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The United States Treaties on Transfer of Prisoners: A Survey

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One of the outstanding success stories in international criminal law over the last decade has been the proliferation of treaties on the transfer of penal sanctions, commonly referred to as prisoner transfer treaties. Such treaties permit individuals imprisoned, and in some instances, on parole, in foreign countries to return to their home country to serve out their sentences or their parole terms. While such an idea can be traced back more than a century, proliferation of these treaties has come only in the past two decades when international travel has become a reality for large numbers of people. Many articles have been written on the legal impact of prisoner transfer treaties. Few however, have discussed the history of such treaties, sought to

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2. See infra note 69 and accompanying text.
compare the various provisions of the treaties, or examined their success. Examination of these issues is lacking perhaps because so few practitioners outside of the government have experience with use of the treaties on a day to day basis. Discussion of this issue is especially timely, since the United States has recently entered into three new prisoner transfer agreements, one of which, the Council of Europe treaty, is a multilateral agreement that will eventually encompass many countries. In this article, the authors will attempt to examine the reason the treaties have been successful and urge that their use be extended to other countries.

**HISTORICAL BACKGROUND—PRISONER TRANSFER AND THE FOREIGN PRISONER**

A. *The European Experience*

The issue of foreign prisoners and what to do with them has been around for some time. Indeed, the United Nations Standard Minimum Rules for the Treatment of Prisoners, since preparation of the initial text in 1934, has included specific recommendations dealing with foreign prisoners. Long before the Standard Minimum Rules, however, some European countries provided procedures in dealing with foreign prisoners.

The Mannheim Convention of 1868 on the Navigation of the River Rhine provided for the execution of penal judgments of one European state in another. At about the same time, the Colonial Prisoner Removal Acts of 1869 and 1884 provided that a foreign national may be paroled and sent home to the United Kingdom. Despite these in-

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3. *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of the Offenders, held at Geneva in 1955, and approved by the Economic and Social Counsel by resolutions 663 C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977. See, e.g., *id.* ¶ 30(3) (prisoner permitted to make defense through interpreter); *id.* ¶ 38(1) (foreign nationals permitted to communicate with diplomatic and consular representatives of the state to which they belong); *id.* ¶ 51(1) (interpreters to be used whenever necessary). Work has been done recently concerning additions to the *Standard Minimum Rules* specifically directed at the foreign prisoner. See *Suggested Addendum to the Standard Minimum Rules for the Treatment of Prisoners*, report of the Working Party on Foreign Prisoners of the Alliance of Non-Governmental Organizations on Crime Prevention and Criminal Justice, New York, March 18, 1983.


5. See *Alliance of Non-Governmental Organizations on Crime Prevention and Criminal Justice, Results of Survey on Current Status of Treaties Dealing with the Transfers of Criminal Sanctions and Criminal Offenders to Home Country for Completion of Sentence* (hereinafter *Survey*), paper presented at Sixth United Nations Congress on Prevention of Crime and Treat-
novations, very little was accomplished to further the concept until 1948, when Denmark, Norway and Sweden entered into a convention regarding the recognition and enforcement of foreign criminal judgments. The convention provided that valid judgments rendered in one state will be enforceable in the other state insofar as the judgment imposes a fine, confiscation, or legal costs. The treaty that established the European Coal and Steel Community in 1951 provided for the execution of fines, penalties and sanctions by the High Authority. The 1948 convention was to be the groundwork for a 1963 cooperation agreement between Finland, Iceland, Norway, Sweden, and Denmark, which permitted a person sentenced in one of the countries to serve the sentence in the other contracting states if the offender was a citizen of that country. Each of the countries were in turn required to enact implementing legislation to give the agreement legal effect.

The Council of Europe has been in the forefront of international efforts to recognize and enforce criminal judgments since the inception of the organization in 1949. In 1964 the European Convention on the Supervision of Conditionally Sentenced or Conditionally

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6. One exception was the 1915 Cook Islands Act of New Zealand, that authorized the transfer of a New Zealand national sentenced to death or serving a sentence of six months or more to a New Zealand prison, but did not permit island natives convicted in New Zealand to return to their homes. Id. at 5.


8. Id., at Art. 1.

9. Treaty of April 18, 1951, reproduced in Basic Community Laws, (Rudden and Wyatt, eds.). Article 92 provided that: "Decisions of the High Authority which impose a pecuniary obligation shall be enforceable. Enforcement . . . shall be carried out by means of the legal procedure in force in each State . . . ." Id. at Art. 92.


Released Offenders came into force, permitting the receiving state to supervise the returning parolee and to imprison an offender who violates the terms of his parole or probation. At about the same time, the European Convention on the Punishment of Road Traffic Offenses also was signed, providing that an offender sentenced in one country could serve the sentence in any of the contracting states if the offender was a citizen of that country or was domiciled there. In 1970, the European Convention on the International Validity of Criminal Judgments was signed, which provided for the enforcement of penal sanctions across international boundaries at the request of the sentencing state. In 1967, a convention between the Benelux countries of Belgium, the Netherlands, and Luxembourg came into effect, providing, inter alia, that a foreign criminal judgment could be executed in one of the other signatory countries. Additional treaties permitting prisoner transfers between France and the colonies of that nation were signed, as well as bilateral treaties between Jordan and Turkey and between Spain and Denmark.

These efforts occurred in response to the growing number of foreigners found in European jails as a result of tourism, migration, job opportunities, and military duty. An international survey, done in 1974 and 1975 and centered on Europe, estimated that fourteen percent of the prison population in the Netherlands at that time were foreigners. Similar percentages were reported in select institutions

13. Id. at Art. 16.
15. 1970 Europ. T.S. No. 70, May 28. The treaty has only been ratified by Cyprus, Denmark, Norway, Sweden and Turkey, though a number of other states have signed the document. See Council of Europe, Chart Showing Signatures and Rati fications of Council of Europe Conventions and Agreements, Strasbourg, November 15, 1982; Explanatory Report on the European Convention on the International Validity of Criminal Judgments, Council of Europe, 1970. Dissatisfaction with this treaty was one of the prime reasons for the negotiation of the Convention on the Transfer of Sentenced Persons. See infra notes 116-29 and accompanying text.
16. See Bulletin Benelux, 1968-74 (for text); De Schutter, International Criminal Cooperation—The Benelux Example, in A TREATISE ON INTERNATIONAL CRIMINAL LAW, 249 (Bassiouni and Nanda eds.) (hereinafter Bassiouni and Nanda).
17. See, e.g., Franco-Tchadian Agreement, discussed in Survey, supra note 5; Treaty Between France and Cameroon, Nov. 13, 1960, discussed in Transfer of Offenders and Administration of Foreign Penal Sentences, Hearings Before the Subcommittee on Penitentiaries and Corrections of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., July 13-14, 1977, at 157 (testimony of M.C. Bassiouni) (hereinafter Senate Judiciary Hearings); see also Shearer, supra note 5, at 590.
18. Survey, supra note 5.

826
in Germany, France, Denmark, Belgium, and Sweden. The study was also one of the first to specifically document the unique problems that foreign prisoners experience, specifically citing difficulties in contacting a lawyer, understanding local languages, problems relating to food and religion, and in relating to inmates and staff members. The great distance separating the prisoner from his home was also cited as a leading cause of the emotional problems observed among foreign prisoners. Prison staff members were also found to have difficulties with foreign prisoners.

Despite the work of the Council of Europe, by 1975 the concept of prisoner transfer had largely reached a dead end. The European Convention on the International Validity of Criminal Judgments was never fully put into practice due largely to the fact that the convention required compulsory transfer which required a lengthy listing of criteria and possible exclusions. The intense current period of activity regarding prisoner transfer was brought about largely by the introduction of three-way voluntariness by the United Nations Alliance of Non-Governmental Organizations on Crime Prevention and Criminal Justice (U.N. NGO Alliance).

Subsequent to the work of the United Nations Alliance of Non-Governmental Organizations on Crime Prevention and Criminal Justice, a resolution was passed at the Fifth United Nations Congress on the Prevention of Crime and Treatment of the Offender in Geneva in 1975, supporting the development of bilateral and multilateral agreements on the transfer of prisoners.

20. Id. A later report revealed that twenty percent of the prison population were foreigners in Sweden. Council of Europe, European Committee on Crime Problems (CCECCP), Fourth Conference of Directors of Prison Administrators, Reports submitted by Mr. Norman Bishop, Strasbourg, 24 April 1979. The prison population in Belgium is also twenty percent foreigners. CCECCP, Select Committee of Experts on Foreign Nationals in Prison, Secretariat Memo, Directorate of Legal Affairs, 26 September 1979, p. 51. Twenty-five percent of the prisoners in Switzerland are foreigners. Id. Fourteen percent of the prisoners in the Netherlands are foreigners. Id. (note submitted by the Netherlands, Oct. 1, 1979, p. 1), Ten percent in Greece. Id. Four to six percent in Norway and Portugal. Id.

22. Id. at 23.
23. Id. at 20. Three-fourths of the prison staff responding to the survey reported problems with foreign prisoners, mostly regarding cultural differences. Id.
24. See supra note 15 and accompanying text.
26. The U.N. NGO Alliance on Crime Prevention and Criminal Justice, especially chairman Don Goff, was to play a pivotal role in the promotion of prisoner transfers with the U.N. Crime Congress and the United States government. Interview with Judy Weintraub, Executive Secretary of the NGO Alliance and Frank Miller, Office of the Solicitor General of Canada (retired), June 5, 1985. The UNSDRI Survey was commissioned at the behest of the NGO Alliance, which had identified the foreign national imprisoned abroad as a problem.
B. Development of prisoner transfer in the United States

At the same time, the issue began to come to the attention of United States lawmakers, though for a different reason: families of constituents imprisoned in Mexico requested investigations of alleged torture against their family members.\(^{27}\) The State Department had maintained files on Americans arrested abroad since at least 1951,\(^ {28} \) and while Americans were certainly arrested abroad in the 1950's and even long before,\(^ {29} \) it was not until the early 1970's that a large number of Americans began to find themselves in foreign jails. At this time, the first newspaper articles began to appear on the topic.\(^ {30} \) In addition, since an estimated 550 Americans were imprisoned in Mexico by 1974,\(^ {31} \) the problem began to become a diplomatic issue as reports as early as 1973. Id. Frank Miller, in the office of the Solicitor General of Canada, attended meetings of the NGO Alliance in New York at which this meeting was first discussed. Id. He took this back to his government, and decided to come to the U.N. Congress with a limited initiative regarding transfer of parole jurisdiction. Id. A working party of the NGO Alliance put together a session on the foreign prisoner at the U.N. Crime Congress in 1975, at which the Scandinavian agreements, the European Convention on the International Validity of Judgments, and theUNSDRI Survey was discussed. Id. When Bill Outerbirdge, chairman of the Canadian Parole Board, made a statement concerning transfer of parole supervision, he received such positive support from the participants that the Canadians subsequently introduced a full resolution calling for the negotiation of prisoner transfers that was subsequently adopted by the U.N. Crime Congress. Id. Goff later met with Leonard Walentynowicz, then Administrator of the Bureau of Security and Consular Affairs of the State Department, in the fall of 1975. Id. Members of the NGO Alliance met shortly thereafter with representatives from Mexico and Canada, where the concepts of transfer and voluntariness were discussed. Id.


