PC-OC INF 5 Rev4
Transfer

Strasbourg, 1 February 2013

Convention on the Transfer of Sentenced Persons (ETS 112)
A GUIDE TO PROCEDURES

This guide includes contributions from the following States:

Albania, Andorra, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Israel, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, and the United States of America.

Some countries have communicated hard copy contributions to the Secretariat, namely:

Austria, Canada, Estonia, Greece, Ireland, Trinidad and Tobago, Turkey and the United Kingdom.

These can be downloaded in PDF by clicking on the country in question.

It stands to be completed and updated upon the Secretariat receiving contributions from States Parties to the Convention on the Transfer of Sentenced Persons.

TABLE OF CONTENTS

ALBANIA

When sentenced persons are transferred to or from Albania, the provisions of the new 1995 Code of Criminal Procedure are applied, as amended in conformity with the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and the 1970 Convention on the International Validity of Criminal Judgments. Law No. 8499 of 10.06.1999, on the application of the provisions of the Code of Criminal Procedure on the transfer of sentenced persons, was the law under which the Convention on the Transfer of Sentenced Persons was actually ratified.

According to Albanian legislation, the transfer of sentenced persons is not permitted if there is no agreement with the requesting state, i.e. if the requesting state is not a Party to the Convention and has concluded no bilateral agreement with Albania.

At present, without such an agreement with the requesting state, Albania, as sentencing state, cannot authorise the transfer of a sentenced person to serve the remainder of his or her sentence in the requesting state without the person's prior consent and co-operation.

Albanian law has been supplemented to provide for the social rehabilitation and education of persons serving prison sentences, in conformity with the Council of Europe Convention on the Transfer of Sentenced Persons. Serving one's sentence in one's state of origin facilitates rehabilitation because the detainee is in a propitious social and family environment. When the environment is favourable and all the requisite conditions for the transfer have been completed, the detainee is transferred. Law No. 8328 of 16.04.1998 stipulates how the sentence should be served and how detainees should be treated depending on their age, sex, offence committed, etc. When detainees sentenced abroad are transferred to Albania, their sentences are commuted to the nearest equivalent under Albanian law as applied by the Albanian courts.

Under Article 519 of the Code of Criminal Procedure, the Ministry of Justice is the authority which decides whether to transfer a person sentenced by the Albanian state to his or her country of origin (the administering state). The transfer of a person sentenced in Albania may be requested and authorised only if the detainee, being aware of the consequences, freely agrees and expresses the wish to be transferred, and if the conditions in which the sentence will be served in the administering state are conducive to social reintegration. Under Albanian law, before ordering the transfer of a detainee to serve his or her sentence abroad, the Minister of Justice must have the detainee's consent in writing. The file is presented to the public prosecutor at the place of destination in the administering state, who applies to the competent court. Having heard

the public prosecutor and the detainee or his or her representative and examined the relevant documents, the court refers the case to the Ministry of Justice, where the final decision is taken. Although there is no specific provision to that effect in the Code of Criminal Procedure, the Ministry of Justice considers it essential that it should receive detailed information from the administering state concerning the serving of the remainder of the sentence by the transferred detainee.

Under Article 512 of the Code of Criminal Procedure, the Ministry of Justice is responsible for applying for the transfer of a person sentenced abroad to serve the remainder of the sentence in Albania. The sentence handed down by the foreign court is not applied directly but converted. The Albanian court judgment does not concern the merits of the case. The court simply decides whether or not the sentence pronounced abroad and the part of the sentence remaining to be served are applicable in Albania. The conditions governing the transfer are generally those enshrined in the 1983 Council of Europe Convention. It should be noted, however, that the sentence must be commensurate with the offence, and the result of criminal rather than administrative proceedings and of a final and therefore binding judgment.

The parties involved in the process of converting the sentence are the public prosecutor and the representative of the detainee whose transfer has been requested. In the event that the court cannot endorse the foreign judgment under Albanian law, the transfer cannot be made. Even if the Albanian court does endorse the foreign judgment and convert the sentence in keeping with Albanian law, the Ministry of Justice has the final say in the matter and may refuse the transfer, for the reasons generally provided for in the Convention and the Albanian Code of Criminal Procedure, or for other reasons, such as prison overcrowding, lack of rehabilitation possibilities or lack of reciprocity in similar cases with the requesting state.

Under Albanian law, if a transfer is requested the sentencing state must attach to the request a certified copy of the final judgment, the case file or part of it, an official report stating the period of time the detainee has already served, including any pre-trial detention or release on parole or other details concerning execution of the sentence. Under our legislation, one day of pre-trial detention equals one and a half days' imprisonment. The requesting state may also be asked in certain cases to supply other information or a special report.

Once the detainee has been transferred, the procedure provided for under Albanian law is applied, and in some cases the detainee may even be pardoned or released on parole. Under the Albanian Criminal Code a detainee may be released on parole after serving:

1. at least half the sentence when convicted of an ordinary offence;
2. at least two-thirds of the sentence when convicted of crimes punishable by a maximum sentence of 5 years' imprisonment;
3. at least three-quarters of the sentence in the case of crimes punishable by 5 to 25 years' imprisonment;
4. at least 25 years in the event of a life sentence.

The law makes no provision for release on parole for deliberate repeat offenders.

These January 2001 provisions amended the existing law, which generally required the detainee to have served at least half the sentence.

Under the Criminal Code and the Code of Criminal procedure, medical measures may be ordered by the court for persons who commit criminal offences in a state of mental imbalance or incapacity. The medical measures concerned are compulsory outpatient care or compulsory care in a medical establishment.

The law identifies three categories of persons for whom medical treatment may be ordered:

1. persons who are not responsible for their actions at the time of the offence;
2. persons who are responsible at the time of the offence but become irresponsible during the judicial investigation or proceedings;
3. persons who become irresponsible while serving sentence.

Albanian legislation contains no particular provisions concerning the transfer of non-responsible persons serving sentences including medical treatment.

Bearing in mind the humanitarian reasons for transfers in general, the transfer of persons who committed offences when they were not responsible for their actions is possible. The case has not yet arisen, so the courts have no practical experience in the matter.

Pending specific provisions on the transfer of mentally disturbed or incapacitated persons, the general rules governing the transfer of sentenced persons provided for in the Code of Criminal Procedure apply.

*****

ANDORRA

The Constitution of the Principality of Andorra recognises the right to freedom as a fundamental human right, providing in Article 9.1 that "All persons have the right to liberty and security and shall only be deprived of them on such grounds and in accordance with such procedures as are established in the Constitution and the laws."

In cases where it is deemed that, for reasons of incapacity, persons may not be held criminally responsible for their actions, they are found to be exempt from criminal responsibility according to Articles 19.1 and 19.2 of the Criminal Code and ordered to be confined in a specialised institution until such time as they are well and under conditions decided by the court in accordance with Article 20 of the Criminal Code. On the basis of the medical reports addressed to it on a regular basis by the institution, the court may subsequently decide to replace confinement by other forms of treatment or simply lift the confinement order altogether.

In accordance with Articles 128.3 of the Code of Criminal Procedure, in cases where accused persons succumb to a mental disorder after the offence has been committed or are afflicted with a serious physical disorder that prevents them from appearing in court and exercising their right to a fair trial, the court orders a temporary stay of the proceedings until they have been restored to good health.

Similarly, Article 108.5 of the Code of Criminal Procedure provides that:

> "*In cases where accused persons in pre-trial detention or under monitored house arrest succumb to a mental disorder after the offence has been committed, the judge (batlle) or the court shall order that they be confined in an appropriate institution until such time as they have received medical permission to leave and prior notification has been given to the judicial authorities, whereupon the procedural situation that applied prior to internment shall be continued. Confinement suspends the time-limits set by pre-trial detention, but may, however, be taken into account subsequently with a view to reducing the prison sentence or period of house arrest. It is possible to appeal against the confinement order given by the examining magistrate or the court in accordance with Articles 194 and 195 et seq. of this Code*."

In the Principality of Andorra, responsibility for adopting protection measures in favour of persons suffering from mental disorders does not rest with the administrative authorities. Instead, forced confinement measures in the case of persons suffering from mental disorders who may pose a serious safety threat either to themselves or others are the responsibility of the civil courts. In practice, such measures are currently adopted via the system of non-contentious proceedings.

To date, it is not possible to transfer sentenced persons to the Principality under the provisions of the Strasbourg Convention: although the ratification proposal was published in the Andorran Official Gazette of 17 May 2000, the instrument of ratification has not been deposited and therefore the Convention has not entered into force in Andorra.

Nonetheless, Article 207 of the Qualificada Law[1] of the Code of Criminal Procedure of 10 December 1998 expressly establishes the guiding principles and recommendations set out in the Convention as a domestic right:

"1. Concerning enforcement of custodial sentences, the necessary steps shall be taken to ensure that sentenced persons are admitted to a prison in the Principality of Andorra, unless otherwise provided by international conventions or agreements.

In cases where persons serve their sentence in a foreign prison, the rules of that prison shall apply.

2. When, under an international convention or agreement, Andorran nationals sentenced to imprisonment by a foreign court are transferred to the Principality of Andorra to serve the rest of their sentence, the following rules shall apply:

a. On their arrival in Andorra, sentenced nationals of the Principality shall be brought by the police before the judge on duty who, in the presence of the lawyer assigned to the case or lawyer on duty, shall question them to establish their identity before ordering that they be imprisoned. In cases where immediate questioning of the sentenced persons is not possible, they shall be transferred to the prison, where they may be held for up to 24 hours before being brought before the duty judge.

After consulting the documents relating to the transfer agreement between the States and the consent given by the sentenced person, as well as the original or authenticated copy of the court decision on the basis of which the sentence was imposed, accompanied, where necessary, by an official translation, the judge shall order the sentenced person to be immediately imprisoned and shall inform the President of the Tribunal de Corts and the Public Prosecutor's Office accordingly.

---

[1] Qualificada Law: Law requiring a larger majority for adoption

b) In accordance with the international convention or agreement, the part of the sentence remaining to be served in the sentencing country shall be directly and immediately enforceable in the Principality of Andorra.

However, when the imposed sentence is harsher in terms of its nature or duration than the sentence prescribed for the same offence under Andorran law, the Tribunal de Corts may, acting ex officio or at the request of the Public Prosecutor's Office or the person concerned, replace it with the corresponding penalty under Andorran law or reduce it to the maximum sentence prescribed by domestic law. To this end, the Tribunal de Corts shall order that an oral hearing, be conducted in accordance with this Code and shall decide on the nature of the offence and the length of sentence to be served.

c) The decision of the Tribunal de Corts shall be immediately enforceable. However, an appeal may be lodged with the Criminal Chamber (Sala Penal) of the Andorran High Court of Justice.

d) The time spent in transfer shall be deducted in its entirety from the sentence remaining to be served in the Principality of Andorra.

e) Any incidents occurring during enforcement of the sentence in the Principality shall be dealt with by the Tribunal de Corts.

f) Enforcement of the sentence to be served in the Principality shall be governed by the provisions of this Code.

g) No court action may be brought or continued against the sentenced person, and no sentence may be imposed by the Andorran courts in relation to the same offence on which the transfer under an international convention or agreement was based.

3. When, under the terms of an international convention or agreement, foreign nationals serving in Andorra sentences imposed by an Andorran court are required to give their consent before they can be transferred to the administering country, such consent shall be given in the presence of their lawyer to the President of the Tribunal de Corts or the President's representative. Steps shall be taken to ensure that such consent is given voluntarily by the persons concerned and that they have full knowledge of the legal consequences thereof.

Once such consent has been given, the President of the Tribunal de Corts or the President's representative shall give a decision which shall be notified to the parties and conveyed to the Ministry of the Interior and Ministry of Foreign Affairs so that the appropriate action may be taken.

Before a transfer may take place, the Andorran authorities shall allow the administering State to verify, through a consul or other official appointed to that end with the prior agreement of both countries, that consent is given in accordance with the conditions set out above.

In all cases, once the Government has adopted the decision to allow the transfer, and at the request of the Public Prosecutor's Office, the President of the Tribunal de Corts shall give permission for the sentenced person to leave the prison and be handed over to the officials in charge of the transfer, which shall be organised and carried out under the responsibility of the Ministry of the Interior in cooperation with the Ministry of Foreign Affairs".

******

AUSTRIA

Click here for PDF version

BELGIUM

By the Law of 19 June 1983, Belgium approved the Convention of 21 March 1983 on the transfer of sentenced persons.

The Law on the transfer between States of sentenced persons, promulgated on 23 May 1990 is intended to implement the Convention.

The Penal and Criminal Affairs Administration, Judicial Co-operation on Individual Cases Service, of the Ministry of Justice has issued internal instructions on the procedures to be followed.

In Belgium, the ratio legis of the Convention, i.e., the reintegration of the sentenced person into his or her own social environment, is pursued on the basis of a detailed examination of each application to ensure that the social arguments advanced genuinely justify transfer.

With regard to the application of the Convention to persons who for reasons of their mental condition are held not criminally responsible it should simply be noted that Belgium rarely receives applications of this sort. Where these rare applications for transfer to a foreign country do arise, they are usually not complied with, if indeed they have not been rejected for other reasons, as the result of an adverse opinion by the Social Protection Committee, on the grounds that it cannot always be guaranteed that a custodial measure will be enforced in a foreign country.

A description of the tasks of the respective authorities involved and a summary of the procedures followed both where Belgium is the sentencing State and where it is the administering State is given below.

1. Ministry of Justice

1.1 Penal and Criminal Affairs Administration - Judicial Co-operation on Individual Cases Service

A. The above-mentioned service receives applications for transfer from foreign authorities, the sentenced person or his or her lawyer.

B. Application for transfer to a foreign country:

- The above-mentioned service requests the Prisons Administration

- Individual Cases Service, for an opinion and certain information (Article 4 of the Convention: see also Para 1.2.A below)

- On receipt of the opinion of the Prisons Administration, it decides at first instance on the admissibility of the request. If the request is rejected, the person concerned is informed of the decision.

- Pursuant to Article 6.2 of the Convention, the Principal Crown Prosecutor is requested to furnish certain documents and to deliver an opinion on the desirability of the transfer (see also Para 2.1 below)

- The Penal and Criminal Affairs Administration communicates the provisional agreement of the Belgian authorities, together with the necessary information and documents, to the foreign authorities.

- If, on reception of the agreement of the foreign State and after all the necessary documents have been checked, the Minister of Justice approves the transfer, this final approval is communicated to the competent Principal Crown Prosecutor who is responsible for taking the necessary steps, via the Crown Prosecutor, to effect the actual transfer.

- As soon as the Principal Crown Prosecutor has communicated the date of the transfer, the Prison Administration is informed.

C. Request for transfer to Belgium:

- In application of the European Convention on the Transfer of Sentenced Persons, where the request emanates from the sentenced person or his or her lawyer, a copy of the request is sent to the competent foreign authorities who are thereby informed that the sentenced person wishes to be transferred to Belgium to serve the remainder of his or her sentence.

An extract of the population register (proving that the person concerned is a Belgian - Article 6.1.a of the Convention) is then forwarded to the foreign authorities.

- On receipt of the agreement of the foreign authorities together with the information requested, the current and future penal conditions affecting the sentenced person are compared before communicating the definitive decision to the foreign authorities.

- After examination of the file, the decision to accept or reject the application is communicated to the foreign authorities together with a request to inform the person concerned.

- Where the Belgian authorities agree to the transfer, the foreign judgment is forwarded to the Principal Crown Prosecutor. who is requested to instruct the Crown Prosecutor to contact the competent foreign authorities to enable the practical arrangements for the transfer to be made.

The Principal Crown Prosecutor is also requested to inform the Penal and Criminal Affairs Administration of the date of the transfer.

The Prison Administration is informed of the agreement on transfer to a Belgian prison and of the date of transfer to enable it to decide where the remainder of the sentence is to be served (see also Para 1.2.B below).

1.2 Prisons Administration - Individual Cases Service

A. Request for transfer to a foreign country:

- The above-mentioned service delivers a preliminary opinion on the admissibility of the request (it checks in particular whether or not the judgment was definitive).

- In compliance with the provisions of Article 4 of the Convention, it forwards the following information to the Penal and Criminal Affairs Administration:

  - name, date and place of birth of the sentenced person;

  - his or her address, if any, in the administering State;

  - a statement of the facts on which the sentence was based:

  - the nature, duration and date of commencement of the sentence;

  - information on the actual amount of the sentence still to be served (minimum 6 months);

If transfer is approved, the service in question is instructed to communicate the decision to the sentenced person.

