, do not adhere to the doctrine of speciality. On the other hand, where the prisoner's consent is not required, such as under the Nordic legislation¹⁵⁰ and the 1970 European

150. See, e.g., the Danish Law No. 214 of 1963, § 6, and the Norwegian Law of Nov. 15, 1963, § 6.

Convention (Article 9), he is protected against prosecution and punishment in the enforcing state for an offense other than that specified in the request for transfer (or enforcement). The commentators on the latter convention make it clear that, since this instrument is based on the principle that enforcement of a foreign judgment does not presuppose the offender's prior consent, it was necessary to provide for the rule of speciality.¹⁵¹

There is, however, a group of treaties which reject the "either (consent)-or (speciality)" concept and manifest that it is neither necessary nor inevitable to follow such a pattern. All but one bilateral treaty between Eastern European and Western countries,¹⁵² as well as the United States-Turkish treaty (Article VI) and the Spanish-Argentinean treaty (Article 13(2)), require the prisoner's consent as a precondition for transfer and grant the transferred offender protection under the rule of speciality. It is noteworthy that the United States-Turkish treaty, modeled after the 1970 European Convention, provides for an additional safeguard to the transferred prisoner. Pursuant to Article VI(1)(b), the sentencing state shall not grant its consent to prosecute the sentenced person for crimes committed prior to transfer if the enforcing state considers such offense to be of a political nature or connected with such an offense or a purely military one.

2. Proposed Solution

The prevailing approach to the rule of speciality, as manifested in prisoner transfer instruments, both international and domestic, is based on an assumption that since the offender is the intended beneficiary in the prisoner transfer scheme, and while extradition is detrimental to the interests of the person concerned, the prisoner's consent automatically excludes speciality. If this concept were adopted, notwithstanding some shortcomings of such a reasoning, it would follow that the rule of speciality must be applied as long as the prisoner's consent is not required. It is, therefore, unacceptable that none of these safeguards be granted to the transferred offender.

A group of international agreements which produces such an anomaly consists of the 1983 Arab Convention, the 1968 Benelux Convention, the 1978 Berlin Convention, the Polish bilateral treaties with developing

151. Explanatory Report on the 1970 European Convention, *supra* note 16, at 39.

152. See the Austrian treaties with Poland—Article 22, Hungary—Article 23, and Yugoslavia—Article 27, the Turkish treaties with Hungary—Article 21, and Yugoslavia—Article 18; and the Hungarian treaties with Spain—Article 23, and Portugal—Article 30. The only exception is the treaty between Poland and Turkey. Evidently, the repugnance of Polish negotiators to the rule of speciality in the prisoner transfer scheme prevailed and was subsequently manifested in treaties with developing countries.

countries, and the ten French agreements with African countries concluded between 1961 and January 1974. They permit an offender to be transferred without his consent, and even against his will, while at the same time, not protecting the offender under the rule of speciality.

This issue is very rarely addressed by domestic legislation. It is noteworthy that the Swiss IRSG distinguishes, as far as inward transfers are concerned, Swiss citizens from other offenders. Only the latter shall not be prosecuted, punished, or extradited to a third state by Swiss authorities for offenses committed before their surrender (Article 99(3)).

To retain the rule of speciality where the prisoner's consent is not required is merely a program minimum. The fundamental notion of fairness requires a further step. As it is commonly accepted that the prisoner is the ultimate judge in matters concerning his transfer, it follows that before he can make up his mind, he must be sure that he understands the possibility of further charges when and if he is brought home. Moreover, he must know what the charges are so that he may intelligently decide whether to come back and face them rather than stay where he is, where the charges cannot be brought against him. It is both insufficient and unfair to leave gathering the relevant information to the sentenced person, and to impute to the prisoner that "he himself should be well aware of any charges that could be brought against him for any past activities in the enforcing state."¹⁵³ Rather, the competent authorities of the prisoner's home country should disclose all outstanding charges against the convicted person to the effect that they would be competent to prosecute and punish him for the offenses disclosed. At the same time, the rule of speciality should apply with respect to all other charges of which the prisoner was unaware while consenting to transfer.

VIII. CONCLUSIONS

The following safeguards should be granted to the person convicted and incarcerated in a foreign state who is being transferred under the prisoner transfer scheme to his home country to serve his sentence there:

- (1) the right to be informed of the possibility of transfer to his home country under an international treaty or domestic legislation of both states involved;
- (2) the right to express to either state his interest in being transferred;
- (3) the right to be provided with advice and information concerning the substance, procedure, and consequences of his transfer, in a language he understands;

153. House of Lords, *Hansard*, Mar. 5, 1984, col. 48 (Lord Elton).

- (4) the right to consent to his transfer;
- (5) the right to be informed, in writing, of any action and any decision taken by either state on a request for his transfer;
- (6) the right to be surrendered to the competent authorities of the enforcing state without an unreasonable delay (the right to a speedy transfer);
- (7) the right to be assisted by counsel in the verification of consent proceedings and exequatur procedure;
- (8) the right to challenge the exequatur decision in a court of the enforcing state;
- (9) the protection against an aggravation of the penal position in the exequatur procedure and the execution of enforcement;
- (10) the protection against double jeopardy in the enforcing state;
- (11) the protection deriving from the rule of speciality insofar as the prisoner's consent is not required, and he is not informed of the outstanding charges against him in the enforcing state before transfer takes place.