29. The only statute dealing with detention of Americans imprisoned abroad, 22 U.S.C. §1732 (1982), was passed in 1868 in response to a waive of arrests of Irish and German citizens who became naturalized U.S. citizens and who subsequently returned to the land where they were born and were arrested. See House Hearings, Part II, at 93 ("Interpretation of Title 22, Section 1732 of the United States Code").


31. House Hearings, supra note 27, at 10, 11 (letter to Fortney Stark from Linwood Holton, Assistant Secretary for Congressional Relations).
of abuse mounted and more and more newspaper accounts were written. Indeed, arrests and detention of Americans in foreign countries, especially on drug charges, had increased noticeably every year between 1969 and 1974.32 By 1977, 2,200 Americans were imprisoned in seventy-five countries.33 Faced with the reality that their loved ones faced long prison terms in foreign countries, desperate family members soon formed parent support groups, which were instrumental in putting pressure on members of Congress to hold hearings on the subject.34 One group, the Committee of Concerned Parents, even published a Survival Manual for Families of Americans Jailed Abroad35 to guide family members through the maze of difficulties encountered.

Hearings on Americans imprisoned in Mexico were held first in the House of Representatives, leading to the passage of a joint resolution urging the President "to insure that U.S. efforts to secure stringent international law enforcement measures are combined with efforts to secure fair and humane treatment for citizens of all countries."36 During hearings held on the resolution in April, 1975, Congressman Fortney Stark reported that his staff had investigated allegations by 159 Americans imprisoned in Mexico, finding sixty-one cases in which prisoners claimed they had been forced to sign a confession without benefit of an interpreter, ninety-six cases in which physical torture during interrogation was alleged, eighty cases in which a prisoner claimed to be held incommunicado for extended periods of time, fifty cases of physical abuse in prison, and sixty-eight cases of extortion by Mexican counsel.37 Following a case-by-case review of some 514 Americans incarcerated in Mexico, the Bureau of Security and Consular Affairs of the State Department reported in January 1976 that the alleged deprivations of basic rights formed a "credible pattern."

32. Id. at 35.
34. Penel Treaties With Mexico and Canada: Hearings Before the Committee on Foreign Relations, United States Senate, on Executive D and Executive H, 95th Cong., 1st Sess., June 15-16, 1977 at 172 (testimony of Mary Coulter, President of 1732, Inc.); id. at 189 (statement of Juanita Carter, President of Freedom Perserverance, Inc.) (hereinafter Senate Foreign Relations Hearings).
Publicity surrounding the alleged presence of U.S. Drug Enforcement Administration agents during torture sessions in Mexico resulted in the passage of the Mansfield Amendment, which prohibited DEA agents from participating in direct arrest and interrogation operations abroad. The State Department also responded to the hearings by developing a prisoner handbook for use by consular officers and by requesting foreign posts to write information booklets on local laws and judicial systems to give to American prisoners. The State Department also began publishing information on the hazards of being arrested abroad, and providing some emergency assistance to Americans in foreign jails. Beginning in 1978, the Department of State was required to submit an annual report to the Congress on the number of American citizens in foreign jails, the charges against them, and what measures have been taken to assist them.

Initially, the Congressional inquiry was focused primarily on con-
farming reports of torture and, once confirmed, encouraging the President to use the authority granted by section 1732 of the United States Code to demand the return of any prisoners unjustly held in Mexico.\footnote{45} State Department officials, however, took the position that section 1732 applied only to the validity of arrest rather than to conditions and treatment during incarceration.\footnote{46}

Efforts were also made in the courts to seek redress for violations of human rights against Americans imprisoned abroad. In Flynn v. Schultz, the Seventh Circuit ruled that the substance of the inquiry required under section 1732 concerning Flynn’s imprisonment in Mexico constituted a nonjusticiable political question and was unreviewable.\footnote{47}

Officials in the United States Department of State and Department of Justice, who had explored the concept of prisoner transfer treaties in the early 1970’s,\footnote{48} began debating the feasibility of transfer treaties

\footnote{45. See House Hearings, supra note 27, at 6 (testimony of Hon. Fortney Stark). 22 U.S.C. \S 1732 (1982) provided that:
Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to the Congress.

46. Id. at 65 (testimony of Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State). See also House Judiciary Hearings, supra note 41, at 267, 268 (Memorandum, Constitutionality of H.R. 7145). However, the Congressional Research Service, in an analysis of the legislative history, indicated that the statute may be applicable to the situation of Americans imprisoned in Mexico. House Hearings, supra note 27, at 93 (memorandum on Interpretation of Title 22, Section 1732 of United States Code).

47. Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984). The court, however, did note that under 22 U.S.C. \S 1732, a duty of inquiry exists on the part of the President with respect to the preliminary determination that a citizen had been “unjustly deprived of his liberty by a foreign government” and that duty was a judicially enforceable one. Id. at 1193, 1195. The court concluded that in the instant case “the examination undertaken by the State Department here satisfies any inquiry and report requirement.” Id. at 1196. The court also noted that the precise meaning of the phrase “unjustly deprived” was in doubt and that the instant case lacked sufficient facts to make a determination even if an objective standard was available. Id. at 1193-94. See also Redpath v. Kissinger, 415 F. Supp. 556 (W.D. Tex. S.A. Div.), aff’d 545 F.2d 167 (5th Cir. 1976) (defendant arrested in Mexico who was allegedly tortured by Mexican officials and received inadequate assistance by U.S. officials not entitled to writ of mandamus when special report into allegations had been made by State Department, which found such claims lacking, and appropriate follow-up inquiries had been made); Dames & Moore v. Regan, 453 U.S. 677 (1981) (22 U.S.C. \S 1732 indicates congressional willingness to give the President broad discretion when responding to hostile acts of foreign sovereigns); 43 Op. Atty. Gen. No. 30 (1981) (phrase “necessary and proper” in 22 U.S.C. \S 1732 implies President has broad discretionary powers under the statute).

48. This was not, however, the first time that the issue of prisoner transfer had come
once again in 1975. In June, 1976, Secretary of State Henry Kissinger met with the President and Foreign Secretary of Mexico, and first discussed the concept of a prisoner transfer treaty between the
two countries. Negotiations proceeded rapidly, and the first prisoner transfer treaty in the Americas was signed between the United States and Mexico on November 25, 1976. Implementing legislation was passed by the Senate and House of Representatives at the same time. In March, 1977, an additional treaty was signed with Canada, and within two years four more treaties came into force with Bolivia, Panama, Turkey, and Peru. In 1985, two new treaties with the Council of Europe ("European Convention") and France have entered into force, and an additional treaty with Thailand has been signed but is not yet in force.

Almost from the outset, questions were raised concerning the constitutionality of the treaties. Virtually all the witnesses who address-
ed the issue at the hearings on the ratification of the treaties and on the implementing legislation asserted that the treaties were constitutional, usually on two specific grounds: (1) the "conflicts of law" ground, and (2) the "waiver" ground. Under conflicts of law principles, United States courts have repeatedly held that the United States Constitution has no applicability to the conduct of a foreign trial for a foreign offense. Because the treaties apply to trials in foreign countries with lawful jurisdiction over the offender and the offense, no questions of constitutionality would arise. Further, the treaties require the prisoner to knowingly and voluntarily consent to transfer. Thus, a second ground of constitutionality is that the Supreme Court has already recognized the right to waive certain constitutional rights providing such informed consent is present. The treaties are non-self-executing, and therefore, much discussion centered around the implementing legislation and safeguards to guarantee that consent of the prisoner was informed and voluntary. The Congress ultimately settled upon an elaborate verification procedure involving the determination by a United States magistrate that the transferring prisoner's consent was knowing and voluntary.

At the same time, the same issues were being raised by the scholarly community, in which a general consensus existed that the constitutionality of the treaties could be sustained.

63. See, e.g., id. at 28 (testimony of Hon. John Hill, Attorney General for Texas); Id. at 46 (testimony of Hon. Herbert Hansell, Legal Advisor, Department of State); Id. at 94 (Testimony of Alan Swann, Univ. of Miami Law School). See also Transfer of Offenders and Administration of Foreign Penal Sentences, Hearings Before the Subcommittee on Penitentiaries and Corrections of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., July 13-14, 1977 p. 124 (testimony of Barbara Watson, Department of State).

64. See Testimony of John Hill, supra note 63 (citing Neely v. Henkel (No. 1), 180 U.S. 109 (1901), and Wilson v. Girard, 354 U.S. 524 (1957)).


66. See Senate Judiciary Hearings, supra note 17, at 25 (statement of Peter Flaherty, Deputy Attorney General, U.S. Department of Justice).

67. Senate Judiciary Hearings, supra note 17, at 1-252.

68. See infra notes 102-08 and accompanying text.

The terms of the treaties and the corresponding implementing legislation established that only the country in which the prisoner was convicted could modify or set aside the conviction or sentence of the prisoner. The prisoner was free, however, to challenge the validity or legality of his transfer to the United States. Should the prisoner be successful in challenging those procedures, however, the prisoner could then be returned to the country which imposed the sentence to complete the sentence, since only the procedure of the transfer, and not the conviction itself, had been challenged. To ensure that the prisoners understand the consequences of their actions, an elaborate series of safeguards were established to verify that consent of the prisoners to transfer was knowing and voluntary.

The treaties and the implementing legislation, as expected, were challenged a number of times in court, most notably in Pfeiffer v. U.S. Bureau of Prisons and Rosado v. Civiletti.