B. Request for transfer to Belgium:

The above-mentioned service decides in which penal establishment the sentenced person will serve the remainder of his or her sentence.

For social reasons, account is taken of the last address of the person concerned before sentencing abroad.

2. The Crown prosecution service

2.1 Transfer to a foreign country

2.1.1 The Principal Crown Prosecutor

- The Principal Crown Prosecutor delivers an opinion on the request for transfer.

- When the decision to transfer has been taken, the Penal and Criminal Affairs Administration requests the Principal Crown Prosecutor to instruct the Crown Prosecutor to take the necessary steps and to contact the competent foreign authorities for the purpose of taking charge of the person concerned at Zaventem airport or at the frontier or escorting him or her to the Belgian frontier where the prisoner is handed over to the foreign authorities in exchange for a declaration that he or she has been delivered.

- In due course, the Principal State Prosecutor informs the Penal and Criminal Affairs Administration of the date on which the transfer took place.

2.1.2 The Crown Prosecutor of the place of detention

- The Crown Prosecutor takes a statement from the sentenced person, informs him or her of the request for transfer, if it does not emanate from the person concerned, and of the consequences thereof, and notes his or her consent in an official report.

The sentenced person is assisted by a lawyer, either on his or her request or where the Crown Prosecutor deems that it is necessary in view of the mental state or age of the prisoner (Article 4 of the Law).

Consent is irrevocable for a period of 90 days from the date of the interview. If transfer has not taken place when the time limit expires, the sentenced person can freely revoke consent by writing to the director of the penal establishment up until the day that he or she is notified of the date of transfer (Article 5 of the Law).

- In the event of a request for transfer to a foreign country, the following documents are forwarded to the Penal and Criminal Affairs Administration in compliance with the Article 6.2 of the Convention:

- a certified copy of the judgment or of the binding decision;

- a certified copy of the law on which it was based;

- a statement indicating what part of the sentence has already been served, including information on any pre-trial detention, remission or any other factor relevant to the enforcement of the sentence;

- a translation of these documents, where required by the administering State.

The Crown Prosecutor takes the final measures necessary for transfer.

2.2. Transfer to Belgium

2.2.1 The Principal Crown Prosecutor

- Pursuant to the regulations in force, the opinion of the Principal Crown Prosecutor may be sought, although, in practice, this is not usually done.

- When the decision to transfer has been taken, the Principal Crown Prosecutor is requested to instruct the Crown Prosecutor to take the necessary steps to effect the transfer. The address of the competent foreign service is communicated to the Crown Prosecutor who notifies the Penal and Criminal Affairs Administration of the date of the transfer.

2.2.2. The Crown Prosecutor of the district where the penal establishment designated by the Prisons Administration is located

- The above-mentioned Crown Prosecutor receives the documents and the agreement of the Belgian and foreign authorities from the competent Principal Crown Prosecutor.

- He takes the necessary measures to effect the transfer.

- The Crown Prosecutor at the relevant court of first instance takes a statement from the transferred person within 24 hours of his or her arrival in the penal establishment. He undertakes an examination to establish the identity of the prisoner which he records in an official report and, on sight of the documents attesting to the agreement of the States and the individual concerned together with the original or an execution copy of the foreign conviction and sentence, orders the prisoner to be immediately imprisoned or placed in the psychiatric unit of the penal establishment, if the measure imposed in the foreign country is similar in nature to that provided in Chapter II of the Law of 9 April 1930 on social protection against mentally abnormal persons or habitual criminals (Article 8 of the Law).

1. Procedure
see diagram.

2. Reasons for refusal

- Article 2 of the Law stipulates that transfer to a foreign State cannot be approved if there are serious reasons for believing that a danger exists that the enforcement of a penalty or measure in the foreign State will seriously worsen the sentenced person's situation for reasons of race, religion or political opinion.

3. Information on early release

Before a final decision is taken on transfer, the administering State is requested to provide information on the date on which the person concerned might qualify for early release.

1. Procedure
see diagram

2. Information on early release

At the request of the sentencing State, Belgium communicates the amount of time which must elapse before the sentenced person would be eligible for early release if he or she served the remainder of his or her sentence in Belgium.

3. Article 9 of the Convention

When depositing the act of ratification, Belgium stated that it was waiving application of Article 9.1.b, where it is the administering State.

The enforcement of the sentence takes place immediately. The foreign judgment by which the measure or penalty was imposed abroad is directly and immediately enforced with respect to that part of the sentence which would still remain to be served in the foreign country.

If by its nature or duration, the penalty or measure imposed in the foreign country does not correspond to that imposed by Belgian law for the same facts, the Crown Prosecutor immediately informs the court of first instance and asks for the penalty or measure to be adjusted to that provided under Belgian law for an offence of the same nature. In no circumstances can the penalty or measure imposed in the foreign country be aggravated (Article 10 of the Law).

TRANSFER TO BELGIUM

Request < foreign authorities	Request < sentenced person or his or her lawyer
Approval + documents (II. 1.1.C) PENAL AND CRIMINAL AFFAIRS ADMINISTRATION	communication of the request (II.1.1.C.)
FOREIGN AUTHORITIES	approval + documents (II.1.1.C.)
MINISTER'S DECISION	communication of the decision (II.1.1.C.)
SENTENCING STATE	communication to the sentenced person (II.1.1.C.)
PRINCIPAL CROWN PROSECUTOR	measures (II.2.2.1)
CROWN PROSECUTOR	transfer + hearing (II.2.2.2.)
PENAL AND CRIMINAL AFFAIRS ADMINISTRATION	Communicaiton of the date of transfer (II.1.1.C)
PRISONS ADMINISTRATION	Decision on appropriate prison (II.1.2.B)

TRANSFER TO A FOREIGN COUNTRY

Request	
PENAL AND CRIMINAL AFFAIRS ADMINISTRATION	PRISONS ADMINISTRATION
Admissibility of the request (II.1.1.B)	Information and opinion (II.2.2.A.)
PRINCIPAL CROWN PROSECUTOR	Opinion (II.2.1.1.)
CROWN PROSECUTOR	Hearing and documents (II.1.2.A.)
PENAL AND CRIMINAL AFFAIRS ADMINISTRATION	MINISTRY OF JUSTICE OF FOREIGN STATE Agreement and documents (II.1.1.B.)
MINISTER’S DECISION	
PRINCIPAL CROWN PROSECUTOR	Measures (II.2.1.1.)
CROWN PROSECUTOR	TRANSFER (II.2.1.2.)
PENAL AND CRIMINAL AFFAIRS ADMINISTRATION	Communication of date of (II.1.1.B.)
PRISONS ADMINISTRATION	Communication (II.1.2.A.) of date of decision to sentenced person

APPLICATION OF THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

I. GENERAL INFORMATION

II. SERVICES INVOLVED

1. Ministry of Justice

   1.1. Penal and Criminal Affairs Administration
   1.2 Prison Administration

2. Crown Prosecution Service

   2.1 Transfer to a foreign country
      2.1.1. Principal Crown Prosecutor
      2.1.2 Crown Prosecutor

   2.2 Transfer to Belgium
      2.2.1 Principal Crown Prosecutor
      2.2.2. Crown Prosecutor

III. TRANSFER TO A FOREIGN COUNTRY

1. Procedure

2. Reasons for refusal

3. Information on early release

IV. TRANSFER TO BELGIUM

1. Procedure

2. Information on early release

3. Article 9 of the Convention.

BULGARIA

INFORMATION

On the practice in the Republic of Bulgaria concerning the application of the 1983 Convention for the Transfer of Sentenced Persons, done at Strasbourg

GENERAL INFORMATION

The Republic of Bulgaria has not passed new legislation concerning the implementation of the Convention for the Transfer of Sentenced Persons. This was not needed, as in the acting Criminal Procedure Code there is a separate Section III in Chapter XXII "Transfer of persons sentenced to deprivation of liberty to serve the term of imprisonment in the state, which nationals they are, pursuant to an international agreement". This Section regulates the conditions for transfer of sentenced persons - their surrender and receiving.

The Section does not explicitly provide for the possibility to apply the principle of reciprocity, but nevertheless the Bulgarian party has followed this principle.

The Republic of Bulgaria is a party to the Convention for the Transfer of Sentenced Persons to imprisonment to serve the term of imprisonment in the state, which citizens constitute, done at Berlin on 19 of May 1978. The said Convention does not require the consent of the sentenced person to be transferred. In its practice in transfers of persons to the Russian Federation, pursuant to that Convention Bulgaria has always followed the requirement not to transfer or receive any person, who has not given his/her consent to that transfer.

In general the transfer does not harm the goals of the justice, as they are almost identical, namely: correction and re-education of the convicts, and prevention to commit other crimes. One special feature is that in certain cases the conditions of life in Bulgarian prisons may be more unfavourable, but the convicts are closer to their families, friends and parents and this factor results in better social contacts and possibilities for faster re-socialization.

The time necessary for the delivery of the documents, needed for the transfer differs and depends on the legal and factual complicity of the case. It may vary from two to four months. In some cases the person has to be identified which significantly delays the direct actions on the transfer.

According to the Bulgarian legislation the Prosecutor's Office enforces the judgements imposing sentences of deprivation of liberty. It supervises the lawfulness of the serving of punishments

Because of these two substantive competencies, concerning the serving of punishments, pursuant to Section 442 (1) of the Criminal Procedure Code the General Prosecutor of the Republic of Bulgaria is entrusted to take decisions for transfer of sentenced persons - Bulgarians and foreign nationals

Thus on one hand the relevant decisions are taken more promptly, and on the other hand as the prerequisites and the conditions for the transfer are formal, there is no legal proceeding stricto sensu to necessarily require a judicial act.

In compliance the above stated, there is judicial practice in cases, when the foreign judgement is converted by an exequatur and, pursuant to section 444 (1) of the Criminal Procedure Code this procedure takes place after the surrender and receiving of the Bulgarian citizen.

According to the legislative acts, which regulate serving of the punishments, the convicted foreign citizens serve the term of deprivation of liberty in the prison in the city of Sofia. The prison administration informs them on the possibility to declare their will to be transferred, pursuant to the transfer agreements and conventions.

If the convict submits a request for transfer to the Ministry of Justice of the Republic of Bulgaria or to the General Prosecutor, the Prosecutor in charge immediately demands certified copies of the judgement with the motives and an indication that the judgement is final, as well as the judicial acts, issued by other control judicial instances, if the latter have passed a judgement on the case. In addition a statement indicating the term of punishment already served and the period left is required from the prison administration and a statement confirming that the convict has paid the fines, indemnities and the court fees and expenses.

The information is reported to the General Prosecutor along with a draft-letter to the relevant competent authority of the state, which national is the convict and which will enforce the remaining part of the sentence. The General Prosecutor signs the letter and submits a request or transfer of the foreign national, and encloses the following documents: the judgement and the other judicial acts referring that the judgement and a statement that it is final and enforceable; the relevant texts from the Criminal Code on the grounds of which the person was sentenced; a statement indicating the term of punishment already served and the period left, and a request by the convict declaring his/her will to be transferred.

If necessary the General Prosecutor requires in the same letter additional information, pursuant Art.6 (1) of the European Convention.

When the other party gives a positive answer to the request and on that ground and on the basis of the enclosed information a legal agreement for transfer between the competent authorities of both states is achieved, the national services of INTERPOL are assigned to negotiate the time and the place of actual transfer of the convict. After that an order issued and sent to the relevant convoying and the executive bodies to transfer the convict.

In this case the period of time for transfer is shorter compared to the case when the administering state initiates the proceeding.

The authorities, which take part in the procedure, including its final stage have already been mentioned in item 8.

The reasons for the refusal of transfer constitute failure to comply with the conditions for transfer, according to Art.3 of the Convention.

Bulgaria does not take into account the release of the convict before expiry of the term or release on bail by the other state, as these actions concern the serving of punishment itself. We are interested in granting, pardon or amnesty, which change the penalty and its term.

The executive state may be provided information on the conduct of the prisoner in our prison, on request.

It refers to cases when a Bulgarian national has been sentenced in another state. In these cases, if the General Prosecutor himself, or through the Ministry of Justice receives a request by a sentenced Bulgarian national or by his/her attorney at law, where he/she has declared his will to be transferred, a letter is addressed to the competent authority of the other state with the request for transfer. The following documents are enclosed to the letter: a document, certifying the Bulgarian nationality of the convict; the applicable legal provisions of the Criminal Code of the Republic of Bulgaria; copy-transcript from the texts, concerning the legal consequences of enforcement of the punishment “imprisonment” in the Bulgarian prisons, as well as a statement on the consequences of the transfer in the administering state. That is to say that if Bulgaria intends to implement the European Convention it will declare that it will apply Art.9 (1) point “a” and Art.10 (2), pursuant the reservations made on the text.

When the other party gives a positive answer to the request and a legal agreement for transfer between the competent authorities of both states (in case of the Republic of Bulgaria this is the General Prosecutor) is achieved, the national services of INTERPOL are assigned to negotiate the time and the place of actual transfer and acceptance of the convict and his/her placement in Sofia prison.

It is obvious from the above stated, concerning the implementation of Art.9 (1) point “a” of the European Convention, that Bulgaria has accepted the principle of continued enforcement. And as Bulgarian legislation so requires, the foreign judgement is subject to adaptment - i.e. “exequatur”, pursuant to Art.10 (2) of the European Convention.

This procedure takes place following a proposal by the General Prosecutor to Sofia City Court. According to the legal principles, the prescribed punishment may not aggravate by its nature or duration the sanction imposed in the sentencing state. The period of the preliminary detention is included in the served term of punishment. The rest of the term of the sentence is reduced with the term considered to be served by the sentencing state.

When serving the sentence in Bulgarian prison the convict’s two working days are considered as three days of convict’s served imprisonment.

In the period of serving of sentence the Bulgarian court may order release on bail before expiry of the rest term of imprisonment, if the convict demonstrated an exemplary conduct and loyal attitude to labor and gave evidences of his correction, provided that he has actually served no less than a half of the period of the sentence.

As it was already stated the procedure is quite shorter, when the sentencing state is submitting the request for transfer upon the will of the sentenced person.

The authorities in charge of the transfer according to our legislation were specified in item 14.

The typical reasons for rejection by the requested party are the different types of penalties, foreseen by the Criminal Law for a certain offence, f. ex. - life imprisonment in one state and deprivation of liberty for a certain maximum period in other state.

As has already been stated Bulgaria is interested in all issues, concerning the term of the sentence in the other state including the reduction of the term of serving of punishment.

The procedure connected with the effect of the transfer, concerning the administering state has been explained in detail in item 14.

Pursuant to Art.1, point “a” of the Convention for Transfer of Sentenced Persons subject of transfer are not only persons, sentenced to imprisonment, but also any other persons, on whom a measure including deprivation of liberty was imposed by a court for a committed offence.

According to our legislation it refers to the persons ordered by the court judgement to pass compulsory treatment from alcoholism or another drug addiction, pursuant to Section 92 of the Criminal Code. Thus, in case when compulsory medical treatment was imposed on a foreign national, pursuant to Section 92 of the Criminal Code he/she can be transferred to his/her own state to undergo this treatment and vice versa. These cases are indisputable.

Further the difficulties arise due to the differences in the definitions of the forms of non-compos mentis in the legislation and the legal theory of the countries. Limited *compos mentis* is not recognized by Bulgarian legislation and in all cases, when a certain person is considered non-compos, he is criminally irresponsible. That is why in such cases we classify the committed acts by such persons as publicly dangerous, but not as crimes.

The court can order compulsory treatment of a person, who has committed such publicly dangerous acts, in state of insanity, or has fallen in such state before the judgement was rendered, or in the period of serving the punishment, pursuant to Article 89 of the Criminal Code. The compulsory treatment should take place in a special ward of a psycho-neurological hospital or in a specialized psychiatric hospital.

In these cases as the concept of a publicly dangerous act is coincides with crime on the grounds, the Convention for the Transfer of Sentenced Persons should be applied too.

CANADA

Click here for PDF version

CROATIA

Appendix and Addition to the New (Procedural) Guide to the Application of the Convention on the Transfer of Sentenced Persons of the Council of Europe

On 6th April, 2001 the Croatian Parliament passed the Act on the Amendment to the Act on the Ratification of the Convention on the Transfer of Sentenced Persons of the Council of Europe. This Act amends the declaration of the Republic of Croatia and the stated amendment has legal effects as of 28th June, 2001.