Pfeiffer, who was convicted in Mexico on a drug charge and returned to the United States under the terms of the Mexican Treaty, claimed that his Mexican trial was unfair and that he should be released. In addition, he claimed that he did not knowingly and voluntarily consent to his transfer.

In the lower court ruling, Judge Gordon Thompson held that procedures in a foreign court that did not comply with United States constitutional practices did not prevent the United States from complying with its treaty commitments. The judge further ruled that the admittedly inhumane treatment Pfeiffer received in Mexico "is not the kind of 'duress' that invalidates his consent." Judge Thompson's rulings were upheld upon appeal to the Ninth Circuit.

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Exchange of Prisoners Treaty, in INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 204 (Lillich ed. 1981). Some commentators argue that American citizens are afforded more protection against foreign civil judgments than against foreign penal judgments and that the provisions of the treaties allow the sending state exclusive jurisdiction over modification of the sentence should be eliminated. See Note, Prisoner Transfer Treaties: Need For the Elimination or Modification of the Retention Provision, 13 CAL. W. INT'L. L. J. 321 (1983).

72. See infra notes 102-108 and accompanying text.
73. 615 F.2d 873 (9th Cir. 1980), cert. denied 447 U.S. 908 (1980).
74. 621 F.2d 1179 (2nd. Cir. 1980).
76. Id.
77. Pfeiffer v. U.S. Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980).
In *Rosado*, District Court Judge T. Gilroy Daly held that the three petitioning prisoners were justifiably fearful for their lives should they remain in Lecumberry Prison in Mexico. They therefore would have said anything to have themselves removed from the prison, making the issue of "voluntary" consent untenable. Judge Daly found that the terms of the treaty were not complied with and granted the writ of habeas corpus.\(^7\)

The Second Circuit Court of Appeals unanimously reversed Judge Daly's decision.\(^7\) The court focused on the humanitarian nature of the treaty and on the elaborate efforts written into the legislation to insure that consent was knowing and voluntary. The court found that the decision to transfer, though difficult, constituted an intelligent choice between available alternatives and could therefore be considered voluntary.\(^8\) In addition, the court noted that the treaty reduced tensions between the two countries and that it offered a way for the prisoner to escape the conditions in Mexico. Other constitutional challenges to the treaties were also subsequently dismissed.\(^9\)

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7. The Second Circuit reached a different conclusion regarding the voluntariness of the prisoner's consent to transfer than the district court primarily because the Second Circuit relied on different interpretations of the nature of that consent, and hence cited different cases to support their conclusion. Judge Daly, in the district court opinion, relied primarily upon Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the Supreme Court upheld the validity of a citizen's consent to a police search of his automobile under the fourth amendment. Interpreting Schneckloth, Judge Daly found that determination of the consent of the petitioner is a question of fact to be determined from all the surrounding circumstances, and that consent that is the result of coercion or duress produced by brutality or violence is constitutionally suspect. Velez v. Nelson, 475 F. Supp. at 867. Upon appeal, however, the Second Circuit found that, "it is readily apparent that a decision whether to permit a police officer to search one's car does not remotely resemble the choice presented to these petitioners under the Treaty." Rosado v. Civiletti, 621 F.2d at 1190. The court noted that "the decision to transfer more closely resembles . . . whether to plead guilty and accept a set of specified sanctions ranging from probation to a possibly long prison sentence, or to stand trial and face unknown dispositions . . . ." Id. They then examined cases construing the voluntariness of guilty pleas, especially United States v. Jackson, 390 U.S. 570 (1968), Brady v. United States, 397 U.S. 742 (1970), and North Carolina v. Alford, 400 U.S. 25 (1970), where the Supreme Court emphasized that the "voluntariness of a guilty plea is determined by considering, not whether the decision of the defendant reflected a wholly unrestrained will, but rather whether the decision constituted a deliberate, intelligent choice between available alternatives". The Second Circuit found that when "petitioner's consent to transfer is viewed in light of the alternatives available to them, it cannot be seriously doubted that their decisions were voluntary and intelligently made." Rosado v. Civiletti, 621 F.2d at 1194.


Transferees were thus estopped from challenging their foreign convictions once they had transferred. They were not barred, however, from challenging the procedures under which they had been transferred or from alleging that the procedures outlined in the treaties and the implementing legislation had not been followed. In at least one case, *Reynolds v. Ralston*, a prisoner was successful in challenging his confinement on this ground.

In that case, the petitioner claimed that his transfer was accomplished without his consent. The petitioner had appeared before a United States magistrate for a consent hearing, but refused to give his consent to transfer. Based on the findings of a psychiatric report, the magistrate appointed a legal guardian for the petitioner at a later hearing at which the prisoner was not present. The legal guardian consented for the petitioner and signed the petition to transfer.

In reviewing the record, the court found that the psychiatric report at no time stated that the transferee was incompetent or unable to make an intelligent and voluntary decision to transfer. Additionally, the United States magistrate in charge of the consent hearing had also failed to make such a finding. Consequently, the court found that the transferee had not given his consent and the procedures whereby another could provide such consent had not been complied with. The petitioner in that case was released from prison and the Mexican authorities apparently did not seek his return.

Other cases of lesser significance that did not touch on the constitutionality of the treaties were also heard by the courts.


82. Reynolds v. Ralston, U.S. District Court for the Western District of Missouri, Civil Action No. 79-3234-CV-S-WRC.

83. "Order granting petitioner leave to proceed in forma pauperis and report and recommendation of United States magistrate that the petition hearing for a writ of habeas corpus be granted and that petitioner be released from serving the sentence imposed by the United Mexican States in the United States of America." Id. at 2.

84. Id. at 4.

85. As they could have under 18 U.S.C. §4108(3)(1982).

86. In Tavarez v. U.S. Attorney General, 668 F.2d 805 (5th Cir. 1982), the Fifth Circuit Court of Appeals upheld the right of the Attorney General of the United States to apprehend and return to Mexico a Mexican fugitive who had been convicted of a state crime in the United States and who had been subsequently transferred back to Mexico under the Mexican Treaty and had then escaped to the United States. Id. at 809. The court also held that the Attorney General could return such offender without benefit of an extradition hearing provided that the offender was given a reasonable opportunity to consult with counsel and file a petition for a writ of habeas corpus. Id. at 810. In Powell v. U.S. Bureau of Prisons, 695 F.2d 868 (5th Cir. 1983), the Fifth Circuit held that a prisoner who returned to the United States pursuant to the Mexican Treaty, was released on parole and later convicted of a new crime in the United States. Id. at 869. He was subsequently imprisoned and ordered to serve the aggregate
THE TREATIES WITH MEXICO, CANADA, PANAMA, PERU, BOLIVIA, TURKEY, FRANCE, THE COUNCIL OF EUROPE, AND THAILAND: A COMPARISON

Though the treaties were negotiated with governments under very different legal systems, they are remarkably similar in their structure and phrasing. In this section the authors will discuss the similarities and differences of the treaties.

A. Conditions of transfer

The general qualifications for transfer are as follows: (1) The prisoner must be a citizen or national of the country to which he or she desires to be transferred; 87 (2) the prisoner must be sentenced and convicted; 88 (3) under all but the French and Thai Treaties, the

87. Mexican Treaty, supra note 51, Art. II(b); Canadian Treaty, supra note 54, Art. II(2); Panama Treaty, supra note 56, Art. III(2); Peru Treaty, supra note 58, Art. III(2); Bolivian Treaty, supra note 55, Art. III(2); Turkish Treaty, supra note 57, Art. IV(b); French Treaty, supra note 60, Art. 2(b); Thai Treaty, supra note 61, Art. II(2); European Convention, supra note 59, Art. 3(1)(a). The European Convention allows defining the term “national” for the purposes of the Convention, thus allowing for a broader definition than the United States generally permits. European Convention Article 3(4). For example, it is not necessary for a person to be a national of only the administering state; signatory states are free to apply the Convention in cases of dual or multiple nationality, even when the other nationality is that of the sentencing state. Council of Europe, Explanatory Report on the Convention of the Transfer of Sentence Persons, Strasbourg, 1983 (hereinafter Explanatory Report). This also allows a signatory state to define stateless persons or citizens of other states who have established roots in the country through permanent residence to be defined as “nationals” for the purposes of the Convention. Id. The Swedish government, in depositing the instrument of ratification, declared that the term “national” is taken to cover aliens domiciled in the administering state. Council of Europe, JUR/Tr. No. 112, 1985. The Canadian Treaty specifically provides that dual nationals may be permitted transfer. Canadian Treaty, supra note 54, Art. I(d). The United States implementing legislation states that a prisoner may be transferred only to a country of which he or she is a citizen or national. 18 U.S.C. §4100(b)(1982). Uncertainty still exists as to whether the U.S. would agree to transfer a person with dual or multiple nationality.

88. Mexican Treaty, supra note 51, Art. I; Canadian Treaty, supra note 54, Art. I(c); Panama, supra note 56, Treaty Art. I; Peru Treaty, supra note 58, Art. I; Bolivian Treaty, supra note 55, Art. I; Turkish Treaty, supra note 57, Art. I(c), II; French Treaty, supra note 60, Art. I(c); Thai Treaty, supra note 61, Art. I(3); European Convention, supra note 59, Art. 2(1).
inmate must have at least six months of the instant sentence remaining to be served;49 (4) there must be no pending proceeding by way of appeal or collateral attack upon the instant conviction or sentence;50 (5) the prisoner must be convicted of a crime which is generally punishable as a crime under the laws of both countries;51 (6) the prisoner,52 as well as the sending state and the receiving state,53 must all provide their consent.

Additional conditions exist. For example, if an offender is sentenced by courts pursuant to laws of a state or province of one of the party countries, the approval or authorization of that state or province is also required.54 All but the Thai treaty and European

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89. Mexican Treaty, supra note 51, Art. II(5); Canadian Treaty, supra note 54, Art. II(5); Panama Treaty, supra note 56, Art. III(4) (waived for “Category I Offenders”, defined as a United States citizen employee or his dependent, a member of the United States Forces or his dependent, or a member of the civilian component or his dependent, Panama Treaty, supra note 56, Art. II(4)); Perú Treaty, supra note 58, Art. III(4); Bolivian Treaty, supra note 55, Art. III(4); Turkish Treaty, supra note 57, Art. IV(d); French Treaty, supra note 60, Art. 2(3) (requiring a minimum of one year left to serve); Thai Treaty, supra note 61, Art. II(4) (minimum of one year left to serve); European Convention, supra note 59, Art. 3(1)(e) (in “exceptional cases”, transfer may occur when less than six months remain to be served; the sentence may also be indeterminate).

90. Mexican Treaty, supra note 51, Art. II(6); Canadian Treaty, supra note 54, Art. II(e); Panama Treaty, supra note 56, Art. III(5); Perú Treaty, supra note 58, Art. III(5); Bolivian Treaty, supra note 55, Art. III(5); Turkish Treaty, supra note 57, Art. I(c); French Treaty, supra note 60, Art. 2(d); Thai Treaty, supra note 61, Art. II(5); European Convention, supra note 59, Art. 3(1)(b); 18 U.S.C. §4100(c) (1982).

91. Mexican Treaty, supra note 51, Art. II(1); Canadian Treaty, supra note 54, Art. II(a); Panama Treaty, supra note 56, Art. III(1); Perú Treaty, supra note 58, Art. III(1); Bolivian Treaty, supra note 55, Art. III(1); Turkish Treaty, supra note 57, Art. III(1); French Treaty, supra note 60, Art. 2(a); Thai Treaty, supra note 61, Art. II(1); European Convention, supra note 59, Art. 3(1)(e); 18 U.S.C. §4100(b) (1982).

92. Mexican Treaty, supra note 51, Art. IV; Canadian Treaty, supra note 54, Art. III; Panama Treaty, supra note 56, Art. III(6); V; Perú Treaty, supra note 58, Art. V; Bolivian Treaty, supra note 55, Art. V; Turkish Treaty, supra note 57, Art. IV(f), V; French Treaty, supra note 60, Art. 2(c); Thai Treaty, supra note 61, Art. III(2), III(7); European Convention, supra note 59, Art. 7. Prisoners under 18 years of age may be transferred with the consent of their parents or guardians or by a court of the sentencing country. 18 U.S.C. §4100(b) (1982). Persons determined to be mentally ill may also be transferred. Id. §4102(9) (1982).

93. Mexican Treaty, supra note 51, Art. IV(2); Canadian Treaty, supra note 54, Art. III(3); Panama Treaty, supra note 56, Art. III(6); V; Perú Treaty, supra note 58, Art. V(1), (3); Bolivian Treaty, supra note 55, Art. V(1), (3); implied in Turkish Treaty, supra note 57, Art. II; Thai Treaty, supra note 61, Art. III(2); European Convention, supra note 59, Art. 7. The French Treaty merely states the grounds on which a request shall and may be refused. French Treaty, supra note 60, Arts. 4, 5. The Panamanian Treaty divides prisoners into two categories: Category I offenders are United States citizens or their dependents, a member of the U.S. Armed Forces or his dependents, or a member of the civilian component or his dependents. Panamanian Treaty, supra note 56, Art. II(4). Category II are all other offenders. Id. Consent of the sending state is not required for Category I offenders. Id. Art. V(4).

94. 18 U.S.C. §4102(6) (1982). See also Mexican Treaty, supra note 51, Art. IV(5); Canadian Treaty, supra note 54, Art. III(5); Panama Treaty, supra note 56, Art. V(7); Perú Treaty, supra note 58, Art. V(6); Bolivian Treaty, supra note 55, Art. V(10). Eighteen states have explicit authority to transfer prisoners. See ARIZ. REV. STAT. ANN. §41-105; CAL. GOV'T. CODE
convention permit transfer to be denied if the offense committed is a military offense. Additional conditions peculiar to each treaty are also enumerated.

As previously noted, persons serving a sentence of parole or pro-
bation may also be transferred, although the authors are unaware that this procedure has ever been utilized.97

B. Procedure for transfer.

Each of the treaties specifies a different means of initiating the request for transfer, including a request to the sending State,98 the receiving state,99 or by some combination thereof.100 In practice, however, the prisoner is the person who usually initiates the transfer request. Most of the treaties note specific factors that should be taken into account when deciding on the appropriateness of the transfer. These include the probability that the transfer will contribute to the social rehabilitation or be in the best interests of the offender, as well as the seriousness of the crime, previous criminal record, health status, and the ties the offender may have with the societies of both countries.101

Before transfer is effected, consent must be obtained from the prisoner.102 Implementing legislation of the United States specifies that government requires that if an inmate imprisoned in the United States has an outstanding significant detainer and detaining authorities refuse to agree to the transfer, the inmate cannot be transferred. Transfer of Offenders to or From Foreign Countries, supra note 94 at Appendices 1-6.

97. 18 U.S.C. §§4102(2), 4102(3), 4106. Provisions also exist whereby a sentence requiring payment of money as an award for damages may be directly enforced as though the payment were a civil judgment in the United States district courts. Id. §4115. These provisions, however, have never been utilized.

98. Mexican Treaty, supra note 51, Art. IV(1).

99. Panama Treaty, supra note 56, Art. V(1); Peru Treaty, supra note 58, Art. V(1); Bolivian Treaty, supra note 55, Art. V(1); Turkish Treaty, supra note 57, Art. XII(1); Thai Treaty, supra note 61, Art. III(2).

100. Canadian Treaty, supra note 54, Art. III(3) (requiring transfer to be commenced by written application from the offender to the authority of the sending state); French Treaty, supra note 60, Art. 11 (permitting request to be submitted by the prisoner, the sending state, or the receiving state); European Convention, supra note 59, Art. 2(2) (prisoner may express interest in transferring to either the sending or receiving state).

101. Mexican Treaty, supra note 51, Art. IV(4); Canadian Treaty, supra note 54, Art. III(6); Panama Treaty, supra note 56, Art. V(6) (this treaty, however, does not require a finding of appropriateness for transfer for U.S. citizen employees or their dependents, members of the U.S. Armed Forces or their components, or a member of the civilian component or their dependents); Peru Treaty, supra note 58, Art. V(5); Bolivian Treaty, supra note 55, Art. V(6); Thai Treaty, supra note 61, Art. III(3). The Explanatory Report of the European Convention specifically states that because no obligation to transfer on the part of the Contracting States exists, "it was not necessary to list any grounds for refusal, nor to require the requested state to give reasons for its refusal to agree to a requested transfer." Explanatory Report, supra note 87, at 7. External factors are also considered. See supra notes 94-97 and accompanying text.

102. 18 U.S.C. §4100(b)(1982). See also Mexican Treaty, supra note 51, Art. IV(2); Canadian Treaty, supra note 54, Art. III(10); Panama Treaty, supra note 56, Art. III(6); Peru Treaty, supra note 58, Art. V(9); Bolivian Treaty, supra note 55, Art. V(3); Turkish Treaty, supra note 57, Art. n(7); French Treaty, supra note 60, Art. 2(e), 12(2); European Convention, supra note 59, Art. 7; Thai Treaty, supra note 61, Art. III(7).
a United States magistrate or judge may verify that the consent was voluntary and made with full knowledge of the consequences thereof.\textsuperscript{103} The verifying officer is required to make sure the prisoner understands that the transfer is subject to certain conditions, including, \textit{inter alia}, that the conviction can only be modified or set aside by a court of the country in which the prisoner was convicted, that the sentence will be carried out according to the laws of the United States, and that the prisoner's consent is wholly voluntary and not the result of any promises, threats or other improper inducements.\textsuperscript{104} These conditions are also put in writing on a consent form the prisoner must sign.\textsuperscript{105} Before signing, the prisoner has a right to consult with legal counsel, which will be appointed for the prisoner if one cannot be afforded.\textsuperscript{106} The proceedings are all tape recorded.\textsuperscript{107} Once consent is verified, it is irrevocable.\textsuperscript{108}

The completion of a transferred offender's sentence is carried out

\begin{quote}
104. 18 U.S.C. §§4107, 4108.
105. The consent forms for Americans returning to the United States are all similar except for the substitution of the name of the country. The form for Peru is as follows:
I, (Name of prisoner), having been duly sworn by a verifying officer appointed under the laws of the United States of America, certify that I understand and agree, in consenting to transfer to the United States of America for the execution of the penal sentence imposed on me by a court of the Republic of Peru, that:
(1) My conviction or sentence can only be modified or set aside through appropriate proceedings brought by me or on my behalf in the Republic of Peru;
(2) My sentence will be carried out according to the laws of the United States of America and that those laws are subject to change;
(3) If a court of the United States of America should determine upon a proceeding brought by me or on my behalf that my transfer was not accomplished in accordance with the treaty or laws of the United States of America, I may be returned to the Republic of Peru for the purpose of completing my sentence if the Republic of Peru requests my return; and
(4) Once my consent to transfer is verified by the verifying officer, I may not revoke that consent. I further certify that:
(1) I have been advised of my right to consult with counsel, and have been afforded the opportunity for such consultation prior to giving my consent to transfer;
(2) I have been advised that if I am financially unable to obtain counsel, one would be appointed for me free of charge; and
(3) 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 The United States Of America For Execution Of The Penal Sentence Imposed On Me By A Court Of The Republic Of Peru.

Form for Verification of Consent to Transfer to the United States of America for Execution of Penal Sentence of United Mexican States, available from Department of Justice, Criminal Division, Office of International Affairs.
106. 18 U.S.C. §§4107(c), 4108(c), 4109.
107. \textit{Id.} §4108(e).
\end{quote}
under the laws and procedures of the receiving state. The sending state has exclusive jurisdiction regarding the sentences imposed, including the power to pardon or grant amnesty, and the receiving state, upon being notified of such measures, is required to put such measures into effect. The authorities of each state may exchange reports on the status of transferees at regularly agreed intervals or upon special request.

Once back in the United States, the prisoner is immediately eligible for parole. The transferred offender is entitled to all credits for good time, labor, and any other credits earned while in the foreign prison. In deciding upon eligibility for parole, the parole commission is instructed to treat the offense as if the crime had been committed in the United States. In addition, the United States is generally barred from prosecuting a transferred offender for the same offense for which the offender was convicted in the foreign country.