The amendment to the declaration of the Republic of Croatia has the following consequences:

1. The Republic of Croatia shall, in the implementation of external sanctions in its territory, be committed to the procedure complying with the provisions of Article 9, paragraph 1.b, and Article 11 of the Convention.

2. This, however, does not exclude the application of the procedure defined in Article 9, paragraph 1.a, i.e. Article 10, paragraph 1, or Article 10, paragraph 2, of the Convention, in cases when another Party is unwilling to apply the procedure defined in Article 9, paragraph 1.b and Article 11, of the Convention, and if so required by the transfer concerned. In that case the sanction shall be adopted through a court order in compliance with the provision of Article 10, paragraph 1, or Article 10, paragraph 2, of the Convention, depending on the terms of the transfer, and the enforcement of the sentence passed in the sentencing State shall be continued.

3. In the application of the procedure provided in Article 10, paragraph 1, or Article 10, paragraph 2, of the Convention, in accordance with the terms of the transfer set by the sentencing State, the Republic of Croatia may decide not to exercise its rights provided in Article 12 of the Convention without the consent of the sentencing State."

Article 9, paragraph 1.b of the Convention defines the obligation of the competent authorities of the administering State ("the competent authorities of the administering state shall…..") to convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11 of the Convention.

Accordingly, in its modification of the declaration of 6th April, 2001, the Republic of Croatia, where the Republic of Croatia is the administering State, adopted as the fundamental principle the procedure laid down in the provision of Article 9 paragraph 1.b, with the application of the provisions under Article 11.

The relevant alteration included in the modification of the statement of the Republic of Croatia in relation to the statement given by the Republic of Croatia in Article 3 of the Act on the Ratification of the Convention on the Transfer of Sentenced Persons of the Council of Europe of 7th December 1994, refers to a case where the Republic of Croatia as the administering State applies the procedure defined under Article 9, paragraph 1.a, or Article 10, paragraph 2 of the Convention, in which case it is necessary to first adopt the sanction, by a court order pursuant to the provisions of Article 10, paragraph 1, or Article 10, paragraph 2 of the Convention, depending on the terms of the transfer and then proceed with the enforcement of the sanction imposed in the sentencing State.

An essential novelty in the modification of the declaration of the Republic of Croatia is to be found in the change of the expression under the subparagraph 2, in the second sentence of the integral text of the modification of the declaration. Comparing the wording of the declaration included in Article 3 of the Act on the Ratification of the Convention on the Transfer of Sentenced Persons of the Council of Europe of 7th December, 1994 with the text of the subparagraph 2, the second sentence of the modification of the declaration, it is evident that instead of the expression "…..adapt the sanction by a court order…", there is the expression "…..adopt the sanction by a court order….".

The consequence of the above described alteration of the expression consists in the Republic of Croatia as the administering State waiving its right to interpret the external court order (the former declaration of 7th December, 1994 used the expression "adapt"), the enforcement of which the Republic of Croatia adopts. Therefore, where the Republic of Croatia as the administering State accepts the possibility to apply the procedure stated under Article 9, paragraph 1.a., or Article 10, paragraph 1. or Article 10, paragraph 2 of the Convention, the Republic of Croatia grants the sentencing State the legitimacy in the implementation of its criminal law jurisdiction within the legal system and in the territory of the Republic of Croatia.

What is left unaltered, is the definition of the exclusive court jurisdiction for the adoption of the sanction imposed in the sentencing State to be implemented in the Republic of Croatia. On the other hand, how courts adopt the sanction imposed in the sentencing State is prescribed in Article 10, paragraph 2 of the Convention.

It should be pointed out here that the application of the provision under Article 9, paragraph 1.a, and Article 10, paragraph 2 of the Convention will take place only where the other state party is not willing to apply the procedure laid down in Article 9, paragraph 1.b, and Article 11 of the Convention, that are defined as the fundamental principle, and where the interests of the transfer require so.

Additionally, the modification of the declaration of the Republic of Croatia provides the possibility of the commitment of the Republic of Croatia, as the administering State, not to apply its rights, without the consent of the sentencing State, provided in Article 12 of the Convention, i.e. the right to grant pardon, amnesty or commutation in accordance with its Constitution or other laws. Of course, this possibility is present only in case of the application of the procedure provided in Article 10, paragraph 1, or Article 10, paragraph 2 of the Convention in accordance with the terms of the transfer set by the sentencing State.

It is certain that the Republic of Croatia, through its modification of a declaration dated 5th April, 2001, regulated the possibilities of the transfer of sentenced persons in an exceptionally liberal and democratic manner.

The Croatian criminal law does not provide the possibility of a person committing a crime in a state of insanity who are found guilty in a criminal procedure later on (i.e. “guilty but insane”).

Namely, criminal law may be applied to persons who commit a criminal offence in the state of diminished responsibility, which fact, at the same time, may be the ground for a more lenient sentence.

On the other hand, if it is established that the defendant committed an offence while in the state of insanity, the state attorney has the obligation to apply, in the bill of indictment or in the charge, to the court to establish that the defendant committed the criminal offence while in the state of insanity. In the further procedure the case is excluded from the jurisdiction of criminal courts and referred to the court authorised to apply measures in accordance with the Act on the Protection of the Mentally Disordered Persons.

Furthemore, the state attorney may avail himself of the possibility to request in the investigation order or during the investigation that the evidence and facts be collected for the purpose of establishing that the defendant commited the offence while in the state of insanity .Only if the state attorney uses the possibility to submit such a request may the court, during the further procedure, order that the defendant, who committed a criminal offence in the state of insanity and who is dangerous to such an extent that it may be reasonably suspected that he may present a danger to his or other people’s life and limb or inflict damage of a larger scope, be placed in custody and held in hospital.

On the other hand, if after the main hearing the court states that the defendant committed the offence in the state of insanity and the state attorney had not used the possibility to request the collection of evidence and of the facts needed to establish that the defendant committed the criminal offence in the state of insanity, the court shall acquit the defendant.

Based on the above, a defendant who committed a criminal offence in the state of insanity may appear in the prison system in the Republic of Croatia only during the stage of investigation as a detainee, provided that the investigating court orders such a defendant to be detained and not committed to a hospital.

Apart from the above stated case, there is always a possibility that a person who is found guilty in a criminal procedure ending in a final verdict and sentenced to a term of imprisonment will become mentally ill or start showing serious mental disorders. In such situations, the prisoner who became a mentally ill person will be excluded from the prison system and committed to a mental hospital from the area of responsibility of the Ministry of Health. The treatment in a mental hospital may last no longer than the term of sentence. If the treatment is completed before the expiry of the sentence, the judge in charge of the sentence enforcement will decide on the continuation of the prison sentence service, whereas the time spent in hospital will be included in the sentence. These determinations are laid down in the Act on Prison Sentence Enforcement applied as of 1st July, 2001.

It may be inferred from the above stated that the Republic of Croatia as the administering State may not adopt the enforcement of the criminal procedure verdict of guilty for an insane person, as such a verdict may not be adapted and even less adopted in accordance with the criminal law of the Republic of Croatia.

There is a possibility for the Republic of Croatia as the administering State to adopt the verdict of an external criminal court, where the criminal procedure was conducted against a defendant with diminished responsibility who was found guilty in a final verdict and sentenced to a term of imprisonment along with a measure of compulsory psychiatric treatment or compulsory treatment against addiction.

Therefore, the prison system of the Republic of Croatia may receive the transfer of a person who committed a crime in a state of diminished responsibility, so that, apart from the prison sentence, a measure of compulsory psychiatric treatment or compulsory treatment against addiction was imposed, or it may be the case of a sane prisoner who became mentally ill during the prison sentence service or started to show symptoms of serious mental disorders, in which case he or she will be excluded from the area of responsibility of the prison system and committed to a mental hospital from the area of responsibility of the Ministry of Health. He or she may be returned into the prison system only on the basis of an order by the judge in charge of the enforcement after the treatment is completed.

CZECH REPUBLIC

APPLICATION OF THE CONVENTION ON THE SURRENDER OF CONVICTED PERSONS AGREED ON MARCH 21, 1983, IN STRASBOURG, IN THE TERRITORY OF THE CZECH REPUBLIC

The Convention on the surrender of convicted persons, agreed on March 21, 1983, in Strasbourg, has become a part of our legal system by its promulgation in the Collection of Laws on December 9, 1992, under No. 553/1992 CoL.

No national legislation has been adopted to the implementation of this Convention.

During the surrender for the execution of the penalty of imprisonment our principal aim is resocialization. The convicted person returns to his home State, where he has his/her family and social background and where, consequently, the prerequisites for his subsequent incorporation in current life are provided to a greater extent than in a foreign state, where his communication with his environs is reduced by different social conditions and language barriers, to say nothing about the limited possibility of contact with his near and dear people / for reasons of high travel costs, health, etc./.

The procedure under the Convention is the responsibility of the Ministry of Justice of the Czech Republic.

System of Execution of the Penalty of Imprisonment

The imposition and execution of the penalty of imprisonment is governed by Sec. 55 - 59 of the Criminal Code of the Czech Republic /Act No. 140/1961 CoL as amended by subsequent regulations/.

The system of the execution of the penalty of imprisonment is specified in Sec. 56 of the Criminal Code of the Czech Republic.

The penalty of imprisonment is executed in four principal types of prisons:

a/ with surveillance,

b/ with supervision,

c/ with confinement,

d/ with close confinement.

The manner of execution of the penalty of imprisonment in the particular prison types is regulated by a specific act.

The court usually assigns the convicted person to the individual prison type as follows:

a/ to the prison with surveillance the offender who has been sentenced for a criminal offence committed by negligence, who had not been imprisoned for a willful criminal offence before,

b/ to the prison with supervision the offender sentenced for a criminal offence committed by negligence who, however, had been already convicted for a willful criminal offence, or the offender who has been sentenced for a willful criminal offence to imprisonment of not more than three years, but had not been imprisoned for a willful criminal offence before,
c/ to the prison with confinement the offender who has been sentenced for a willful criminal offence who does not meet the conditions for the execution of his sentence in the prison with supervision or with close confinement, and the offender who has been sentenced for a criminal offence committed by negligence and who has not been allocated to the prison with surveillance or supervision,
d/ to the prison with close confinement the offender who has been sentenced for exceptional sentence of imprisonment, who has been sentenced as a particularly dangerous recidivist /habitual criminal/, who has been sentenced for a particularly serious criminal offence to at least 8 years or who has been sentenced for a willful criminal offence and had escaped from prison in the past five years.
The court may allocate the offender to another type of prison than that to which he should be assigned as per the above rules, if it assumes so with reference to the seriousness of the offence and the degree and character of the offenders degradation, his reformation will be guaranteed better in another prison type. However, the offender who has been sentenced to an exceptional penalty shall be always assigned to the prison with close confinement.
Exceptional sentence of imprisonment includes the penalty of imprisonment for over twenty up to thirty years as well as the life sentence.

Czech Republic as Sentencing State
Procedure of Surrender or Convicted Persons to another State
In most cases the Ministry of Justice acts on the basis of an application of the sentenced person.

a/ statement of the sentenced person containing his/her expression of interest in the surrender, addressed
- directly to the Ministry of Justice of the Czech Republic,
- to the Penitentiary Service of the Czech Republic, which forwards the case to the Ministry of Justice of the Czech Republic;
b/ checking whether the conditions of Art.3, para.1 /with the possible application of para.2/ of the Convention have been complied with,
c/ collection of data according to Art.6, para.2, letters a/, b/ and c/ of the Convention with the assistance of respective courts and the Penitentiary Service of the Czech Republic,
d/ if the conditions specified in the Convention have been complied with, the drafting of an official request for surrender,
e/ the time required for the compliance with the request varies between 3 and 6 months,
f/ after the receipt of information from the requested State containing its consent with the surrender, an instruction is issued without delay to the Penitentiary Service of the Czech Republic to effect the surrender.

Ministry of Justice of the Czech Republic as Initiator:
a/ check-up that the conditions of the Convention have been complied with,

b/ request addressed to the sentenced person, whether he/she assents to the surrender for the execution of the penalty of imprisonment to his/her home country,
c/ collection of data with the assistance of the respective courts and the Penitentiary Service of the Czech Republic,
d/ in case of interest of the convicted person in surrender drafting of an official request for surrender,
e/ the time required for the compliance with the request varies between 3 and 6 months,
f/ after receipt of information from the requested State containing the consent with the surrender, an instruction is issued to the Penitentiary Service of the Czech Republic to effect the surrender.

Another Country's Authority as Initiator:
a/ receipt of the request for surrender from another State,
b/ checking whether the conditions of the Convention have been complied with,
c/ collection of data with the assistance of the respective courts and the Penitentiary Service of the Czech Republic,
d/ if the conditions have been complied with an instruction is issued to the Penitentiary Service of the Czech Republic to effect the surrender,
e/ the time required for the compliance with the request of another State varies between 1 and 2 months.
The mean period of the procedure under the Convention is 6 to 7 months.

Institutions participating in the procedure:
- Penitentiary Service of the Czech Republic,
- courts which have decided about the penalty for criminal offences,
- Ministry of Justice of the Czech Republic which decides definitely.

The Ministry of Justice request information concerning the rules used in the other State related to early release of prisoners.

Czech Republic as Administering State
Procedure of Surrender of Convicted Person to the Czech Republic
The procedural aspect of the execution of the sentences of foreign courts in the territory of the Czech Republic is regulated in national law in Chapter 25 of the Criminal Procedure Code of the Czech Republic of 1961 /Act No. 141/1961 CoL as amended by subsequent regulations/ concerned with legal relations to other countries.
The surrender procedure is uniform regardless to the initiator of the procedure.
If a sentence of a foreign court in a criminal case should be executed in accordance with the Convention, the Ministry of Justice of the Czech Republic
a/ having collected the data and referential containing the following information on the convicted person
- name, date and place of birth,
- permanent address, temporary address or the place of stay,
- when he expressed interest in surrender,
- certificate of citizenship,
- name of court which sentenced him and the penalty imposed,
- how long his freedom has been restricted /custody, imprisonment/,

b/ submits the case to the respective regional court with the proposal that it should recognize the decision of the foreign court in the territory of the Czech Republic,

c/ having heard the State Attorney the Regional Court decides about the proposal. In its decision-making the Court examines the conditions provided in the Convention;
d/ the period of decision-making varies between 2 and 4 months.
e/ If the sentence of the foreign court has been recognized by the competent regional court in the Czech Republic, the Ministry of Justice of the Czech Republic can express its consent with the surrender of the convicted person for the execution of the penalty of imprisonment / if the other State has requested the surrender of a person sentenced in the territory of the Czech Republic / or request the State whose court has passed the sentence to surrender the sentenced person.
f/ The time required for the determination of the term by the convicting party:
- if the foreign State has initiated the surrender the time varies between 1 and 2 months,
- in other cases between 2 and 3 months.
g/ The sentenced person surrendered by another State is taken over by the Penitentiary Service of the Czech Republic upon the instruction of the Ministry of Justice of the Czech Republic.
h/ Within 24 hours from the surrender the Judge of the respective court will decide about taking the person into custody.
The respective court competent to the decision in this case is the district or regional court according to the seriousness of the criminal offence for the execution of the penalty for which the person has been surrendered.
i/ The court decides about the execution of the sentence of the foreign court in a public session, issuing a judgment.
The judicial proceedings convert the sanction imposed in the sentencing State into the sanction provided by the legal system of the Czech Republic for the same criminal offence and under the conditions specified in Art.11 of the Convention.
j/ The total period of the surrender procedure varies between 6 and 7 months.

Institutions participating in the procedure:
- the competent regional court
- the State Attorney of the Czech Republic,
- the Penitentiary Service of the Czech Republic,
- the court which decides about the execution of the sentence passed by the foreign court,
- Ministry of Justice of the Czech Republic which decides definitely.

DENMARK

The Danish contribution to "A guide to procedures" concerning the Convention on the Transfer of Sentenced Persons

The provisions contained in the European Convention on the International validity of Criminal Judgements were incorporated in Danish law by act no 522 of 23 December 1970 on the enforcement of European criminal sentences. Following Denmark's subsequent signature on 21 March 1983 of the European Convention on the Transfer of Sentenced Persons it was considered appropriate to subsume rules governing international enforcement of sentences etc. into one statute. Therefore, the rules enshrined in the 1970 Act were, subject to a few amendments as to form, incorporated into the Act no 323 of 4 June 1986 on International Enforcement of Sentences etc: thus enabling Denmark to ratify the European Convention on the Transfer of Sentenced Persons.