109. Mexican Treaty, supra note 51, Art. V(2); Canadian Treaty, supra note 54, Art. IV(1); Panama Treaty, supra note 56, Art. IV(2); Peru Treaty, supra note 58, Art. VI(2); Bolivian Treaty, supra note 55, Art. VI(2); Turkish Treaty, supra note 57, Art. XX, XXVI; French Treaty, supra note 60, Art. 9(2); European Convention, supra note 59, Art. 9(3); Thai Treaty, supra note 61, Art. V(1); see also 18 U.S.C. §4100(d), 18 U.S.C. §3244(1)(1982). The receiving state may not, however, extend the length of the sentence beyond the sanction imposed by the sending state.

110. Mexican Treaty, supra note 51, Art. V(2), VI; Canadian Treaty, supra note 54, Art. IV(1), V; Panama Treaty, supra note 56, Art. VII; Peru Treaty, supra note 58, Art. VII; Bolivian Treaty, supra note 55, Art. VII; Turkish Treaty, supra note 57, Art. VIII, IX (however, collective pardons by the receiving state are applicable to transferees, as are individual pardons given on grounds of infirmity, old age or permanent illness); French Treaty, supra note 60, Art. 6, 7; European Convention, supra note 59, Art. 13 (sending state alone has the power to decide on application for review of judgment). But see European Convention Art. 12 (pardon, amnesty or commutation permitted by either sending or receiving state); Thai Treaty, supra note 61, Art. IV. See also 18 U.S.C. §4100(d)(1982).

111. Mexican Treaty, supra note 51, Art. V(5); Canadian Treaty, supra note 54, Art. IV(5); Panama Treaty, supra note 56, Art. IV(3); Peru Treaty, supra note 58, Art. VI(3); Bolivian Treaty, supra note 55, Art. VI(3); Turkish Treaty, supra note 57, Art. XVII(3); French Treaty, supra note 60, Art. 16; European Convention, supra note 59, Art. 15; Thai Treaty, supra note 61, Art. V(5). See also 18 U.S.C. §4106(e).

112. 18 U.S.C. §4106(e).

113. Id. §4100(c)(1).

114. Id. §4100(c)(5).

115. Id. §4111. Section 4111 specifically bars detention, prosecution or trial of a transferred offender if (1) such action would be barred when the sentence on which the transfer was based had been issued by a court of the jurisdiction seeking to prosecute the offender; or (2) 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 States or another state. Id. Most of the treaties do contain provisions barring the receiving state from prosecuting a person for the same offense for which he was convicted. See Mexican Treaty, supra note 51, Art. 12; Canadian Treaty, supra note 54, Art. VI; Panama Treaty, supra note 56, Art. VI(1); Peru Treaty, supra note 58, Art. VI(1); Bolivian Treaty, supra note 55, Art. VI(1); Turkish Treaty, supra note 57, Art. V(1). The French Treaty provides that transfer may be refused "if the facts upon which the conviction is based are also the object of proceedings for sentencing or habeas corpus."
COUNCIL OF EUROPE CONVENTION

The concept of a flexible European treaty by which foreign nationals could be transferred back to their home countries was first discussed by the European Ministers of Justice in 1978.\textsuperscript{116} The Ministers were prompted by the rising number of foreign nationals imprisoned in their respective countries\textsuperscript{117} as well as the fact that few member states had ratified the earlier International Validity of Criminal Judgments Treaty. The states which had ratified that treaty found the procedures for transfer under the treaty to be slow and cumbersome.\textsuperscript{118} The task of developing a draft treaty was given to the European Committee on Crime Problems, which in turn established a Select Committee consisting of experts from seventeen countries\textsuperscript{119}. In May, 1982, a draft was sent by the Committee on Crime Problems to the Committee of Ministers for adoption. The Committee approved the text and the Convention on the Transfer of Sentenced Persons was opened for signature on March 21, 1983.\textsuperscript{120}

The European Convention differs from the International Validity of Criminal Judgments Treaty in several respects. The European Constitution provides a simplified procedure for transfer, the sentencing state and the administering state may both request transfer, the contracting states are not obligated to comply with a request for transfer, and the transfer is subject to the prisoner’s consent.\textsuperscript{121}

The Convention also differs from previous United States prisoner transfer agreements in several respects. First, both the sentencing and the receiving state may grant a pardon or commutation of the sentence.\textsuperscript{122} Previous transfer agreements that the United States has entered into allow only the sending (sentencing) state to grant pardon

\textsuperscript{116} Explanatory Report, supra note 87, at 5.
\textsuperscript{117} See supra notes 19-23 and accompanying text.
\textsuperscript{118} Explanatory Report, supra note 87, at 6.
\textsuperscript{119} Id. The Select Committee consisted of experts from fifteen Council of Europe member states (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada, the United States of America, the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented as observers. Id. at 5, 6.
\textsuperscript{120} Id. at 6.
\textsuperscript{121} Id. at 7.
\textsuperscript{122} European Convention, supra note 59, Art. 12.
or commutation of sentence.\textsuperscript{123} Secondly, strong emphasis is placed on the right of prisoners to seek review of their cases under the law of the sentencing state even after being transferred back to their home countries.\textsuperscript{124}

The most important difference between the European Convention and previous United States transfer agreements is that the receiving state has the right to choose between two ways of enforcing a sentence. The receiving state can either continue enforcement of the sentence imposed in the sending (sentencing) state through a court or administrative procedure into a decision which substitutes a sanction prescribed by the law of the receiving state for the sanction imposed by the sentencing state.\textsuperscript{125} If requested, the receiving state must inform the sending state as to which of these two procedures the receiving state is going to apply.\textsuperscript{126} The basic difference between the two procedures is that in the "conversion of sentence" procedure (commonly known as \textit{exequatur}\textsuperscript{127}) the sentence enforced is no longer based on the sanction imposed in the sending (sentencing) state.\textsuperscript{128} The United States exclusively has employed the continued enforcement provisions.\textsuperscript{129}

\textbf{THE THAI TREATY}

The Thai Treaty proved to be more controversial. During hearings in the Senate Foreign Relations Committee, Senator Paula Hawkins,

\begin{footnotesize}
\textsuperscript{123} See \textit{supra} note 110 and accompanying text.
\textsuperscript{124} European Convention, \textit{supra} note 59, Art. 13. The \textit{Explanatory Report} notes that: "The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact . . . . The term "review" within the meaning of Article 13 covers also proceedings which in some states may result in a new examination of the legal aspects of the case, after the judgment has become final . . . . The sentencing state's competence to decide on any application for review should not be interpreted as discharging the administering state from the duty to enable the sentenced person to seek a review of the judgment. Both states must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person's right to apply for a review." \textit{Explanatory Report}, \textit{supra} note 87, at 18, 19.
\textsuperscript{125} European Convention, \textit{supra} note 59, Articles 9, 10, 11.
\textsuperscript{126} \textit{Id.} at 9(2). Each state also has the possibility to exclude the application of one of these two procedures. \textit{Id.} at 3(3).
\textsuperscript{128} \textit{Id.} It has been the experience of the authors that most individuals returned to the United States are eventually released under the U.S. parole system. \textit{See Fogelnest, Simon \& Pisani, \textit{Coming Home: A Handbook for Americans Imprisoned in Mexico}}, at 10-13 (1984).
\textsuperscript{129} \textit{Convention on the Transfer of Sentenced Prisoners}, S. \textit{Treaty Doc.} No. 23, 98TH
\end{footnotesize}
who chaired the hearings, noted that most of the Americans who would be returned under the Thai Treaty were convicted of drug offenses. She initially appeared to oppose the treaty on the grounds that the treaty was "coddling" drug peddlers, whom she referred to as "murderers". Subsequent testimony by the United States Department of State, Department of Justice, and attorney Richard Atkins (representing International Legal Defense Counsel), addressed her concern that those returned under the treaty would simply be set free.130 Subsequently, a compromise was worked out between the Committee and the Department of Justice to the effect that those convicted of large-scale drug trafficking (defined as those convicted in possession of more than one kilo of heroin) would be deemed "inappropriate" for return to the United States under the treaty. This is the first time that such a provision has been inserted into a transfer treaty.

The Thai Treaty provides, as one of the conditions of transfer, that "the offender, at the time of transfer, have served in the transferring state any minimum period of the sentence stipulated by the law of the Transferring State."131 This provision, which is unique to the Thai Treaty, was inserted at the request of the Thai government, apparently due to a historic sensitivity regarding interference of foreign courts with Thai judicial decisions. The Thai government indicated that a clause would be inserted into the Thai implementing legislation requiring foreign prisoners to remain in Thailand for four years or one-third of their sentence, whichever is less. Though United States officials were reluctant to support such a measure, little chance existed of passing the Treaty and the implementing legislation unless the clause was inserted. In congressional hearings, advice and consent of the treaty was urged by the United States Department of State and United States Department of Justice, as well as by the authors.132 Later,
however, word was received that the Thai Parliament had changed the minimum stay requirement from four to eight years, a measure which would have put almost all the prisoners then in Thai prisons years away from eligibility. When concern over this provision was expressed by the United States government and several European governments, the Thai government indicated that its Parliament would consider changing the provision back to four years during Parliamentary session in 1985. To date, no such changes have been made.

**THE PERU TREATY AND PAYMENT OF FINES**

With the exception of the Bolivian and French Treaties, the treaties are silent as to whether provisions of the sentence other than the period of detention must be complied with prior to transfer. Whether or not Americans were required to pay their fines in full before transferring became an issue in 1982 when the transfers of a number of Americans from Peru were delayed because of their inability to pay large fines assessed against them. In one case the amount of the fine exceeded $100,000.

The authors, representing the prisoners, traveled to Lima to meet with officials in the Peruvian Ministry of Justice, Supreme Court, and Office of the President. The position outlined by the Peruvian Ministry of Justice was that United States citizens should pay their fines in full prior to their transfer.

The contrary position held that United States citizens should not pay their fines and civil reparations prior to transfer, but rather at completion of sentence, as would a Peruvian remaining in Peru. To require an American to “prepay” the fine and civil reparation in full was argued to be discriminatory because Peruvians in Peruvian jails were not required to do likewise. This requirement amounted to a “purchase price” necessary for United States citizens to exercise their rights under the treaty. In addition, to permit the effective implementation of the treaty and to avoid discrimination, transferring Americans should be permitted to complete their sentences in United States jails and then be in the same relative position with respect to payment of fines and/or civil reparations as Peruvians who are in jail as a result of domestic Peruvian crimes.