Instead of rewriting the words of the Convention into one Danish piece of legislation, Denmark chose in the wording of the 1986 Act to refer in general to the provisions of the two conventions, which appear annexed to the Act. In this manner the wording of the Convention had been provided with the same validity as the wording of the Act itself. Thus the Act contains solely those provisions which the conventions imply being laid down by individual member States, e.g. governing transfer procedures.

According to Article 10 of the Act on International Enforcement of Sentences etc., transfer to and from Denmark is in principle also possible in the absence of an applicable treaty.

Apart from the European Convention on the Transfer of Prisoners, Denmark is also party to an agreement between the Nordic Countries concerning enforcement of sentences. According to the Danish Act no 214 of 31 May 1963 on co-operation with Finland, Iceland, Norway and Sweden, sentences imposed in the other Nordic Countries can be enforced in Denmark. In principle, the sentencing country has to request the enforcement of the sentence in another Nordic country, but such a request can be initiated by the prisoner. Furthermore, the sentenced person has the right to give his opinion concerning the enforcement of the sentence in another Nordic country, before the decision on the transfer is made. However, the transfer can take place without the prior consent of the prisoner.

For several reasons the serving of a sentence in a foreign country may cause problems for the sentenced person. Linguistic difficulties may cause the person to feel isolated and may prevent the person from participating in educational activities etc. The fact that the sentence is served in a location where the prisoner's relatives will generally be unable to visit him will also be particularly psychically stressing for the person in question. In addition, the fact that if the prisoner does not serve his sentence in his home country it will, in actual fact, be impossible to assist him in getting a job and in securing him a dwelling and to provide him with other kinds of support during the period following his release. Such circumstances, among others, will essentially counteract his being rehabilitated.

When considering application of the Convention the Danish authorities will attach importance especially to such humane considerations and rehabilitation aspects.

The Danish Criminal Code from 1930 is based on general preventive as well as special preventive concepts. A range of different treatment options is therefore available in Danish Prisons.

Treatment in the sense that actual treatment sanctions (e.g. borstals, houses of correction and preventive detention for psychopaths), the extent of which would depend fully or in part on the results of the treatment, was abolished in 1973.

Denmark has a relatively simple system on three types of punishment: ordinary imprisonment, "simple detention", and fines/"dayfines". Simple detention will however be abolished in 2001. Imprisonment may be measured out in fixed terms ranging from 30 days to 16 years or life; simple detention from 7 days to 6 months. Imprisonment may be given in the form of conditional or unconditional sanctions. Besides, sentences can be passed for treatment (noncustodial) or commitment to psychiatric hospitals or homes for the mentally deficient.

The Prison Service runs 13 State prisons, an institution for convicted persons requiring psychiatric treatment, and 40 local gaols. Five of the prisons are closed, i.e. they are secured by external ring walls as well as by internal safeguarding measures such as secured buildings, electronic security systems etc., combined with relatively high ratio of staff.

Persons who are to serve custodial sentences must be placed in open institutions, unless this is found inadvisable for special reasons. To determine the type of institution to be selected, weight is attached inter alia to the nature of the crime, the term of imprisonment, and the risk of escape. Wherever possible, the prisoner will be confined to an institution close to his place of residence.

Prisoners in open and closed prisons are subject to the same set of rules, but freedom for inmates in closed prisons is more restricted because of the more serious nature of the clientele.

Prisoners may correspond with anyone. Reading inmates' letters will only occur under special circumstances. In open institutions prisoners have telephone booths in the wards, and to a certain extent private phones in their cells. Prisoners are entitled to receive visits by relatives and friends of at least one hour a week. More often than not they will be allowed visits on a more extended scale. Visits are had without any kind of control, and they take place either in inmates' cells or in special visiting rooms designed for that purpose. In closed prisons inmates are searched after visits, due to the risk of the smuggling of drugs and weapons etc.

Inmates in open prisons are usually granted weekend leave every three weeks. It will also be possible for inmates in closed prisons to be granted weekend leave once they have served approximately one fourth of their sentence and provided that it is considered that there is only limited risk of abuse.

Inmates have access to radio, television, and newspapers. Whilst serving their sentences, inmates are obliged to work. Equal weight is attached to work and education. With regard to education and training, inmates are offered the same opportunities as ordinary citizens. The hotel functions which traditionally have been associated with imprisonment and which to a certain extent contribute to a social and functional crippling of inmates are now being replaced by the so-called elf-administration principle, which will (again) make inmates responsible for their own daily life.

Prisoners are subject to the provisions contained in the Criminal Code. In addition, for reasons of security and order they have to comply with rules laid down for the institution and follow instructions given by members of the staff. If inmates breach the rules applying to their stay in prison, or if they escape or attempt to escape, disciplinary sanctions may be imposed on them in the form of fines or punitive confinement in special cells.

Prisoners will usually be released on parole once they have served two thirds of their sentence. In 1999 83,2 % of prisoners sentenced to more than three months were released on parole. 16,8 % were kept in prison either because they did not wish to accept the terms, which the Prison Service considered necessary to limit the risk the relapse into crime, or because the Service considered that the risk of reoffending was so great that early release would be unsafe. Some of these were later released, after they had served two thirds of their sentence but before the serving of the sentence was completed.

Procedures of transfer of foreign nationals for enforcement of the sentence in the home country will usually be initiated by the person serving a sentence submitting an application for transfer to the Ministry of Justice. The prison governor will often attach to the application a copy of prison records containing information about the times of, inter alia, remand in custody, expected release on parole, and end of prison term. Often the application will be forwarded via the Prison Service, which will subsequently act as intermediary in all communication with the prisoner. Thus, inquiries from the prisoner will be directed to and answered by the Service, and the Ministry of Justice will keep the Service informed about developments in the case.

Procedures described in the following are identical, irrespective of which party will take the initiative to initiate transfer proceedings.

When the application from the sentenced person has been received by the Ministry of Justice, the person concerned, in accordance with Section 29 of the Public Administration Act, is requested to give his consent that the Ministry obtain from the Prosecution Service the information and documents concerning the personal circumstances of the sentenced person as set out in Article 4.3. and Article 6.2. of the Convention on Transfer of Sentenced Persons, cf. Section 29 of the Public Administration Act.

In some instances, however, the Ministry of Justice will promptly inform the sentenced person that it is not considered that there are sufficient grounds for submitting a request for transfer to the administering State. This will for instance apply in the event that at the time of submission of the prisoner's request the remainder of the sentence to be served is less than 6 months, or if the Ministry of Justice is certain that the sentenced person's home country will be incapable of assuming responsibility for the enforcement of the sentence, for instance if the person in question has insufficient connection to the alleged "home country".

When, as required by Section 29 of the Public Administration Act, the sentenced person has communicated his consent, the Ministry of Justice will request the relevant chief constable to provide the necessary information and documentation as well as to provide a statement to be included in the considerations whether the Ministry of Justice shall submit a request for transfer for the enforcement of the sentence in the sentenced person's own country. The Ministry of Justice will request the chief constable to return the case files via the appropriate District Attorney, whose opinion will also be sought. The Ministry of Justice will inform the sentenced person that his transfer request is being considered.

The files having been received from the Prosecution Service, the Ministry of Justice will, against the background of the opinion of that Service and in accordance with Section 2(2) of the Act on International Enforcement of Sentences etc., decide whether to communicate a request to the authorities in the sentenced person's own country for transfer for the enforcement of the sentence.

As a principal rule such a decision will be to the effect that the Ministry of Justice submits a transfer request to the relevant authorities in the administering State. Occasionally, however, for the assessment of whether to make such a request the Ministry of Justice will initially request the administering State to furnish the supporting documents and information set out in Article 6.1. of the Convention on the Transfer of Sentenced Persons.

Apart from the information and documents with which in pursuance of Article 6.1. of the Convention the administering State shall furnish the sentencing State, Denmark does not, in principle, require to be provided with special information in respect of the rules applied in the administering Stated relating the early discharge of a prisoner.

Despite the fact that the administering State shall have authority to eventually decide on the early release of the prisoner, Denmark does not transmit to that State information on the conduct of the prisoner while serving his sentence.

Proceedings of transfer of Danish nationals serving a sentence abroad for the enforcement of the sentence in Denmark are often initiated by the sentenced person communicating a request to the Ministry of Justice either direct or through the diplomatic service of the Ministry of Foreign Affairs for transfer to Denmark for enforcement of the sentence imposed abroad. For its determination whether in such cases to communicate a request in pursuance of the European Convention on Transfer of Sentenced Persons for transfer to Denmark for the enforcement of the sentence, the Ministry of Justice will, in accordance with Article 4.4. and Article 6.3., request the sentencing State to communicate the documents and information set out in Article 4.3. and Article 6.2. of the Convention.

It will also occur that the sentenced person expresses the transfer request to the authorities of the sentencing State, which will then contact the Ministry of Justice. To its communication to the Ministry of Justice the foreign authority will usually attach the information and documents mentioned in Article 4.3. and Article 6.2. of the Convention.

Thus thequestion of which party initiated the transfer proceedings is inconsequential for further procedures in the case.

In pursuance of Article 3.4. of the Convention, Denmark has made a declaration according to which the concept of a national in Article 3.1. a is understood also to comprise persons residing permanently in Denmark. In cases where the sentenced person is not a Danish national, and in which it is doubtful whether the person fulfils the residence requirement, but where it appears that he has applied for asylum in this country, the Ministry of Justice will request the Immigration Service of the Ministry of the Interior to furnish an opinion on this question.

Having received the information and supporting documents set out in Article 6.2. of the Convention, or at least a copy of the judgement and the law on which it was based, the Ministry of Justice will, as a chief rule, request the relevant chief constable to furnish an opinion to be included in the Ministry’s deliberations on whether to request the sentencing State that the person concerned be transferred to Denmark. The chief constable will be requested to provide the information set out in Article 6.1.a and b to be attached to a request, if any, and additionally, in the event that the sentenced person is not a Danish national, any available documentation that the person concerned is a permanent resident in Denmark.

In certain cases, however, the Ministry of Justice will communicate promptly that there are not sufficient grounds for transfer to Denmark for enforcement of the sentence. This would for instance apply if, at the time of the request, the remainder of the sentence is less than 6 months, or if the Ministry of Justice is positively aware that Denmark is unable to assume responsibility for the enforcement of the sentence imposed abroad, possibly because the person concerned is not a Danish national and does not reside permanently in Denmark.

Once the records have been received from the chief constable the Ministry of Justice will, on the basis of the chief constable' s opinion and pursuant to Section 2(2) of the Act on International Enforcement of Sentences etc., decide whether to communicate a request to the authorities in the sentencing State for transfer to Denmark for the enforcement of the sentence.

As a principal rule, such a decision will result in a request from the Ministry of Justice to the sentencing State for the transfer of the sentenced person. Simultaneously, the Ministry will request to be furnished with, in the event that the sentencing State is prepared to consent to the transfer, the information and supporting documents set out in Article 6.2. of the Convention provided that these have not already been received.

Apart from the information with which in pursuance of Article 6.2. of the Convention the sentencing State is required to furnish the administering State, Denmark will not require to be furnished with special information in respect of the "penal situation" of the person concerned.

In its request for transfer of a sentenced person the Ministry of Justice will usually indicate what the sentence in the case under consideration was likely to have been had the criminal offence been adjudicated in Denmark. In addition the request will state the maximum penalty for a corresponding offence in Denmark. Further, the Ministry of Justice will provide the information that under Section 38 of the Criminal Code early release will, in principle, not be granted until two thirds of the sentence have been served, but that, in special circumstances, release on parole may take place earlier, provided that the prisoner has served at least one half of his sentence and that this constitutes a period of at least 2 months.

Pursuant to Danish law the enforcement of sentences imposed abroad shall, in principle, be effected in accordance with the provisions of Article 9.1.(b) and of Article 11 of the Convention on conversion of sentence, and the decision on conversion is taken through a court order. Thus, upon his transfer the sentenced person will have to appear before a Danish court, which, against the background of the facts of the case, will convert the sentence imposed abroad to the sentence imposed had the offence been committed in Denmark.

Solely provided that it would otherwise be impossible to have a sentenced person transferred to this country the Ministry of Justice may decide that the enforcement of the sentence imposed abroad shall be effected pursuant to the provisions of Article 9.1.(a) and Article 10 of the Convention concerning continued enforcement. In that case the sanction shall be adapted in accordance with Article 10.2. The decision on adapting the sentence shall be taken by a court following the transfer to Denmark of the person concerned.

Denmark has little experience as to cases concerning the transfer for further treatment of persons who for reasons of their mental condition have been held not criminally responsible for the commission of an offence. As regards the few cases concerning transfer from Denmark to other States, requests to authorities abroad have been denied.

Mention may also be made of a case in which on 21 June 1995, country X denied a request submitted by a Danish national to be allowed to serve the remainder of his sentence of psychiatric treatment in Denmark. The grounds for the refusal were as follows: "Although there is a provision under the Convention for the transfer of such a person, it requires a declaration addressed to the Secretary General indicating the procedures which will be followed in such cases. [Country X] has not made such a declaration and therefore denies the transfer request."

Danish law implies that Denmark would be able to assume responsibility for the enforcement in cases in which the person has been sentenced to further treatment.

ESTONIA

Click here for PDF version

FINLAND

1. General Information

Transfer of sentenced persons to and from Finland is governed by the Convention on the Transfer of Sentenced Persons and the International Cooperation in the Enforcement of Certain Penal Sanctions Act. The Convention and the Act entered into force simultaneously on 1 May 1987. The content of the Convention, to its essential parts, has been incorporated into the Act.

The scope of application of the Act is not restricted to physical transfers of persons alone; a foreign judgement can be sent for enforcement in Finland if the person concerned is a national of or domiciled in Finland and he consents to the enforcement of the sentence. As of 25 March 2001, along with the entry into force of the Schengen Agreement, enforcement of a foreign judgement in Finland is possible even without the person's consent.

Under Finnish criminal law, a person may be sentenced to imprisonment either for life or for a fixed period not exceeding 12 years, or in specific circumstances 15 years.

A person sentenced to a fixed period of imprisonment may be released on parole upon completion of two thirds of his sentence including a possible pre-trial deprivation of liberty. However, first-time offenders are eligible for parole after serving one half of their sentence.

Parole is accompanied by a period of probation, the lenght of which is the remainder of the sentence, not exceeding, however, three years. Probation usually entails supervision. Under certain circumstances probation may be forfeited.

Persons not legally responsible for their acts are not sentenced to prison. Instead they are committed to involuntary treatment at a psychiatric institution for an indefinite period of time. Consequently they are not transferable.

2. The procedure in the transfer

The procedure, whether it concerns a transfer in or transfer out, follows the rules laid down in the Convention. After the necessary exchange of information a decision on the transfer is made by the Minister of Justice. That decision is not appealable. No particular grounds for refusal exist.

Upon consenting to a transfer to Finland the Ministry of Justice orders the enforcement of the sentence to be continued. Same rules and regulations apply to the enforcement of a foreign sentence as to that of a domestic sentence. Only in exceptional cases (where the foreign sentence somehow differs in nature from a Finnish sentence) shall the foreign sentence, at the request of the Ministry of Justice, be converted into a Finnish sentence. Conversion is taken care of by Helsinki District Court.

It is the established policy of the Ministry of Justice that requests for transfer, in or out, will be accomodated as long as the overall criteria for a transfer are at hand. Priority is thus given to the social rehabilitation of the sentenced person. However, sometimes when a transfer of a person sentenced for a narcotics offence is requested to a country with a considerably more lenient approach to the punishability of narcotics offences, negotiations as to the length of the sentence to be served in the administering State have to be entered into. So far, these negotiations have proved fruitful; an acceptable compromise by virtue of Article 10.2 of the Convention has always been found.

The length of the procedure depends on the time spent on gathering the necessary information for a decision. That time, obviously, varies. Once all the information is available a decision is made at once. It is of no significance from where the iniative for a transfer comes.

GERMANY

GENERAL INFORMATION

Please state whether your State has enacted specific legislation in order to implement the Convention, or if general legislation exists that provides for the transfer of sentenced persons.

Answer:

Germany has enacted specific legislation in order to implement the Convention in the shape of the Act to Implement the Convention of 21 March 1983 on the Transfer of Sentenced Persons, the Additional Protocol of 18 December 1997 and the Schengen Agreement (ÜAG) as amended on 29 July 2009 (Federal Law Gazette 2009 [BGBl.] Part I page 2274).

In general, the conversion or enforcement of sentences or other sanctions imposed upon aliens in Germany is regulated by sections 48 - 58 (conversion), as well as by section 71, subs. 1, 2 and 5 (enforcement) of the Act on International Mutual Assistance in Criminal Matters dated 23 December 1982 (IRG) as amended on 18 October 2010 (Federal Law Gazette 2010, Part 1, page 1408). Section 71, subs. 3 and 4 of this Act, do not apply to requests for enforcement pursuant to the Convention of 21 March 1983 on the Transfer of Sentenced Persons, Art. 2 of the Additional Protocol and Art. 68, 69 of the Schengen Agreement (section 2 subs. 1 of the Act to Implement the Convention of 21 March 1983 on the Transfer of Sentenced Persons). Section 71, subs. 4 of this Act, does not apply to requests for enforcement pursuant to Art. 3 of the Additional Protocol (section 2 subs. 2 of the Act to Implement the Convention of 21 March 1983 on the Transfer of Sentenced Persons).

A translation of the Act on International Mutual Assistance in Criminal Matters (IRG) can be found under http://www.gesetze-im-internet.de/Teilliste_translations.html.

A translation of the German Criminal Code (StGB) can be found under http://www.gesetze-im-internet.de/Teilliste_translations.html.

Please provide information on your experience, if any, concerning the transfer of persons who for reasons of their mental condition have been held not criminally responsible for the commission of an offence, for further treatment either

(a) in your State (transferred from another country to yours)

Answer:
In the few cases we have had we have not experienced any difficulties.

(b) in another State (transferred from your country to another country)

Answer:
In a number of Member States the enforcement of accommodation in a psychiatric hospital pursuant to the Convention is not possible because such detention orders are not provided for as penal measures.

As regards mentally disturbed prisoners reference is made to the description of our domestic law on the basis of the questionnaire of July 1, 1998 (cf. Annex).

Please state whether, in practical terms, your main aim when applying the Convention is the social rehabilitation of sentenced persons. or rather deterrence, general prevention or other criminal policy aims?

Answer:
In each individual case, the decision of transfer of sentenced persons is taken on the basis of a weighing up of interests on the basis of all purposes of punishment.

Please describe your State's system of enforcing custodial sentences.

Answer:
The prisoner has the right to suspension of the remainder of a prison sentence pursuant to sections 57 and 57 a of the Criminal Code. In addition, the Federal President or the Premiers of the Länder also have the discretionary option by way of a pardon of suspending sentences on probation or of remitting them.

II. WHEN YOUR COUNTRY IS THE SENTENCING STATE
(request for a person to be transferred from your country)

Please describe in detail the procedure followed. Do not hesitate to use graphs. In describing the procedure, please include i.a. information on:

- whether the procedure changes, or takes longer in practice, depending on whether your State takes the initiative, or it acts upon the request of either the administering State or the sentenced person;

- which authorities take part in the procedure and which authority ultimately takes the final decision;

- typical reasons (or fixed criteria) for refusal, if any;

- what kind of and how much information exactly does your State require in respect of the rules applied in the administering State relating to the early discharge of a prisoner (e.g. remission, conditional release, parole, etc.)?

Answer:

Germany has stated in respect of Article 5 para 3 of the Convention that requests could also be made by, or directed to, the Ministries of Justice of the Federal Länder (the Land justice administrations). It also falls to the governments of the Länder to exercise the power to take decisions on in-coming requests and to make out-going requests for the transfer of sentenced persons if the normal channels to the Land Ministries of Justice are closed as a result of a conflicting declaration by the other member State concerned.

Requests on the part of sentenced persons for transfer to a foreign State are dealt with as follows:

If the request is received by the prison in which the sentenced person is incarcerated, the latter forwards the request with a statement to the enforcing authority.

The statement on the part of the prison should indicate the address of the sentenced person in the administering State, his or her social ties, conduct while incarcerated, and similar specific information; other investigation or criminal proceedings known to the prison should be mentioned in the statement. If such proceedings subsequently become known, the enforcing authority is to be informed without delay. A statement is not required if it is recognisable that the Convention does not apply to the sentenced person.

If the request is received by the enforcing authority, the latter consults the statement of the prison, unless it is recognisable that the Convention does not apply to the sentenced person.

Once the statement of the prison has been received, the enforcing authority submits the file to the Land administration of justice for a decision, whilst at the same time the enforcing authority also makes a statement regarding the request which should contain information on whether transfer of the sentenced person to his or her country of origin appears suitable and whether there are reasons giving rise to an interest of the sentenced person in enforcement in the foreign State, particularly taking into account special and general preventive aspects.

Furthermore, at the time when suspension of the remainder of the sentence on probation could be considered pursuant to section 456 a of the Criminal Code (apart from enforcement in the case of extradition or deportation) a statement should be made.

Whether the initiative comes from the sentencing State or is based on a request by the administering State or the sentenced person does not particularly effect the course or the duration of the proceedings.

Refusals are made primarily on the basis of special and general preventive considerations.

As a sentencing State, Germany requires information on all relaxations under the law on enforcement which could favour the sentenced person, as well as on their application in practice.

On the assumption that the administering State must be in a position of eventually deciding on the early release of the prisoner, do you transmit to that State information on the behaviour of the prisoner while serving his sentence?

Generally yes.

III. WHEN YOUR COUNTRY IS THE ADMINISTERING STATE (request for a person to be transferred to your country)

Please describe in detail the procedure followed. Do not hesitate to use graphs. In describing the procedure, please include i.a. information on:

- whether the procedure changes, or takes longer in practice, depending on whether your State takes the initiative, or it acts upon the request of either the sentencing State or of the sentenced person;

- which authorities take part in the procedure and which authority ultimately takes the final decision;

- typical reasons (or fixed criteria) for refusal, if any;

- what kind of information exactly does your State require in respect of the „penal situation" of the person concerned (how much of the sentence has already been served, pre-trial detention, remission, etc.)?

Answer:

Germany has stated in respect of Article 5 para 3 of the Convention that requests could also be made by, or directed to, the Ministries of Justice of the Federal Länder (the Land justice administrations). It also falls to the governments of the Länder to exercise the power to take decisions on in-coming requests and to make out-going requests for the transfer of sentenced persons, if the normal channels to the Land Ministries of Justice are closed as a result of a conflicting declaration by the other member State concerned.

Under the German declaration on Article 3 para 3 of the Convention the enforcement of sentences can only be taken over if a German court has declared the judgment to be enforceable.

The proceedings are in line with the above mentioned provisions of sections 48 - 58 of the Act on International Mutual Assistance in Criminal Matters, which also list the authorities concerned.

Whether the administering State takes the initiative or acts at the request of the sentencing State or of the sentenced person also does not particularly effect the course or the duration of the proceedings here.

Rejections are made primarily because the sentenced person has insufficient ties with his or her country of origin.

As administering State, Germany requires all information relevant under international law which enable it to subsequently calculate detention time.

Please explain in detail what the effect of the transfer is for your State, under Article 9, i.e.: (a) do you continue the enforcement of the sentence, either immediately or through a court or administrative order, (b) do you adapt the sentence in the sense of Article 10.2, or (c) do you convert the sentence, either through a judicial or an administrative procedure?

Answer:

The sentence to be enforced is converted in court proceedings
(Article 11 in conjunction with Article 9 para 1 (b) of the Convention).

Transfer of mentally disturbed offenders under the 1983 Convention

Question 1a.
Criminal law provision for depriving mentally disturbed offenders of their liberty

before sentencing

When persons who cannot be considered responsible for their acts because they are mentally disturbed commit an offence, temporary placement may be ordered during the preliminary investigation (Ermitlungsverfahren) under Article 126a of the German Code of Criminal Procedure (StPO).

Where there are urgent grounds for believing that a person in a state of criminal irresponsibility has committed an unlawful act and that placement in a psychiatric hospital will be ordered, the court may, where public safety so requires, order their temporary placement in this psychiatric hospital under Article 126a para.1 StPO.

It is also possible to confine the accused person in a public psychiatric hospital for observation under Article 81 para.1 StPO in order to prepare a psychiatric assessment of their mental state. Confinement under Article 81 para.1 StPO may not exceed a total of six weeks.

further to a judgment

When a person in a state of criminal irresponsibility has committed an unlawful act, the court includes in its judgment an order for the person's placement in a psychiatric hospital under Article 63 of the Criminal Code (StGB), where a comprehensive assessment of the offender and the offence indicates that, on account of his or her state, the offender is likely to commit very serious unlawful acts and is consequently a danger to the public.

Question 1b.
Criminal law provision for depriving mentally disturbed offenders of their liberty

Where an offender is permanently incapable of defending his or her interests in court proceedings because of a mental disorder, the court may give a placement order and follow the security procedure provided for by Articles 413 ff. StPO. Under this procedure, which provides for the application of security measures, the court may order placement in a psychiatric hospital under Article 63 StGB where a comprehensive assessment of the offender and the offence indicates that, on account of his or her state, the offender is likely to commit very serious unlawful acts and is consequently a danger to the public.

Questions 1a. and b.
Administrative law provision for depriving mentally disturbed offenders of their liberty

Deprivation of liberty under administrative law is governed by the federal Länder's legislation on placement. Placement is subject to the existence of a mental disorder and of a threat to public safety and public order, which may mean danger to oneself or to others. In such cases compulsory placement in a psychiatric hospital is ordered, but the principle of proportionality must be respected.

Where placement is ordered under the federal Länder's legislation, enforcement is always subsidiary to the enforcement of a security measure under Article 63 StGB or placement under Article 126a StPO. This means that in cases where placement is carried out or ordered because a comprehensive assessment of the offender and the offence indicates that the offender is also likely to commit very serious unlawful acts in future and is consequently a danger to the public, placement under criminal law is considered first. Placement under the relevant federal Land legislation is enforced, if the above conditions are met, only in cases where placement under criminal law is ruled out.

Question 2a.

When a custodial sentence is imposed on a person under criminal law on the grounds that they have committed a criminal offence, but cannot be considered responsible for it on account of a mental disorder, Germany can take delegated responsibility for the enforcement of this penalty under the general conditions set forth by the Convention of 21 March 1983 on the Transfer of Sentenced Persons, if it is likewise possible in this case to impose a custodial sentence under Article 63 of the German Criminal Code.

Question 2c.

Enforcement can also be delegated in these cases if a custodial sentence is still being served. That is also the case if the criminal law basis for the custodial sentence is subsequently modified in the sentencing state as a result of a mental illness suffered by the sentenced person.

Questions 2b. and d.

There are no custodial sentences under administrative law falling within the scope of the Convention of 21 March 1983 on the Transfer of Sentenced Persons. Article 1a of the Convention concerns a punishment or measure involving deprivation of liberty ordered by a court on account of a criminal offence. This does not cover administrative decisions.

Question 3a.

Placement under a placement order pursuant to Article 126a StPO

Placement orders given under Article 126 StPO are enforced by the prosecuting authorities in accordance with a detention order issued by the court. This includes enforcement in a public hospital. However, enforcement in a remand prison is allowed only if the latter is equipped with a neuro-psychiatry department.

Placement in a psychiatric hospital under Article 63 StGB

Mentally disturbed offenders may be placed in a psychiatric hospital under Article 63 StGB subject to the following conditions:

- the offender has committed an unlawful act;
- the offender was in a state of criminal irresponsibility (Article 20 StGB);

- a comprehensive assessment of the offender and the offence indicates that, on account of his or her state, the offender is likely (in future) to commit very serious unlawful acts;

- the offender is consequently a danger to the public.

Placement in a psychiatric hospital is of unlimited duration. The judgment cannot provide for a time-limit. However, under Article 67e StGB, the court may at all times consider whether subsequent enforcement of the placement order should be suspended and coupled with probation. The court must review placement in a psychiatric hospital at yearly intervals.

The court can suspend placement, subject to probation, either at the beginning of the process, ie when the judgment is delivered, or later on. A suspended sentence coupled with probation results in release under supervision in accordance with Article 67b StGB.

Persons placed in a psychiatric hospital under Article 63 StGB receive treatment according to their medical requirements. As far as possible, they must be cured or make such progress as to no longer be dangerous. Persons placed in psychiatric hospitals receive the supervision, assistance and care they need. In addition, section 138 of the German Sentence Enforcement Act (Strafvollzugsgesetz) provides that placement in a psychiatric hospital is governed by the Länder's legislation unless federal legislation includes different provisions. The federal lawmakers deliberately refrained from introducing broader regulations. They provided for persons placed by virtue of Article 63 StGB to be treated in the same hospitals as those placed by virtue of the federal Länder's legislation on placement.

Question 3b.

The procedure to be followed for the transfer of sentenced persons covered by 2a. and 2c. is described below.

The Federal Republic of Germany must first receive a request for delegation of the enforcement of the foreign judgment. This request can be made either by Germany itself, or ex officio by the sentencing state, or on the initiative of the sentenced person or their representative.

A foreign request must be addressed in writing by the foreign Ministry of Justice to the federal Ministry of Justice or the Justice Department of the Land with jurisdiction *ratione loci* for enforcement.

The request must be accompanied by the documents listed under Article 6 paras 1 and 2 of the Convention. It must be written in German or accompanied by translations either into German or into one of the Council of Europe's official languages.

The request and appended documents are then submitted to the regional court with jurisdiction *ratione loci* for a decision on the admissibility of enforcement of the foreign judgment in the Federal Republic of Germany. When considering whether the requirements for delegation of enforcement are met, the court relies on the statement of the facts and the legal findings set out in the foreign judgment. If the court declares enforcement of the foreign judgment admissible, it commutes the decision into the penalty closest to it under German law and indicates the total duration of the sentence remaining to be enforced.

When calculating the period of detention served in the administering state, account must also be taken, under Article 461 of the German Code of Criminal Procedure, of the person's stay in hospital if they were transferred for medical reasons to a hospital outside the prison after starting to serve their sentence, and if they did not provoke their illness with the intention of interrupting the serving of the sentence, which is hard to imagine for mentally disturbed persons.

The Federal Republic of Germany then authorises delegation of the enforcement of the foreign judgment to Germany. The transfer details are directly settled between the German prosecuting authorities with jurisdiction *ratione loci* as administering authorities and the relevant government department in the sentencing state. Once the sentenced person has been transferred, enforcement of the sentence is governed exclusively by German law. The administering authorities may interrupt the enforcement of a custodial sentence if the sentenced person becomes mentally ill or if, because of illness, there are grounds for fearing that enforcement will result in imminent danger to the life of the sentenced person, or if the sentenced person is otherwise suffering from a serious illness which cannot be diagnosed or treated in a prison or prison hospital and there are grounds for believing that the illness will probably last a considerable time. Enforcement may not be suspended if there are major reasons - of public safety in particular - for not doing so (Article 455 of the Code of Criminal Procedure).

Question 3c.

The answer to this question follows on from the answer to question 2a.

Note: This information concerns mentally disturbed offenders who are not responsible for the criminal offence they have committed, ie who are criminally irresponsible, on account of their mental disorder. Account has not been taken of cases in which offenders are not responsible, for example, for an act committed under the influence of drink.

This information refers only to the 1983 Convention on the Transfer of Sentenced Persons.

GREECE

Click here for PDF version

HUNGARY

I. GENERAL INFORMATIONS

With the purpose of regulating cooperation with other States in the field of criminal matters – inter alia in order to implement the Convention of the senteced persons - the Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters (hereinafter called „Act") was adopted by the Hungarian Parliament.

Some relevant general rules of the Act read as follows:

- Application of the Act:

„This Act shall be applied unless otherwise stipulated by an international treaty".

- General objection of the fulfillment of a request:

„*Requests for legal assistance may not be performed nor submitted if they would prejudice the sovereignty, security or public order of the Republic of Hungary*".

- Forms of legal assistance:

„Extradition, surrender or acceptance of criminal proceedings, surrender or acceptance of sentences of imprisonment or enforcement of such measures, procedural assistance and denunciation at the authorities of Foreign States"

- conditions of performance of legal assistance:

„(1) Unless otherwise provided for by this Act, requests for legal assistance may only be performed or submitted, on the condition that

a) the act is punishable according to both Hungarian law and the law of the Foreign State;
b) the legal assistance is not related to political offences or other closely related offences, nor to military offences.

In the application of Subsection (1), an offence shall not be considered a political offence if, taking into account all of the circumstances, hence the goal of the offence, the motive, the mode of commission, the methods used or contemplated, the general criminal law aspects of the offence outweigh the political aspects in the commission of the offence.

(3) The general criminal law aspects of pre-meditated murder or offences comprising the offence of pre-meditated murder shall always outweigh the political aspects".