Some authorities in Peru expressed a different viewpoint. They argued that since the treaty required the United States to “take over”

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134. Bolivian Treaty, supra note 55, Art. III(6); French Treaty, supra note 60, Art. 5(d).
enforcement of the sentence, the United States was obligated not only to enforce the penal sanctions but also to act as a collector of the fines and/or civil reparations for the Peruvian government should the Peruvians decide to transfer the Americans without full payment. The request that the United States government act as a collection agency for the Peruvian government was not felt to be a necessary part of the treaty obligation by United States authorities.

A number of private proposals were put forward, including a mutual waiver of fines, the payment of a percentage of the fines and civil reparations, and the use of instruments such as promissory notes and standby letters of credit to ensure that full payment would be made by the families. The matter was finally resolved when a formula was agreed upon whereby the families of those imprisoned posted a letter of credit for the amount of the fine, to be paid out in yearly increments based upon the number of years of the Peruvian sentence remaining to be served.

CONSENT OF SENDING AND RECEIVING STATES

The treaties are generally silent as to the exact criteria for determining whether an individual should be transferred. Most of the treaties contain general language noting that the parties should keep in mind all factors bearing upon the social rehabilitation of the offender, including the nature and severity of the offense, previous criminal record, medical condition, the strength of the prisoner's connection by residence, presence in the territory, family relations and other factors bearing on the social life of the offender.\(^\text{135}\)

The Congress expected the Attorney General of the United States to develop standards and guidelines for the transfer of prisoners soon after the treaties came into effect.\(^\text{136}\) No formal standards were ever developed. From 1977 through July, 1983, sixty foreigners seeking to transfer from the United States to their home countries were denied transfer.\(^\text{137}\) Of those, seventeen denials were for "Testimony," and forty-three for "Seriousness of Offense." During this period, approximately 485 prisoners were permitted to transfer from the United States.\(^\text{138}\)

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135. See, e.g., Mexican Treaty, supra note 51, Art. IV(4).
138. Id.
The Department of Justice did review a number of administrative requests from private counsel to support the transfer of an offender. Rather surprisingly, only one case appears to have been filed seeking reversal of an adverse decision of the Department of Justice in this area.

The experience of the authors over the past seven years has demonstrated that foreign governments generally do not place major obstacles in the path of Americans seeking to transfer back to the United States. One notable exception was the situation in Peru regarding the payment of fines, discussed above. The authors are not aware of any American who has ever applied and been denied transfer back to the United States from Panama, Bolivia, or Turkey. In Mexico, a number of Americans have been provisionally denied, but normally the denials have not been permanent and the individual has been able to transfer on the following transfer or shortly thereafter. In one case, an individual was denied transfer for over two years (eight consecutive transfers) before consent was given. Experience has shown that Mexican authorities look to the nature of the offense, the extent of involvement of the person in the crime (if more than one person was arrested), and the publicity surrounding the case.

**Effect of a Foreign Criminal Judgment**

One of the most common concerns of Americans contemplating transfer is the effect their transfer will have once they return to the United States. A specific interest is whether or not the transfer will notify local or national authorities of the conviction, prevent the transferee from exercising civil rights under national or state laws, and prevent them from holding certain jobs in the future. For many potential transferees, this is the paramount consideration.

A specific section of the implementing legislation for the prisoner transfer treaties provides that "[a]n offender transferred to the United States to serve a sentence imposed by a foreign court shall not incur

139. See, e.g., *In Re Transfer Application of Alfredo Gutierrez Vaca-Diez*, Memorandum to Michael Abbell, Chief, Office of International Affairs, Criminal Division, Department of Justice, from Phillip L. O'Neill, attorney for Vaca-Diez, Mar. 4, 1983. See also *In Re Transfer Application of Manuel Iriarte-Torres*, Memorandum to Rex Young, Deputy Director, Office of International Affairs, Criminal Division, Department of Justice, from Richard A. Atkins, attorney for Iriarte Torres, and Robert L. Pisani, Feb. 12, 1985.

any loss of civil, political, or civic rights nor incur any disqualification other than those which under the laws of the United States or of the State in which the issue arises would result from the fact of the foreign conviction." The central concern, therefore, is not the fact of the transfer itself, but rather, what possible effect a foreign criminal judgment can have under United States law.

Certainly, the FBI would be aware of the foreign conviction of an individual who transferred back to the United States under the terms of any of the transfer treaties. Upon return from a foreign country to a prison in the United States, the prisoner is automatically fingerprinted and a rap sheet is taken out in his or her name. The rap sheet will include a description of the foreign offense and will reflect the fact that the prisoner has been convicted of an offense in a foreign country.

The fact that United States authorities would gain a definitive record of a foreign conviction was noted by the Senate Judiciary Committee in 1977. In discussing the possible drawbacks of the transfer from the prisoner’s perspective, the Committee specially noted that “American law enforcement agencies may gain records of convictions which they previously would not have had, and certain employment disabilities may flow from the dissemination of a record of a foreign conviction.”

In light of this fact, more than a few prisoners have elected to remain in the foreign country to serve out their sentences. United States law enforcement authorities, however, can become aware of the existence of a foreign criminal conviction even absent a transfer. First, quasi-governmental organizations such as INTERPOL may record the conviction of a foreigner through the national central bureau in the original country, thereby making the fact of the conviction

144. This, too, can be a risky decision, since double jeopardy protection does not apply to an individual who has been convicted of an offense, had served time abroad, was subsequently released and returned to the United States. See Pye, The Effect of Foreign Criminal Judgments in the United States, 32 U.M.K.C.L. REV. 117-24; Abbell, Information Booklet for United States Citizens Incarcerated in Mexican Prisons Regarding the Operation of the Treaty Between the United Mexican States and the United States of America on the Execution of Penal Sentences, U.S. Department of Justice, 1978, pp. 7-8; Chua Han Mow v. United States, 730 F. 2d 1308 (1984) (defendant’s conviction in Malaysia for same heroin offense as in case tried in district court did not violate fifth amendment bar against double jeopardy).
known to the headquarters of that organization in St. Cloud, France, and, via computer, to the rest of the national central bureaus abroad.\textsuperscript{145}

Secondly, United States law enforcement agencies abroad, such as the Drug Enforcement Administration (DEA) and the Central Intelligence Agency (CIA), will certainly notify their home offices of the arrest and conviction of an American abroad on drug charges and may even have informal agreements whereby criminal records are computerized in a foreign country and subsequently transferred to the United States.\textsuperscript{146} A 1982 Executive Order by President Reagan established an affirmative responsibility on the part of the CIA, the DEA, the FBI, the Department of State, the Department of the Treasury, the armed forces, the Defense Intelligence Agency and the National Security Agency to gather information on drug trafficking and traffickers.\textsuperscript{147} On numerous occasions, the DEA has become aware of an arrest of an American long before United States consular officers are notified. This is especially true of countries where a strong DEA presence is maintained, such as Mexico and Peru.

Finally, formal agreements may exist whereby criminal convictions are exchanged between the United States and other countries. Such agreements exist, for example, between the United States and Germany,\textsuperscript{148} and the United States and Turkey.\textsuperscript{149}

Thus, the question of the effect of a foreign criminal conviction may be relevant to an American imprisoned abroad even if the provisions of the prisoner transfer treaties are never utilized.

Nothing in the "Full Faith and Credit Clause" of the United States Constitution\textsuperscript{150} requires a United States court to respect the judgment of a foreign nation.\textsuperscript{151} Such recognition generally has been given to

\begin{footnotesize}
\textsuperscript{146} For example, the CIA has been collecting information on narcotics traffickers and trafficking since at least 1969. Note, Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted, 16 N.Y.U.J. INT'L L. AND POLITICS 365 (1984). DEA routinely exchanges information about narcotic traffickers with foreign countries. Id. at n.87. DEA currently has 62 overseas offices in 40 countries. Kenney, Structures and Methods of International and Regional Cooperation in Penal Matters, 29 N.Y. L. SCH. L. REV. 84 (1984). FBI has Special Agents assigned as legal attaches in 13 countries, where they maintain liaison with local police. Id.
\textsuperscript{149} Treaty With the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, entered into force Jan. 1, 1981, T.I.A.S. 9891, Article 36.
\textsuperscript{150} U.S. CONST. art. IV, §1.
\textsuperscript{151} 47 Am. Jur. 2d §1217.
\end{footnotesize}
judgments granting or denying recovery of a sum of money, establishing or determining the status of a person, and determining interests in property, as well as certain matters of family law, assuming fair procedures are provided and the rendering court had jurisdiction.

Although penal judgments of foreign countries are not required to be recognized or enforced by United States courts, such penal judgments may be enforced if a treaty is in effect. Absent a treaty or federal statute, recognition and enforcement of foreign country judgments is a matter of the law of the individual states of the United States.

Recognition of foreign penal judgments, while not required by United States courts, has been provided in some circumstances. One area in which some case law has developed with regard to recognition of foreign penal judgments is that of multiple offender statutes, where state and federal governments have been called upon to determine if conviction of a crime in a foreign country can be used to enhance subsequent criminal convictions. United States courts, when confronted with the application of foreign convictions under multiple offender statutes, have examined the fairness of the process by which such convictions were obtained. If the court concludes that the procedures of the foreign nation did not meet minimal due process standards, the foreign judgment is not recognized. Sister state convic-


153. **Restatement, supra note 152, §492.**

154. **Id. §493. See also The Antelope, 23 U.S. (10 Wheat.) 66 (1825). Foreign judgments regarding collection of taxes are also not required to be recognized and enforced, though no law of the United States would be violated by granting such recognition and enforcement. Restatement, supra note 152, §493, comment a.**

155. **Restatement, supra note 152, at §493, Reporters Note No. 3. Recognition is a necessary prerequisite to enforcement of a foreign judgment. Id. §491, comment b. For a discussion of the distinction between "recognition," "enforcement," and "execution" of foreign sentences, see Bassiouni, Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada, 11 Vand. J. Transnat'l L. 249 (1978).**

156. **Restatement, supra note 152, §491, comment a.**

157. **Id. §493, comment e, and Reporters' Note No. 3.**

158. **Pye, writing in 1964, noted that about one-third of all the states give effect to foreign criminal judgments in their multiple offender statutes, though a number are ambivalent. Pye, supra note 144, at 132 (1964). A more recent commentator has noted changes since Pye's article away from giving recidivist effect to foreign convictions, at least on the state level. See Comment, The Collateral Use of Foreign Criminal Convictions in American Trials, 47 U. Chi. L. Rev. 108, n. 115 (1979).**