- special guarantee:

„The Minister of Justice (or the Chief Public Prosecutor) may make the performance of requests for legal assistance subject to conditions; if fulfillment of these conditions is denied, the aforementioned parties may refuse the request, if it can be assumed that the proceedings underway in the Foreign State, the prospective punishment or the enforcement of such is inconsistent with the Constitution and with the provisions and basic principles of international law on human rights".

1. Title 1 of Chatper IV of the Act regulates the acceptance of enforcement of imprisonment sentences imposed by foreign courts. Title 2 of the same Chapter regulates the surrender of sentences of imprisonment imposed by Hungarian courts.

2. Yes, the Minister of Justice may request statements of reciprocity and may make such statements of reciprocity at the request of Foreign States. Even if there is no reciprocity the Minister of Justice shall reach a decision on the performance of requests for legal assistance by Foreign States in agreement with the Minister of Foreign Affairs.

3. Yes, the Convention on the surrender of the sentenced persons with the purpose to serve their sentences in their own country, signed in Berlin on 19 May 1978. This Convention is in force but it shall only be applied with Cuba and Mongolia. Hungary has not any transfer case with these counties, but if this Convention could be applied Hungary would request the consent of the sentenced person - taking into consideration the general rule of our Act on International Criminal Matters concerning the basic principles of international law on human rights.

4. a) *In the case of acceptance of enforcement of imprisonment imposed by foreign courts* the Metropolitan Court examines the foreign judgement and brings decision on the fulfillment of the judicial conditions of the sentence enforcement specified in this Act (e.g.: consent of the person for the transfer, remaining at least one year of the sentence to be served, unlimited sentence, Hungarian citizenship of the person or being an immigrant to Hungary and in addition permanent residence is in Hungary in both

cases), but the Minister shall decide on the acceptance of the enforcement. It means that – except for the lack of fulfillment of the judicial conditions - the Minister of Justice has the right to consider priority between the ends of justice and the social rehabilitation of sentenced persons. As far as the end of the social rehabilitation concerned, according to one of the mentioned judicial conditions, the person has to be either a Hungarian citizen or an immigrant to Hungary, but it is also stressed that his permanent residence has to be in Hungary.

b) *In the case of the surrender of imprisonment imposed by a Hungarian court* one of the judicial conditions of the surrender is that the Foreign State guarantees the enforcement of the remaining portion of the punishment; and in this case the consideration of the ends of justice and the social rehabilitation of sentenced persons falls also whithin the discretion of the Minister of Justice.

5. Hungary signed the Protocol in 1999 but it has not entered into force, so Hungary does not have yet any internal legislation in that field.

6. According to Act IV of 1978 on the Criminal Code of the Hungarian Republic the deprivation of liberty may be life imprisonment or an imprisonment lasting for a definite period of time. The shortest and the longest duration of a sentence shall be two months and fifteen years, respectively; or twenty years in respect of cumulative or consolidated sentences. Life imprisonment may be imposed only on persons over the age of twenty at the time of commission of the criminal act.

The imprisonment shall be executed in a penal institution, in the grades of high security prison, prison or detention centre. High security prison is a stricter mode of execution than the prison, and the prison is stricter than the detention centre.

7. In case of impeccable conduct displayed during the execution of the punishment, the court may order that the remainder of the punishment shall be executed in a degree which is one step more lenient; and if the convict disturbs repeatedly and seriously the order of the execution of punishment, the court may order that the remainder of the punishment shall be executed in a grade by one step stricter. In view of changed conduct of the convict the court may invalidate its decision.

II. HUNGARY AS SENTENCING STATE

Foreign persons sentenced in Hungary – if they are citizen of a Member State to the Convention – are officially informed about the essential content of the Convention, the conditions of the transfer.

The sentenced person may formulate or may have assistance to formulate a request for transfer in all Hungarian penitentiaries. The representative of the sentenced person may also make a request by authority of the sentenced person.

The request is forwarded to the Minister of Justice. The International Law Department of the Ministry of Justice requests the sentencing court to present the file of the criminal procedure to examine whether the conditions of the transfer are fulfilled. On the Hungarian side, the final decision is made by the Miniter of Justice. In the course of the deliberation, the Minister of Justice takes into consideration the priority between the ends of justice andthe social rehabilitation, the arguments and the circumstances of the sentenced person (the difficulties of keeping touch with his or her family, the problems arising out of the lack of knowledge of the Hungarian language, etc.), the date when the sentenced person could be released on parole and the time remaining till then. According to our experiences the whole procedure requires minimum one year, it is not practical to grant a request for the transfer, if there is no considerably more time left until the release of the sentenced person.

- after establishing that the necessary conditions of the transfer are fulfilled the Ministry of Justice requests the sentencing court to send the documents listed in Article 6 par. 3 of the Convention; at the same time it requests the competent penitentiary judge to record the declaration of the sentenced person in which he or she agrees voluntarily to the transfer beeig aware of all legal consequences thereof, and the opinion of the concerned penal authorities about the conduct and relationships of the sentenced person.

After having the necessary documents furnished with authentificated translation the Ministry of Justice informs the competent authorities of the Administering State and the sentenced person on its decision. The Ministry of Justice requests the Administering State to inform it whether the State has the intention to consent with the transfer of the sentenced person and to send the documents listed in Article 6 para. 1 of the above-mentioned Convention. For the information of the Administering State the Ministry encloses the judgements of the sentenced person, his of her declaration, and the relevant Hungarian law furnished with official translation. So the State will be informed - inter alia - on the rules of the parole:

„*The court may place a convict sentenced to imprisonment of a definite period on parole, if it may be reasonably supposed - in view especially of his impeccable conduct displayed during the execution of the punishment and of his readiness to conduct a law-abiding way of life - that the aim of the punishment may also be reached without further incarceration.*

Parole may only take place, if the convict has served
- at least four-fifth of his punishment executable in high security prison,
- at least three-forth of his punishment executable in prison,
- at least two-third of his punishment executable in a detention centre.

If the sentence imposed is for less than three years imprisonment, in cases qualified for special consideration, the court may include a clause of eligibility for parole after one-half the sentence has been served.
Such persons may not be let on parole

a) who have been sentenced to imprisonment for an intentional crime, which they perpetrated after they had been sentenced earlier to executable imprisonment, before the termination of the execution,
b) a prisoner who served less than two months of his term of imprisonment,
c) habitual recidivists,
d) persons who committed a criminal act as part of a criminal organization,
e) persons who committed a criminal act punishable by imprisonment of three years or longer in a business-like manner or as part of a criminal conspiracy."

- after establishing that the necessary conditions of the transfer are not fulfilled, the Departement of the International Law of the Ministry of Justice informs the sentenced person that the Minister of Justice did not agree to the transfer and that his or her decision is definitive.

III. HUNGARY AS ADMINISTERING STATE

The Minister of Justice shall receive the request by a Foreign State for the surrender of enforcement of a sentence and if fulfillment of such request is not contrary to the general conditions of fulfillment she or he shall forward such request to the Metropolitan Court.

According to the referred Act the Metropolitan Court is exclusively competent in the transfer cases when Hungary is the Administering State. This rule would provide the professional competence of the acting judges and the promptness of the procedure. The Metropolitan Court acts as a single judge.

Unless forbidden by this Act appeals against the decisions of the Metropolitan Court may be lodged. Appeals has no delaying effect. The appeals chamber of the Metropolitan Court shall review the appeal in chamber.

In the case of acceptance of enforcement the Metropolitan Court has a double task:

Before the transfer

The Metropolitan Court examines the foreign judgment and takes a decision whether the obligatory conditions specified in this Act for the enforcement of the sentence are fulfilled. Sentences of imprisonment which are imposed by foreign courts and are enforceable may be accepted:

- if the person consents to the transfer of the enforcement, and
- upon receipt of the application for transfer by the Minister of Justice at least one year of the sentence remains to be served or if the person has been sentenced to an unlimited period,

- under the condition that the person is a Hungarian citizen and has his permanent residence in Hungary, or is an immigrant to Hungary who is not a Hungarian citizen.

(So the sentenced person whether she or he is a Hungarian citizen or not, has to have strong enough ties with Hungary.)

The Metropolitan Court forwards its decision, against which there shall be no appeal, together with all the documents to the Minister of Justice.

The Minister of Justice decides on the acceptance of the enforcement of the sentence. If the court finds that the conditions specified in this Act for the acceptance of the enforcement are not fulfilled, the Minister shall refuse the request referring to the court decision.

The Minister of Justice informs the Requesting Foreign State.

If enforcement of the sentence is accepted, Interpol, in cooperation with the police authorities, takes measures for the surrender of the sentenced person.

2. *After the transfer*

Following acceptance of the enforcement of the sentence the Metropolitan Court, on the motion of the prosecutor, determines in hearings the sentence to be enforced in Hungary on the basis of the foreign sentence. Presence of the transfered sentenced person, the prosecutor and the counsel for the defense shall be required at such hearing. The Metropolitan Court shall be bound in its decision by the findings of the foreign court.

Within three months from the acceptance of the sentenced person, the Metropolitan Court shall determine the sentence of imprisonment, in accordance with the type of punishment and the enforcement degree imposed by the foreign court and of the same duration.

If the type, enforcement grade or duration of the imprisonment imposed by the foreign court is inconsistent with Hungarian law, the Metropolitan Court determines the punishment within the limits established under Hungarian law for the same offence which served as the grounds for the original sentence. To the greatest extent possible, this punishment should conform with the sentence imposed by the foreign court in terms of type, enforcement grade and duration.

The duration of the punishment imposed by the Metropolitan Court may not exceed that imposed by the foreign court.

The amount of time spent in custody in a Foreign State in relation to the case, and the amount of time spent in custody shall be taken into account in the punishment imposed by the Metropolitan Court.

The above detailed Hungarian law shall apply to the enforcement of the sentence and parole.

The rules of the acceptance of enforcement of measures for the deprivation of personal liberty ordered by foreign courts and surrender of enforcement of measures for the deprivation of personal liberty ordered by Hungarian courts reads as follows:

If the conditions specified in the Act are fulfilled, the enforcement of measures for the deprivation of personal liberty ordered by foreign courts may be accepted or the enforcement of measures for the deprivation of personal liberty ordered by Hungarian courts may be surrendered.

Measures ordered by foreign courts may be accepted if identical or similar measures or punishment are recognized by Hungarian law.

The mentioned provisions shall be applied *mutatis mutandis* to the acceptance or surrender of such measures.

ICELAND

I. General Information

In order to implement the Convention, a special legislation was adopted by the Althing in the spring of 1993, Act No. 56/1993 on International Co-operation concerning the Enforcement of Sentences. As to the application of this Act, there is at present time no experience or example concerning the transfer of persons who for reasons of their mental condition have been held not criminally responsible for the commission of an offence, for further treatment, neither in our State nor in another State.

General policy statements on the objectives of penal system can not be found in Icelandic law. Thus, it is difficult to state whether it belongs to a certain category or designated to either social rehabilitation of sentenced persons, deterrence or general prevention. It is assumed that the Icelandic penal system aims at a combination of these objectives, and this also applies to the application of the Convention.

It should be pointed out that prisoners serving sentences have in the recent decade received increased social rehabilitation while in prison. Social workers and psychologists employed by the State Prison Administration, inter alia visit and talk with prisoners. Prisoners are also offered treatment for problems involving alcohol, and they can seek the help of a special prison minister. Rules concerning treatment and conditions of prisoners and their rights are set forth in Act No. 48/1988 on Prison and Imprisonment. This Act also addresses matters involving prison administration which is the responsibility of the State Prison Administration. According to the Act, sentenced prisoners have the right to a job, studies, recreational activities, being outdoors, physical activity, health and religious services, visits during hours and telephone conversations, depending on what circumstances allow. Prisoners may be permitted to study and work outside the prison.

As a part of social rehabilitation of sentenced persons, it may be added that the Althing enacted, in the spring of 1994, an Act on Community Services, No. 55/1994, which will come into force on 1 July 1995. The Act makes possible, if a person has been unconditionally sentenced to imprisonment of up to three months and if public interests are deemed not stand in the way, to have him serve the sentence by performing such services without payment, not less than 40 hours and not more than 120 hours. The Act specifies a number of prerequisites for such an arrangement, including that the convicted person require that community services be substituted for the sentence. The Act establishes a Community Services Committee, which among other things is given the task of assessing when the prerequisites for community services have been fulfilled and determine where, how and over what period of time community services shall performed.

As to the Icelandic system of enforcing custodial sentences, prisoners serve their sentences in one of five sentence-serving prisons operating in Iceland with space for approx. 110 prisoners. Women prisoners serve their sentences in a separate prison, but there is no separate prison for juveniles.

Rules concerning conditional release from prison are set forth in Section 40 and 41 of the Penal Act N° 19/1940 and in Regulation on the Enforcement of Sentences N° 29/1993. According to this, conditional release is subject to an application by the prisoner concerned to the State Prison Administration. The State Prison Administration also receives applications concerning pardons which it brings forward to the Ministry of Justice for decision. According to Section 40 of the Penal Law a prisoner can be released conditionally when he has served 2/3 of the sentence. In special circumstances, a conditional release can be granted when the prisoner has served half of his sentence. More detailed rules concerning conditional release can be found in Section 5 of the aforementioned Regulation, where reasons which lead to the denial of conditional release are set forth.

The time for conditional release is up to three years. However, if the sentence which is left to serve is more than three years the time for conditional release can be up to five years. The main condition for conditional release is that a person to whom it is granted, will not be found guilty of a criminal offence during the period. Some others conditions can be stipulated for conditional release by the State Prison Administration. The decisions of the State prison Administration can be appealed to the Ministry of Justice for review.

II. When Our Country is the Sentencing State

As mentioned at the outset there is at present time no experience or practice concerning the application of the Convention in our country. Thus, no request from other country concerning transfer of persons has yet been received by the Icelandic authorities concerning the length of the procedure depending on which party initiates the request, typical reasons for refusal and exactly what kind of information is required. According to the Act on International Co-operation concerning the Enforcement of Sentences the Ministry of Justice takes the final decision concerning transfer or persons for continuing enforcement of their sentences in another State.

III. When Our Country is the Administering State

There is still very little practice on the subject, and therefore it is not possible to describe in details the procedure which have developed in the application of the Convention. Icelandic authorities have twice requested a transfer of persons from another country on the basis of Article 5 of the Convention. In 1994 two requests were addressed for that purpose to the Ministry of Justice in the Netherlands. However, the requests were revoked before they were executed by the authorities of the Netherlands, for reasons which are not relevant to procedural aspects related to the application of the Convention.

The Ministry of Justice decides whether a transfer of a sentenced person from another country is requested such a request will be accepted from another State or the sentences person.

As to the effect of the transfer for our State under Article 9 of the Convention, rules concerning the matter are set forth in Section 24 and 25 of the Act on International Co-operation concerning the Enforcement of Sentences. Section 24 stipulates that when the enforcement of sentence continues in our State, it is subject to an administrative decision. Thus, the Ministry of Justice will adapt the sentence to the most comparable sentence under Icelandic Law.

When a person is transferred to the country, his sentence, according to Section 25 of the Act, can be converted through a judicial procedure, i.e by the courts. The person will as a general rule be in detention on remand until a judgment is reached in his case.

When persons are transferred to the country the Ministry of Justice decides in each case whether the enforcement of sentence will be continued or the sentence will be converted through a judicial procedure. However, Icelandic authorities will general adhere to the policy to apply the converting principle set forth in Article 11 of the Convention.

IRELAND

Click here for PDF version

ISRAEL

Israel ratified the multilateral Convention on the Transfer of Sentenced persons on 24th September 1997. The convention came into force for Israel on 1st January 1998. Prior to this date Israel passed internal enabling legislation in order to give legal effect to the terms of the Convention. "The Serving of a Prison Sentence in the Prisoner's Country of Nationality Law", 1996 sets out the conditions and procedures for the transfer of sentenced persons. A translated copy of this law is attached hereto.

According to Section 3 of this Law, the transfer of a sentenced person, whether to or from Israel, can only be effected, if both Israel and the foreign country involved are parties to either a multilateral or bilateral Convention prescribing the transfer of sentenced persons.. In cases where no such Convention or treaty exists, then provided both Israel and the other country involved agree, a specific prisoner transfer may be effected pursuant to an ad-hoc agreement between the two states relating to that specific prisoner only.

Israel is not a party to any bilateral treaty on the Transfer of Sentenced Persons that does not require the prior consent of the person concerned. In fact Section 4 of the above mentioned law states categorically that the transfer of a sentenced person can only be effected with the consent of the prisoner concerned.

For Israel, the primary purpose of prisoner transfers is humanitarian in view of the undue hardships of incarceration abroad. Proximity to family as well as the removal of difficulties in cultural orientation and communication serves to enhance the social rehabilitation and reintegration of the prisoner into the community. For Israel an important consideration is also the fact that the transfer of the prisoner to his home environment mitigates the hardship of his incarceration on his immediate and extended family.

Israel has not ratified the Protocol to the Convention on the Transfer of Sentenced Persons.

Israel will only agree to the transfer of persons sentenced to a term of imprisonment. Imprisonment is defined in the " Serving of a Prison Sentence in the Prisoner's Country of Nationality Law", 1996 as " actual incarceration, including the keeping of a person in a closed institution , juvenile delinquents institution, medical or psychiatric care institution, whether by order of the court at the completion of a criminal

procedure or pursuant to an order issued by a foreign state's authority having the authority to decide criminal matters."

Israel has adopted the continuing enforcement procedure when enforcing a custodial sentence from a foreign State. Generally speaking, a prisoner serving his sentence in an Israeli prison can have up to 1/3rd of his sentence rescinded for good behaviour, as well as an additional 15 days per year administrative release. In addition after serving 1/3 of his sentence the prisoner, depending on his behavourial record, his degree of dangerousness to the community, and other factors may be awarded "vacation" time outside the prison. This is at the discretion of the Director of the prison.. Such vacation time can vary from a minimum of 24 hours to a maximum of 96 hours. The purpose of these "vacations" are to enable the prisoner to remain in close contact with his family and his community, and to ease his rehabilitation back into society.

Considering that the Convention only came into force in Israel as of January 1998, no significant case law has been established. In this period Israel has transferred three persons to their country of nationality, one of whom was a Swiss national indicted for murder. He was deemed to be criminally not responsible because of a severe mental disturbance. The court ordered that he be committed to psychiatric care. In view of difficulties in communication, cultural differences, and the fact that the prisoner's family were all in Switzerland, it was believed that transferring the prisoner back to the environment he was familiar with would aid in his rehabilitation. The prisoner's father was awarded guardianship and with the utmost cooperation of the Swiss authorities the prisoner was transferred, accompanied by his Israeli psychiatrist, back to Switzerland.

Israel has also accepted the return of seven Israeli nationals, the majority of whom were transferred from the United States. As a result of the change in Israel's internal law, enabling it to transfer Israeli nationals back to Israel in order for them to serve their prison sentences in their country of nationality, Israel was also able to amend her extradition law, making it now possible to extradite Israeli nationals on the condition that, if convicted and given custodial sentences, they be returned to Israel in order for them to serve their prison sentences in Israel. In fact two Israeli nationals, whose extradition had been sought by the United States, were extradited on the condition that they would be returned to Israel in order to serve their prison sentences if convicted and sentenced.

As stated above, Israel's internal law specifies that no prisoner may be transferred to his country of nationality without the consent of the prisoner, the State of Israel and the foreign State. When effecting a transfer, the Minister of Justice and the Minister of Internal Security are both required to sign on behalf of the State of Israel. In the case of a foreign national serving a sentence in Israel as a result of committing a security offence, the consent of the Minister of Defence is also required.

In the two years that the Convention has been in force in Israel, Israel has transferred three persons back to their country of nationality and is currently processing another two requests. All the requests were initiated by the prisoners themselves, though in accordance with Israel's internal law, it is incumbent upon it to inform foreign nationals, serving sentences in Israeli prisons, that if they wish, they have the possibility

of transferring to their country of nationality in order to serve their Israeli imposed sentences. Once the requests are received by the Central Authority in the Ministry of Justice, they are passed on to the Ministry for Internal Security, which is the Ministry responsible for both the police and the prisons facilities.

To date no prisoner requesting to be transferred from Israel back to his country of nationality has been refused. In agreeing to the transfers, Israel looks primarily to the fact that the prisoner requesting to be transferred is in fact a citizen and a resident of the country to which he wishes to be transferred. If his life is centered in that country, and provided there is no specific reason justifying his remaining in Israel, Israel will not object to his transfer.

One of the considerations in determining whether or not the State of Israel can justify refusing a foreign national's request to transfer concerns the length of time the sentenced person will need to serve in the administrating state. Israel therefore requires particulars as to the administrating State's regulations concerning remission for good behaviour, pardon and parole regulations.

In the case of the three prisoners transferred to date, we did not supply information as to the prisoner's conduct in prison , though we would have been happy to do so if requested. A prisoner's behaviour while in prison in Israel is only an ancillary factor in considering whether or not to approve the transfer. As stated in the proceeding paragraphs, humanitarian issues relating to the prisoner's family, and center of life are more important when considering whether or not to approve a request to transfer.

In theory it is irrelevant whether the procedure to transfer is initiated by either the sentenced person or the sentencing State. However the procedure can be shortened if at the same time that the sentenced person informs the sentencing State of his requests to transfer, Israel as the administrating State is also informed of the request. This enables us to make the relevant inquires and reach a tentative decision as to whether or not to agree to the request. That way in the event of the sentencing State agreeing to the transfer, Israel's response will be extremely prompt. The decision on whether or not to agree to an Israeli citizen's request to transfer to Israel is taken by both the Minister for Internal Security and the Minister of Justice. The approval of both is required before a transfer can be approved. The criteria that are considered when making a decision as to whether or not to approve a transfer to Israel, are stated in Section 7 of the law (a copy of which is attached herewith.), and include questions of citizenship and more importantly, residency, as well as considerations relating to either public order or public safety. In instances where the criteria specified in Section 7 of the law are not met, particularly in regard to residency, the Ministers involved may exempt the prisoner requesting the transfer, from any of the criteria specified.

When transferring a sentenced person back to Israel, we require the following information concerning the "penal situation" of the prisoner:

- the sentence handed down by the court, with a clear distinction between the period of incarceration and the period of conditional release.

- the amount of time the prisoner has already served of his sentence including any pre-conviction time spent in prison discounted against the time to be served.
- the period of time the prisoner is still required to serve, NOT including any rescission of the sentence for good behaviour or any other reason.

The transfer of a prisoner to Israel, in order for him to serve the remainder of his sentence, is effected on the basis of an order of the Minister of Justice . This order is valid for a period of 60 days. Within this period of time, the prisoner must be brought before the Jerusalem District Court, and at the request of the Attorney General, the court will issue an "order of imprisonment". This order is an administrative order that continues the enforcement of the sentence as determined by the foreign court.(State)

The State of Israel in answering Questionnaire JC35 on the Transfer of Mentally Disturbed Offenders under the 1983 Convention on the Transfer of Sentenced Persons, would like to inform the Committee of Experts on the Operation of European Conventions in the Penal Field of the following:

Israel would like to draw the attention of the Committee to Israel's Declarations contained in the instrument of accession deposited on 24 September 1997. The fourth paragraph states that :

"In conformity with Article 9, paragraph 4, of the Convention, Israel declares that it may apply the Convention to persons who, for reasons of their mental condition, have been held not criminally responsible for the commission of the offence, and it will be prepared to receive such persons and keep them in a place where they will receive further medical treatment."

Section 1 of Israel's internal "Transfer of Prisoners to Their State of Nationally Law, 5757-1966 defines a

- ***"prisoner"*** as a person undergoing imprisonment except for a detainee, and further defines,

- ***"imprisonment"*** as actual incarceration, including the keeping of a person in a closed institute, juvenile delinquents institution, medical or psychiatric care institution, whether by an order issued by a court at the completion of criminal procedure or pursuant to an order issued by a foreign state's authority having the jurisdiction to decide criminal matters.

Therefore, according to Israel's declarations and to its internal enabling legislation, Israel has no legal difficulty in transferring mentally disturbed offenders who have been deemed not liable and therefore not convicted of a criminal offence back to their country of nationality, or vice versa accepting mentally disturbed Israeli nationals who have similarly been deemed not liable and therefore not convicted of a criminal offence, provided that the order depriving such persons of their liberty was issued by a court at the completion of a criminal procedure or by a state authority having jurisdiction to decide criminal matters.

Obviously Israel has no problem transferring mentally disturbed offenders who have been held to be criminally responsible and convicted of a criminal offence.

Israeli criminal law examines the fitness of an offender to be held criminally responsible for his actions at two separate points in time,

- at the time the offence was committed, and
- at the time of his being brought to trial.

at the time the offence was committed.

1. The question asked by an Israeli court in determining whether or not a person is fit to be held criminally responsible for his actions at the time of committing an offence, is whether or not he was capable of understanding the nature of his actions at the time he committed the offence, as well as being able to distinguish between right and wrong. If he was incapable of understanding what he did, that is understanding the nature of his actions rather than its consequences or its results, and was incapable of realizing that his behaviour was morally prohibited according to the standards of a reasonable man, and that his inability to understand stems from a mental defect or illness, then the court will hold that he cannot be held criminally responsible for his actions.

2. In the case of such an offender the court will, in accordance with Section 15 of the Treatment of Mentally Ill Persons Law-1991, order him to be committed to a psychiatric hospital or undergo medical treatment. This court order is for an indefinite period. The court issues an order of committal on the basis of a medical report, though the actual decision to commit is a judicial one. Once the court issues an order committing an offender to a hospital or to medical treatment he is then required to be brought before the District Psychiatric Committee, which consists of two psychiatrists under the chairmanship of a jurist, every six months or whenever he so requests. It is the committee's function to assess the offender's progress and determine whether or not he still needs treatment. The termination of the committal order is then a decision of this committee, not of the court.

at the time of his being brought to trial

1. In determining whether or not a mentally disturbed offender is fit to stand trial, provided that it has already been determined that he was fit to be held criminally liable at the time he committed the offence, the court looks to see whether he is capable of understanding the whole criminal process, understands the charges against him, is able to co-operate fully with his solicitor in preparing his defence and so forth. If the court determines that the offender is not capable of the above then he is not fit to stand trial and the court can order his committal to a psychiatric hospital or order him to undergo medical treatment. In deciding whether or not to commit the offender, the court will also weigh how dangerous the offender is to society or himself. If the court does order the offender to be committed to a hospital or undergo medical treatment then he will be

required to appear before the District Psychiatric Committee every six months or at his request. If in the future, the offender is released from hospital and is deemed fit to stand trial the State Attorney can, after weighing all the circumstances, instruct that he do so.

2. Under Section 10 of the Treatment of Mentally Ill Persons Law-1991, the Chief District Psychiatrist has the authority to order the committal of a mentally disturbed person, irrespective of whether or not he is suspected of committing an offence, to a psychiatric hospital for a period of up to 7 days. This can be extended for an additional 7 days by the Chief District Psychiatrist on the basis of a detailed request by the Medical Director of the hospital to which the person has been committed. After this time the committal order can only be extended by a decision of the District Psychiatric Committee at the request of the Medical Director of the hospital where the person is committed, initially for three months, then for up to six months at a time. The number of times that the committal order can be so extended is indefinite. The authority of the Chief District Psychiatrist is parallel to that of the court, though he will only exercise this authority in those cases where the mental illness of the suspect is such that his ability to rationally judge reality is impaired and as a result of this he presents a real and immediate physical danger either to himself or society. The criteria the Chief District Psychiatrist uses in reaching his decision are different to those employed by the court in a criminal procedure. In a criminal procedure the court looks not only at the offender's medical and psychiatric reports when deciding whether or not to commit the offender to either a hospital or medical treatment against his will, but also considers whether or not the offender is a danger to himself or society. On the other hand in an administrative procedure the criteria employed by the Chief District Psychiatrist are broader and not only concerned with whether or not the person presents a danger to himself or society. He also must consider whether as a result of his mental illness the person is no longer capable of looking after his basic needs; whether his actions cause severe mental suffering to the people around him so that their ability to lead a normal life is impaired; and whether he presents a severe danger to property. On the basis of all of the above he may issue a committal order.

3. In respect of the specific cases listed in question 2 of the Questionnaire, the Israeli response would be:

where, because of his mental incapacity, the person could not be held responsible for his actions, but nevertheless a measure was imposed on him under criminal law that deprives him of his liberty, the person could be transferred back to Israel

where, because of his mental incapacity, the person could not be held responsible for his actions, but nevertheless a measure was imposed on him under administrative law that deprives him of his liberty, according to Israeli domestic law, (see Section 1 above) Israel would not be able to transfer such a person back to Israel, because the measure depriving the person of his liberty would not be an order issued by a court at the completion of a criminal procedure or pursuant to an order issued by a foreign state's authority having the jurisdiction to decide criminal matters.

where the person became mentally ill after having committed the crime and a measure was imposed on him under criminal law that deprives him of his liberty, in such a case, according to our domestic law , the person could be transferred back to Israel. However because Israeli criminal law treats such offenders as possibly being able to stand trial once they are released from hospital or medical treatment, Israel will decide each case on a case by case basis.

where the person became mentally ill after having committed the crime and a measure was imposed on him under administrative law that deprives him of his liberty. Israel would not be able to transfer such a person back to Israel for the same reasons as outlined in 3b above.

4. There is no difference in the procedure to be followed when transferring a mentally disturbed offender back to Israel, from the procedure to be followed when transferring a sentenced person under the Convention. In these transfers as in all transfers, Israel will follow the "continued enforcement procedure" as stipulated in Article 9 (a) of the Convention. However in the case of mentally disturbed offenders transferred back to Israel, once an Israeli court rules on the enforcement of an order issued in foreign state then the treatment that the mentally disturbed offender will receive, the duration of his treatment and the termination of said treatment will be according to Israel's internal regulations governing such orders. In such cases, in order to assist Israel in deciding whether or not to accept such a transfer, and to avoid any misunderstandings with the transferring state, Israel will require detailed reports as to the offender's medical and psychiatric condition , as well as the treatment he is receiving and the progress that has been made.

The only additional condition that Israel will require from the requesting country when transferring a mentally disturbed offender, is that the measure depriving the person of his liberty be an order issued by a court at the completion of a criminal procedure or pursuant to an order issued by a foreign state's authority having the jurisdiction to decide criminal matters.

The Serving of a Sentence in the Prisoner's State of Nationality Law, 5757-1996*

Chapter A - General Provisions

1. In this law the following terms shall mean -

"prisoner" - a person undergoing imprisonment except for a detainee;

"imprisonment" - actual incarceration, including the keeping of a person in a closed institute, juvenile delinquents institution, medical or psychiatric care institution, whether by an order issued by a court at the completion of criminal procedure or pursuant to an order issued by a foreign state's authority having the jurisdiction to decide criminal matters;

"a foreign state" - a state which transfers a prisoner to serve his imprisonment term in Israel or which receives a prisoner from Israel in order that he shall serve his imprisonment term there;

"the ministers" - the Minister of Justice and the Minister of Public Security.

2. (a) An Israeli national imprisoned in a foreign state may be transferred to Israel in order to serve his imprisonment term in Israel in accordance with the provisions of this law.

(b) A national of a foreign state imprisoned in Israel may be transferred to a state of his nationality, in order to serve his imprisonment term there, in accordance with the provisions of this law.

(c) The provisions of this law shall not apply to a person convicted of an offense pursuant to the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950[1] or pursuant to the Crime of Genocide (Prevention and Punishment) Law, 5710-1950[2].

3. The transfer of a prisoner from a foreign state to Israel or from Israel to a foreign state, shall be carried out according to a bilateral or multilateral convention to which Israel and the foreign state are parties, and which contains provisions on this matter; or it may be carried out pursuant to an ad-hoc agreement between the two states which provides for the transfer of a specific prisoner.

- Passed by the Knesset on the 22nd Kheshvan, 5757 (November 4th, 1996) and published in Sefer Ha-Chukkim no. 1603 (5757), p. 6; the Bill and an Explanatory Note were published in Hatzaot Chok 2543, of 3rd Iyar, 5756 (22nd April, 1996), p.794.
- Amended by the Knesset in December, 1999 was published in the Sefer Ha-Chukkim no. 1720 (5760), p. 36.

1 Sefer Ha-Chukkim, 5710, p.281.

2 Sefer Ha-Chukkim, 5710, p.137.

4. (a) A transfer of a prisoner according to this law shall be carried out only with the consent of the prisoner, the State of Israel and the foreign state.

(b) The prisoner shall give his consent in writing in a language he understands.

(c) In case the prisoner is a minor or legally incompetent, or is mentally deficient, his transfer shall require the consent of his legal guardian.

(d) If the prisoner is hospitalized in a psychiatric care institution, and he has not been declared legally incompetent, his transfer shall require his consent and the knowledge of the person responsible for his care.