159. **See U.S. ex. rel. Foreman v. Fay, 184 F. Supp. 535 (S.D.N.Y. 1960); U.S. ex. rel. Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1959). In Dennis and then again in Foreman, the federal courts struck down the use of Canadian convictions under the New York multiple offender statute on grounds of absence of adequate counsel. The courts in both cases employed
tions involving constitutionally suspect absence of counsel also have been denied recognition.\textsuperscript{160}

A 1983 federal court decision involving the prisoner transfer treaty with Mexico slightly broadened the use of foreign convictions for establishing recidivism.\textsuperscript{161} In addition, a recent change in United States federal law under the Controlled Substances Import and Export Act permits a foreign conviction to be considered for the purposes of sentencing enhancement if the subsequent conviction came under the provisions of that Act.\textsuperscript{162} On an international level, the Single Convention on Narcotic Drugs has long permitted foreign convictions to be taken into account "for the purpose of establishing recidivism."\textsuperscript{163}

Although most disabilities encountered by a defendant convicted in a foreign country will occur on a state level,\textsuperscript{164} federal statutes may also come into play to some extent, depending once again upon the wording of the applicable statute and interpretation by the courts.\textsuperscript{165}

\textsuperscript{160} A "look behind" approach in examining whether the convictions comported with fundamental notions of due process. Whether other constitutional defects also would be ground for nonrecognition has been debated. See generally Comment, supra note 158. Not all states have embraced this "look behind" approach. In People v. Braithwaite, 240 N.W.2d 293 (1976), 67 Mich. App. 121 (1976), the Court of Appeals of Michigan disallowed the use of a prior Canadian conviction in imposing a sentence for a separate crime committed in Michigan. The court stated that "since many foreign jurisdictions do not provide due process rights equivalent to those existing in the United States, it would be manifestly unfair to allow foreign convictions to be considered in sentencing a defendant convicted of a crime in this country . . . . We, therefore, hold that in sentencing a defendant convicted of a crime in this state, the court may not consider prior convictions of the defendant rendered in a foreign country in imposing sentence." Id. at 294.

\textsuperscript{161} See Burgett v. Texas, 389 U.S. 109 (1967); United States ex. rel. LaNear v. LaVallee, 306 F.2d 417 (2d Cir. 1962); U.S. ex. rel. Savini v. Jackson, 234 F.2d 742 (2d Cir. 1957).

\textsuperscript{162} See United States v. Fleishman, 684 F.2d 1329 (9th Cir. 1982) (prisoner transferred under Mexican prisoner transfer treaty is permitted to challenge collateral consequences of a foreign criminal conviction in U.S. courts, but such conviction may be used in subsequent proceedings in the United States involving enhancement of sentence even if torture was allegedly used to procure the conviction in Mexico).

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\textsuperscript{167} See United States v. Fleishman, 684 F.2d 1329 (9th Cir. 1982) (prisoner transferred under Mexican prisoner transfer treaty is permitted to challenge collateral consequences of a foreign criminal conviction in U.S. courts, but such conviction may be used in subsequent proceedings in the United States involving enhancement of sentence even if torture was allegedly used to procure the conviction in Mexico).

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In one federal case, *Cooley v. Weinberger*, the Tenth Circuit Court of Appeals ruled that the quality of a foreign criminal proceeding was a factor to consider in deciding whether the judgment should be recognized. In that case, a woman who was convicted of murdering her husband in Iran served time there, and was subsequently pardoned, returned to the United States and attempted to collect Social

The Commodities Futures Trading Commission is authorized to refuse to register any person if investigation shows that such person "has been convicted in a state court or in a foreign court of conduct which would constitute a felony under federal law if the offense had been committed under federal jurisdiction." 7 U.S.C. §12(a)(3)(H) (emphasis added). The Commodities and Securities Exchange is permitted to deny any applicant for registration any persons "permanently or temporarily enjoined by order . . . of any court of competent jurisdiction from acting as a commodity pool operator, future commission broker, or floor broker"; and to forbid an individual from offering securities if such person "is subject to any order . . . of any court of competent jurisdiction entered within 5 years from temporarily or permanently enjoining such offer from engaging in . . . the purchase or sale of any commodity". 17 C.F.R. §§32.12, 230.305 (emphasis added). Other government regulations permit exemptions from Worker's Compensation benefits for "persons convicted in a court of competent jurisdiction or any subversive act against the United States or any of its allies", 20 C.F.R. §61.2 (emphasis added); from the benefits of the Railroad Retirement Act by any employee "finally convicted by any court of competent jurisdiction of the felonious homicide of an employee", 20 C.F.R. §237.907, (emphasis added); from eligibility for financial assistance from the Department of Health and Human Services for conviction of certain crimes by a court of competent jurisdiction, 45 C.F.R. §76.11; from certain Social Security benefits by a claimant "finally convicted by a court of competent jurisdiction of the felonious and intentional homicide of a minor or widow," 20 C.F.R. §410.250.

These and other federal and state statutes note that conviction for certain crimes may incur certain disabilities, therefore, the authors are frequently asked by Americans returning from foreign prisons if they are required to answer "yes" to the question "Have you ever been convicted of a crime?" The authors are not aware that the federal government has ever answered this question. If the question is phrased more specifically with some reference to a jurisdictional basis ("court of the United States," "court of competent jurisdiction"), then the answer may follow logically. If, however, only the word "crime" is mentioned, then the answer is much less certain. If the definition of a "crime" is broadly construed to mean an offense which would have constituted a crime in the United States had the act been committed here, then the answer would be "yes" in most cases. The final answer may depend on whether the person with the conviction believes the government possesses some knowledge of the offense and conviction. Under this rationale, those transferring back to the United States would have less claim to answering "no," since the U.S. government is automatically aware of the fact of the foreign conviction. To the extent that the federal government holds that any conviction in a foreign country is a conviction for the purpose of federal law, then failure to disclose such conviction when asked may constitute making a false or misleading statement. Many federal statutes, even if they do not mention foreign criminal judgments, state that making false or misleading statements, or misrepresenting, concealing or withholding facts, are grounds for exclusion of whatever benefits the individual is seeking and may in itself constitute a criminal offense. Specific examples include making false or fraudulent statements in general, 18 U.S.C. §1001 (1982), making demands against the United States based on false or fraudulent documents or statements, 18 U.S.C. §1003 (1982), making false loan and credit applications generally, 18 U.S.C. §1014 (1982), making false statements to procure a Small Business Act loan, 15 U.S.C. §1645 (1982), making a fraudulent application for food stamps, 7 U.S.C. §2015(b)(1982), making false statements for the purchase of a firearm, 18 U.S.C. §922 (1982), making false statements in an application for a passport, 18 U.S.C. §1543 (1982), and making false statements to obtain unemployment compensation, 18 U.S.C. §1918 (1982).

166. 518 F.2d 1151 (10th Cir. 1975).
Security benefits as a surviving widow. She was denied under provisions of the Social Security Act that prevented her from collecting money because of her involvement in the death of her husband. Even though her conviction occurred in a foreign country, the Court found that the foreign court was a "court of competent jurisdiction" within the meaning of the relevant federal statute and she was denied benefits. The court accepted her contention that if the Iranian procedures were shocking to the conscience and did not bear any reasonable resemblance to due process, then the conviction should not be recognized in the United States. The Court found, however, that procedures in Iran were similar to those in the United States and ruled against her.

An attorney representing an American considering transfer under the treaty agreements should consult the applicable state and federal disability statutes to determine the extent of any disability caused by a criminal conviction. Once such a determination is made, the precise wording of the statute should be carefully examined. If the statute contains language such as "conviction by a court of the United States" (or some similar phrase) as the basis for a disability, then there is a good chance that the courts would not permit a foreign criminal conviction (in the international sense) to be used. If the statute, however, included a phrase such as "court of competent jurisdiction" (as was the case in the Cooley decision, discussed supra), "any other jurisdiction", or similar broad language, then such conviction may be admissible for purposes of establishing a disability. Once such a fact is established, the attorney should examine cases involving foreign country and sister state convictions that have "looked behind" the foreign offense to the fairness of the proceedings to determine if a ground exists for excluding recognition of the proceedings by the court.

**Do Prisoner Transfer Treaties "Coddle" Criminals?**

Occasionally, a remark is made to the effect that the United States government is "coddling" criminals by insisting on the one hand upon a strict law enforcement policy in many parts of the world, and then on the other hand requesting that United States nationals arrested under this policy be returned to the United States. Others have pro-

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167.  *Id.* (citing 42 U.S.C.A §402(g)); 20 C.F.R. §404.364(1971).
168.  See cases discussed *supra* notes 159-60 and statutes discussed *supra* note 165.
fessed complete indifference and perhaps a disguised satisfaction at the plight of Americans imprisoned abroad.

The authors contend, however, that United States policy in this area has been neither confused nor contradictory. The United States has been pursuing a strong international law enforcement policy, aimed especially at illicit drug smuggling, for over a decade. Regardless of the wisdom of that policy, the policy is certainly not in conflict with a fundamental concern for the welfare of United States citizens abroad. For decades, the correctional policy of the United States has been aimed at a rehabilitative, as well as punitive, approach toward the prisoner. This method has included the promotion of the social reintegration of the offender into society in general and the offender’s family in particular, as exemplified by the use of halfway houses. The use of prisoner transfer treaties can be seen as a logical extension of this philosophy.

On a less philosophical level, protecting the inherent dignity of a human being is not contradictory to a policy of strict law enforcement. Indeed, this policy was specifically endorsed by the Senate Judiciary Committee in 1977 in a report on the implementing legislation for the prisoner transfer treaties: “Having prisoners closer to home and family will substantially benefit them without diluting the effect of criminal sanctions.”169 In 1982, United States Attorney General William French Smith made exactly the same point while signing the United States-Thailand prisoner transfer treaty in Bangkok.170 This was also the policy of officials at the Department of State, who saw no contradiction between international efforts to combat drug trafficking and concern for the welfare of American citizens abroad.171 One administrator noted that without “public confidence in just treatment, law enforcement becomes difficult, and even ultimately impossible.”172 The desire of a prisoner to serve out the sentence in his own country, where the prisoner’s native language is spoken, where the food is familiar, and where the prisoner’s family may visit on a regular

169. Senate Transfer Report, supra note 143, at 11 (emphasis added).
171. House Hearings, supra note 27, (Pt. III) at 4 (statement of William H. Leurs, Dep. Ass. Sec., Bureau of Inter-American Affairs, Dept. of State). Another official at the Department of State noted in a report published at the same time that “To initial allegations that the treaty would be an ‘endorsement’ of drugs or drug violators, supporters of the treaty idea responded that the intent was merely to transfer prisoners from foreign institutions to ones in the country of nationality and pointed out that prisons in the U.S. are in no sense attractive places.” Blevins, supra note 27, at 8.
basis, does not automatically amount to "coddling" criminals. Clearly, law enforcement and concern for one's own citizens are not mutually exclusive concepts.

**Benefits of the Treaties**

Prisoner transfer treaties produce tangible benefits on many levels, including the prisoner, the relations between the sending and receiving states, and the internal policies of the states themselves.

**A. International Support for the Treaties**

The use and implementation of prisoner transfer treaties since 1975 has been extremely rapid and is a testimony to their usefulness and effectiveness. Use of the treaties has been supported by two consecutive sessions of the United Nations Congress on Crime Prevention and Treatment of the Offender. At the Seventh United Nations Congress on Prevention of Crime and Treatment of the Offender, held in Milan in 1985, the Congress adopted a Model Agreement on the Transfer of Foreign Prisoners, that was subsequently adopted by the General Assembly of the United Nations. Although the Council of Europe took several years to complete a draft prisoner transfer treaty, eighteen states signed the treaty in less than a two-year period, and the treaty came into effect in only twenty-eight months. The press release issued by the Council of Europe announcing the coming into force of the treaty accurately summarizes the reasons for the international community to support prisoner transfer:

The Convention . . . is intended to facilitate the repatriation of foreign prisoners. In so doing it takes account of modern trends in crime and penal policy. Improved means of transport and of communication have led to a greater mobility of persons and, in consequence, to increased internationalization of crime. As penal policy has come to lay greater emphasis upon the social resettlement of offenders, it has been considered desirable that sanctions imposed on a foreign offender be enforced in his home country rather than in the state where the offense was committed and the judgment

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rendered. The new Convention is also rooted in humanitarian consideration: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contact with relatives may have detrimental effects on the foreign prisoner.175

The Council of Europe treaty has the potential to become the international instrument in this field, due to the relative ease with which the drafters appear to be willing to accept accessions from other states. Interest in the treaty has been expressed by Finland and Israel, as well as by other states in the Far East.176 This is an especially good sign for the United States, since the Council of Europe treaty may be the optimum vehicle by which to obtain transfer agreements with countries that have too few American prisoners to make worthwhile the lengthy negotiations necessary to conclude bilateral agreements.

Other countries with sizeable numbers of foreigners imprisoned abroad have moved rapidly to negotiate agreements with those countries holding substantial numbers of their citizens.177 In 1986, the Commonwealth Secretariat will be considering a draft proposal that will allow for the transfer of prisoners within the countries of the Commonwealth.178 Even the communist block countries have negotiated a transfer agreement among themselves, though the document lacks the essential element of prisoner voluntariness found in the treaties discussed in this article.179

International nongovernmental organizations have also enthusiastically supported prisoner transfer treaties. In addition to the work of the United Nations NGO Alliance on Crime Prevention discussed previously, support has also been expressed by the Howard League for Penal Reform,180 the International Penal and Penitentiary Foun-

175. BARTSCH, NEWS OF THE COUNCIL OF EUROPE: CONVENTION ON THE TRANSFER OF SENTENCED PERSONS.
176. Representatives of several Latin American and Caribbean countries have also expressed an interest to the authors in examining the provisions of the Council of Europe treaty with a view to requesting accession.
177. One notable example is Thailand, where negotiations have been underway with the United States, Canada, England, and France.
179. Convention Concerning the Transfer of Persons Sentenced to Imprisonment to Serve Their Sentence in the State of Their Citizenship, in GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK, (1980). The treaty is in effect between Hungary, Bulgaria, Cuba, Poland, German Democratic Republic, Mongolia, and Czechoslovakia.
1986 / Transfer of Prisoners

dation, the International Committee of the American Correctional Association, the International Prisoners Aid Association and other international organizations.

B. Improvement of International Relations

One of the reasons most often cited for supporting transfer treaties is that the treaties ease diplomatic and law enforcement relations between the United States and the other signatory countries. The treaties help alleviate the strains that arise from the imprisonment of substantial numbers of foreign nationals. The treaties have been viewed as an ongoing effort to improve relations between the United States and other countries, and as part of an effort to establish closer international cooperation in law enforcement activities.

C. Interests of the State in the Treatment of Its Citizens Abroad

The legitimate interest of a state in the welfare of the citizens of that state traveling or living abroad has been universally recognized. Incarceration in one's own country has been recognized as "severe enough punishment"; serving a prison term in a foreign country creates special hardships for the prisoner. The Judiciary Committee of the House of Representatives, in approving implementing legislation for the prisoner transfer treaties, noted that the most fundamen-

183. Interview with Judy Weintraub, Executive Secretary, U.N. NGO Alliance, Jan. 9, 1985.
185. Id. The Senate Committee on the Judiciary, in noting the benefit to law enforcement and improving international relations, noted the similarity between extradition and prisoner transfer:
Extradition requires that the United States recognize the judicial process of foreign countries. We deliver our citizens to what may be certain punishment in a foreign country. The prisoner transfer would take us the next step. The United States would not only recognize foreign criminal processes, but we would administer the punishment meted out by these foreign systems.
188. Id.
tal reason to support prisoner transfer is concern for human rights and the welfare of the prisoner.\textsuperscript{189}

As noted above, rehabilitation of the offender is facilitated as a result of allowing the offender to serve the sentence in the offender's own country. The authors have had years of first hand experience representing Americans returned under the treaties. In most cases, prisoners have spent a minimum of one, and usually two, years in the jails of the foreign country. Returning prisoners usually are genuinely grateful to be back in United States prisons to serve out their sentences. Therefore, the availability of the treaties may have greatly reduced any recidivist tendencies on the part of the offender.

Though the treaties have not alleviated the reported high incidence of torture and ill-treatment against Americans arrested abroad,\textsuperscript{190} they have been successful in offering Americans and other foreign nationals a way out of the conditions and treatment encountered in foreign jails. The value of the treaties can be seen in the numbers transferred: to date, over 750 Americans have transferred back to the United States under the treaties, and almost 500 foreigners have transferred back to their home countries from jails in the United States.\textsuperscript{191} An additional 300 to 400 Americans may be eligible to transfer when the Council of Europe treaty becomes fully operational: twenty-five to thirty for the French, and fifteen to twenty-five for Thailand.\textsuperscript{192} The treaties have proved to be invaluable for the American prisoner trapped in a hostile environment, for the family members desperate to see their loved one again, and for the attorney who has had to go through the difficult experience of representing Americans imprisoned abroad and face the possibility that despite best efforts the client may go to jail for many years.\textsuperscript{193}

\textbf{D. Reduction of Prison Overcrowding}

Another important effect of prisoner transfer treaties is that the treaties reduce prison overcrowding. As stated earlier, a number of

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\textsuperscript{189} Id.
\textsuperscript{190} For a discussion of torture against Americans imprisoned abroad, see House Hearings, supra note 27.
\textsuperscript{191} Department of Justice, Bureau of International Affairs, Criminal Division. Prisoner Transfers, 1977-1983. Almost eighty percent of all transfers have occurred to and from Mexico. Id.
\textsuperscript{192} Americans Arrested Abroad: 1983, Worldwide Summary, Department of State. The figures for Europe include servicemen.
\textsuperscript{193} For a discussion of the problems facing the U.S. attorney representing an American imprisoned abroad, see Atkins and Pisani, Representation of American Arrested Abroad, in
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European countries reported that the number of foreigners imprisoned in their jurisdiction amounted at times to twenty percent of the total inmate population.194 The United States has a similar problem: recent United States Bureau of Prison statistics indicate that nearly twelve percent of the federal prison population in the United States now consists of foreigners.195 Large numbers of foreign inmates also occupy cells in state prisons.196 Increased use of transfer treaties will help relieve overcrowding in areas of the United States that are at present most severely affected: the southwestern and western regions. In an era when discussions are being held about the wisdom of building costly new prisons manned by private industry, transfer treaties represent one way to hold down costs.

E. Easing Prison Tension

Tensions caused by racial, cultural, and economic differences in the inmate population have been well documented. The UNSDRI study cited above found a high level of inmate and staff hostility toward the foreign prisoner.197 For example, hostility clearly exists between the Latin prisoners and the rest of the inmate population in prisons in the southwest and western United States. Foreign prison administrators as well are often eager to transfer foreigners out of their jurisdiction, not only because foreigners are victimized by cultural difficulties, but the foreigners also adversely influence local prisoners by staging hunger strikes, making unreasonable demands for improved facilities, and generally cause difficulties in the administration of the prisons. Transferring foreign prisoners could help reduce such tension and ease inmate management problems.

CONCLUSION

Recent changes enacted into law under the Comprehensive Crime Act affect the prisoner transfer process to some extent.198 The United States Parole Commission has been abolished199 and replaced by a

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194. See supra note 20 and accompanying text.
197. See supra note 19 and accompanying text.
United States Sentencing Commission that will provide guidelines for sentencing. Section 223 of the Act amends the implementing legislation for the transfer treaties by noting that "the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court." It remains to be seen whether this provision would reopen the question of the constitutionality of enforcing foreign criminal judgments absent due process rights for the accused.

Despite political as well as ideological objections to their use, the transfer treaties have been remarkably successful in achieving their goal and for that reason are no doubt a permanent part of the international relations between many countries. Indeed, given the glacial pace of some international ideas and agreements, the progress made on prisoner transfer, both in terms of numbers transferred and agreements entered into, has been nothing short of remarkable. Ten years ago, the concept of prisoner transfer was hardly known outside of a few European countries and international criminal law specialists. Today, agreements exist between many countries, and with the recent coming into force of the first western multilateral agreement, i.e. the Council of Europe treaty, smaller countries that may have been reluctant to enter into the tedious bilateral negotiations necessary to conclude such an agreement may become party to the larger multilateral agreement. The treaties represent a triumph for the often disparate concepts of concern for the welfare of prisoners, intergovernmental cooperation, and law enforcement.

200. Id. at §218(a).