(e) The ministers are authorized to consent, on behalf of the State of Israel, to such aforesaid transfer of a prisoner as stated in sub-section (a).

(f) Where a prisoner serves a sentence in Israel as a result of an offense involving a violation of national security, or the conspiracy to commit such an offense, or where a prisoner is charged and convicted under the Military Justice Law, 5715-1955[3], his transfer shall also require the consent of the Minister of Defense.

5. (a) A prisoner who was transferred to Israel shall bear the costs of his transfer including the costs of his escort.

(b) The ministers may exempt a prisoner from the aforementioned costs in subsection (a), in full or in part, and order the Treasury to pay them. The ministers may do so upon a decision that the prisoner's economic need justifies it or if they determine that the matter is justified for other reasons.

(c) The State of Israel shall not bear the costs of the transfer of any prisoner to a foreign state, including the costs of the prisoner's escort.

(d) If the ministers determine that the state has a special interest in transferring the prisoner to a foreign state, they may exempt him from part or all the expenditures, and order the Treasury to pay them.

6. Transferring a prisoner from Israel to a foreign state and receiving a prisoner from a foreign state and transferring him to Israel, shall be carried out by the Prison Service in coordination with the foreign state. In order to perform this duty, the Service shall have all the powers and authorities granted in the Prisons (New Version) Ordinance, 5732-1971[4] (hereinafter "the Prisons Ordinance"); for this purpose, there shall apply to a prisoner who is being transferred the provisions which apply to a prisoner under the Prisons Ordinance.

---

3 Sefer Ha-Chukkim, 5715, p.171.

4 Dinei Medinat Israel, New Version 21, p.459.

6(a) The court which is authorized to hear requests according to this law is the District Court of Jerusalem.

Chapter B - The Transfer of a Prisoner to Israel

Conditions for the transfer of a prisoner to Israel

7. (a) A prisoner may be transferred in order to serve his imprisonment term in Israel upon a finding by the ministers as to the following :

(l) At the time the offense was committed the prisoner was a national of the State of Israel.
(2) The prisoner's permanent residence is in Israel.
(3) The circumstances of the case justify incarceration in Israel.
(4) The act for which the prisoner was convicted would be considered a criminal offense, if committed in Israel.
(5) There is no reason, relating either to public order or to public safety, to prevent the transfer of the prisoner to Israel.

(b) The ministers may exempt a prisoner from any of the terms specified in sub-section (a) clauses (l), (2) and (4), if they see fit.

8. The transfer of a prisoner to Israel, in order to serve his imprisonment term, shall be made according to an order issued by the Minister of Justice; the order shall specify the nature of the offenses for which the prisoner was convicted, the term of imprisonment to which he was sentenced, and the remaining imprisonment term that the prisoner must undergo in Israel.

9. An order issued according to section 8 above, shall have the effect of an authorization document for the purpose of keeping the prisoner in lawful custody until such time as he starts to serve his imprisonment in Israel; and the aforesaid custody shall be deducted from his imprisonment term, provided that such custody term shall not exceed 60 days or the remaining imprisonment term that the prisoner must undergo, whichever shall be the first to occur.

10. (a) Where a prisoner is transferred to Israel according to this law, the District Court shall order, on request by the Attorney General, that the term of imprisonment, or the remaining period of imprisonment, shall be served in Israel in such manner and conditions as set out in the Order.

(a.1) In its order according to sub-paragraph (a), the Court may shorten the term of imprisonment to be served in Israel, and set the term according to the maximum term of imprisonment that is provided in Israel’s Penal Law for the offense for which the penalty was imposed, provided that the Court may do so in accordance with an agreement between Israel and the state in which the penalty was imposed.

(b) In the event that the prisoner's sentence has been repealed, or that the prisoner was pardoned by virtue of an individual or general pardon, or his imprisonment term was reduced in the foreign state, of which a notice was given to the Minister of Justice, the Minister of Justice shall so inform the District Court, and the Court shall order the release of the prisoner or the reduction of his imprisonment term, accordingly.

(c) The Court may decide that the imprisonment sentence which the prisoner must serve according to this section, shall run concurrently, partly or fully, with another term of imprisonment to which he was sentenced in Israel.

11. (a) An order issued by a Court pursuant to section 10 above, shall be considered as a sentence of an Israeli Court which cannot be appealed; any provision pertaining to imprisonment or release therefrom, shall apply to an imprisonment according to this law.

(b) For the purpose of the provisions of section 49 of the Penal Law, 5737-1977[5] (hereinafter "the Penal Law"), and of section 28 and Article Nine 1 of chapter B of the Prisons Ordinance, the term of imprisonment shall include the imprisonment term which the prisoner served abroad.

12. In no case in which a prisoner was transferred to Israel according to this law, for the purpose of serving a sentence of a foreign state, will a claim be permitted against the validity of the court decision by which the sentence was given, nor a claim that the prisoner retracts his consent to be transferred, as given according to section 4.

Chapter C - Transfer of a Prisoner to a Foreign State

13. (a) The conditions set out in section 7 above, shall apply, mutatis mutandis, to the transfer of a prisoner convicted in Israel who is being transferred to a foreign state, according to this law.

(b) The aforesaid transfer shall be carried out according to an order issued by the Minister of Justice, which shall specify the nature of the offenses for which the prisoner was convicted, the term of imprisonment to which he was sentenced and the remaining term of imprisonment which he must undergo in the foreign state.

(c) An order issued according to sub-section (a) above, shall not invalidate any other lawful order ordering that the prisoner shall be kept in custody or prohibiting him from leaving the state.

(d) The transfer of a prisoner pursuant to an order issued according to sub-section (a) above, shall be carried out while the prisoner is kept in lawful custody.

---

[5] Sefer Ha-Chukkim, 5737, p.226.

14. In the event that a prisoner's sentence has been repealed or his imprisonment term was reduced, the Minister of Justice shall so notify the foreign state.

Chapter C1 - Serving a Sentence in Israel imposed by a Foreign Judgment

14.A For purposes of this Chapter -

"the sentenced person" - a person who has been sentenced by a foreign judgment.

"foreign judgment" - a final judgment which has been given in a criminal proceeding outside of Israel as set out in Section 10 of the Penal Law, and it is immaterial if it is possible to appeal the judgment or otherwise change it.

14B.(a) The request of the Attorney General to the Court in accordance with Section 10 of the Penal Law, for the carrying out in Israel of the penalty imposed by a foreign judgment, shall include the following:

- A certified copy of the foreign judgment;
- A written certification from the Competent Authority of the State in which the foreign judgment was given specifying that the punishment is immediately enforceable and specifying the amount of punishment to be enforced in Israel.

(b) For this purpose the "Competent Authority" shall mean the authority which is determined by that State as an authority competent for submitting requests in connection with the enforcement of judgments in a foreign state and for which a notification concerning this has been submitted to the Minister of Justice.

Chapter D - Prisoners in Transit

15.(a) If a foreign state requests from the State of Israel - in reliance on a convention or a special agreement according to section 3 - to allow a prisoner who is being transferred for the purpose of serving his sentence in said state or in another state, to pass through Israel, the Minister of the Interior may agree, on behalf of the State of Israel, that the prisoner or his escort shall pass through Israel.

(b) The Minister of the Interior may refuse such request as stated above in sub-section (a), if it may prejudice the State of Israel's sovereignty, its national security, public interest or any other vital interest of the state.

16. (a) The transit of a prisoner through Israel according to sub-section 15(a) shall be according to a transit visa issued by the Minister of the Interior.

(b) During his transit the prisoner shall be kept in custody at such location as the Commissioner of Prison Service shall instruct; a transit visa as stated in sub-section (a) above, shall have the effect of a lawful authorization document in order to keep the prisoner in said custody.

(c) The provisions of the Extradition Law, 5714-1954[6] shall not apply to a prisoner in transit.

Chapter E - Implementation and Regulations

17. The ministers are responsible for the implementation of this law and they are authorized with the approval of the Constitution, Law and Justice Committee of the Knesset, to promulgate regulations with respect to the implementation of this law.

Dan TICHON	Binyamin NETANYAHU	Ezer WEITZMAN
Chairman of the Knesset	Prime Minister	The President of State

Tzakhi Hanegbi	Avigdor Kahalani
Minister of Justice	Minister of Interior Security

[6] Sefer Ha-Chukkim, 5714, p. 174.

ITALY

SECTION I - GENERAL INFORMATION

1. Italy has enacted a specific law to implement the Convention, which is Law n. 334 of July 25th, 1988. Italy also enacted law n. 565 of December 27th, 1988 to implement teh Convention of the European Comminities on transfer of sentenced persons, Bruxelles, 25 th May 1987). Italy also has general provisions in the code of criminal procedure (Article 731 and following articles) but these provisions would apply only where international treaties and agreements (that, for instance, is the case of the agreement we have with Thailand, dated 1989) are in force.

We have realized though that in certain cases where we would be willing to make the transfer to Italy such a transfer is not possible because the relevant provision (Article 731 c.p.p.) refers to treaties and international agreements even where according to the domestic law of the sentencing State such a transfer would be possible also in the absence of a treaty (that is the case, for instance, of Argentina, where many Italians live or have a double nationality). Because we want to solve such a problem, we are now going to modify our domestic legislation (code of criminal procedure) allowing for the transfer also in the absence of a treaty; a draft has been prepared and after the approval of the Gabinet it will be presented to the Parliament.

I would like to stress the importance of having the legal possibility to transfer in the absence of an international instrument. Because the people move now across the borders much more frequently than twenty years ago, States should have the possibility to allow their citizens to serve in their own country the sentence imposed abroad. And that becomes of an utmost importance when we look at the great differences among legal systems (criminal substantive law) around the world. We had some problems when two Italian citizens have been sentenced to very heavy punishments in islamic countries.

2. See point 1 above.

3. No.

4. Italy does not have fixed criteria –not even in practical terms- to measure the purpose of contributing to the social rehabilitation of the sentenced person against the purpose of ensuring the ends of justice, which are both to be considered the goals of the ETS Convention. In general our attitude would be to give great importance to the humanitarian reasons.

A problem might arise when is there a very big discrepancy between the length of sentences in the two systems. To that extent we had a case-law which migth be interesting to describe.

When deciding on a transfer to Hungary the Court of Appeal of Rome, which was competent on wether to give a favourable opinion on the transfer (the ultimate decision being on the Ministry of Justice), stated that it was not opportune to make such a transfer taking into account that the person concerned was sentenced to a thirteen years and six months of imprisonment punishment while the maximum penalty according to Hungarian law would have been eight years. As the Head of the competent ministerial office I then asked the Prosecutor general to ask the Court of Cassation to vacate such judgment. With a decision rendered on 22d December, 1995 the Court decided that the previous judgment should be vacated and the case re-heard. As far as the point of law was concerned, the Court said that it is in the system of the Convention that the sentence imposed in the sentencing State be adapted according to the law of the receiving State, under the condition that it cannot exceed the maximum provided for by the law of the latter State; it also stated that it falls under the competence of the Ministry of Justice to evaluate wether a transfer is opportune or not.

A problem might arise also when according to the law of the receiving State the person concerned is to be released.

Italy had that problem with a State of the Council of Europe where a law was introduced stating that for offences committed prior to a certain date the sentenced person would be released after having served 1/5 of the sentence. In practise we had some people sentenced for drug trafficking who were sentenced to twenty years; after having served 1/5 of the sentence (four years) they made an application for transfer. The position of the Italian Government was the following. If the person concerned is to be immediately and authomatically released once arrived to his country (the administering State) doubts arise on wether the Convention would be correctly applied should the tranfer be decided. In fact the aim of the Convention is to allow the sentenced person to continue serving the sentence in his own country; if no sentence is to be served in the receiving State there is no ground for the Convention to be applied.

5. In making the Draft of the Law which will implement the Protocol to the Convention we deemed that it would have been wise to fix the period of 40 days as a maximum duration of provisional arrest pending the arrival of documents supporting the request. We thought wise to apply the same term which is provided for by our domestic law in the extradition cases.

6. Enforcement of sentences is basically regulated by Law no. 354 of 26th of July, 1974 (Ordinamento Penitenziario) which has been amended during the recent years. A very important role in the enforcement of sentences (which is the primary task of the Prison Department-DAP, under the direction of the Ministry of Justice) is played by the Magistratura di Sorveglianza (Court supervising over the execution of sentences; either mono-judge, i.e. Magistrato di Sorveglianza or a panel-judge, i.e. Tribunale di Sorveglianza). This body has the task of controlling and supervising the execution of a sentence (as far as rights of detainees are concerned) and has the important task to decide on the possible application of alternative measures to imprisonment as well as on all general benefits which are both granted by the Ordinamento Penitenziario Act. The Surveillance Magistrates are independent and the hearings before the Tribunale di Sorveglianza are public and a representative of the District Attorney General's Office (Procura Generale) is present. Against the decisions of such a Court an appeal can be lodged with the Court of Cassation (points of law).

Having said that, it is perhaps interesting to have an overview on the alternative measures to prison detention that can be applied under the Ordinamento Penitenziario Act. No reference will be made to benefits (like leave permits for urgent family reasons, leave permits for good conduct) as that seems not to have a strong impact on the execution of a sentence. In general the Ordinamento Penitenziario Act aims to ensure not only retribution (because you committed a crime therefore you have to pay for it) but also to rehabilitation and rehinsertion in the society.

LIBERAZIONE CONDIZIONALE (Conditional Release): Accoding to Article 176 of the penal code, conditional release can be granted to convicts who have behaved in such a way as to ensure the succesful outcome of the said provision; cosnditional release can only be granted to those detainees who have served thirty months in prison and at least half of the imposed sentence, if the remainder of the sentence does not exceed five years (these terms increase in case of a recidivist). Also prisoners serving life sentences can be granted this benefit, but they ought to have served at least 26 years of the sentence. Conditional release can be revoked.

LIBERAZIONE ANTICIPATA (Early Release): If the detainee had good conduct the overall penelty will be reduced of 45 days for each semester. The good conduct abroad would be taken into consideration.

AFFIDAMENTO IN PROVA AL SERVIZIO SOCIALE (Probation): if the rest of the sentence does not exceed three years a detainee can be released on probation under certain condition (good conduct, possibility to work outside, availability of a house etc.); if he/she is drug addict that is also possible (rest of sentence not exceding four years) provided that a therapeutic treatment is forseen.

SEMILIBERTA' (Semiliberty): After having served at least half of the sentence (2/3 in case of serious offences) a detainee can be granted semiliberty in order to work outside, provided that he/she had good conduct and his/her rehinsertion in the society can be foreseen. After the work teh detainee must return immediately to jail.

DETENZIONE DOMICILIARE (House Arrest). In case of a pregnant woman or serious illness. But also when the rest of the punishment to be served does not exceed two years, should be proved that there is no danger for society.

SOSPENSIONE DELLA PENA PER INFERMITA' (suspension of the penalty for reasons of health): this benefit will be granted when, on the base of an official medical report, serving the sentence in jail is absolutely incompatible with the condition of the detainee.

INFERMITA' PSICHICA: Sould a detainee be considered as mentally ill (i.e. he is not in the position to be anyhow conscious of his situation) he will be recovered into a judicial psychiatric institution.

AIDS AFFECTED: special provision are provided for detainees affected by AIDS (SIDA).

7. See point no. 3 above. The decision has been made available in Italian. Also the decision on the Baraldini case was distributed (in English) in one of the previous meetings..

SECTION II - WHEN YOUR COUNTRY IS THE SENTENCING STATE

8. The description of the Italian system is the one which appears in the GUIDE TO PROCEDURES (proposals for amendments have been described in point 1 above).

9(a). The procedure will not change.

10(b). See Guide to Procedures.

11 ©. See point. 3 above.

12(d). Italy, as a general rule, would not ask for preventive information on conditional or early release, except the case where is there a doubt that the sentenced person, if transferred, would be immediately released. According to my experience I must say that administering States usually give any rlevant information on their own initiative.

13. Only after a request of the receiving State. Should that State ask for the relevant information together with the transfer, we would do that (such information are to be asked to the Surveillance Magistrate-Magistrato di Sorveglianza; that might require some time).

SECTION III - WHEN YOUR COUNTRY IS THE ADMINISTERING STATE

See GUIDE TO PROCEDURES related to Italy. No changes except for the ongoing amendments.

15(a). No difference.

16(b). See Guide to Procedures.

17©. No.

18(d). Length of pre-trial detention. Remission already granted. Good behaviour in the prisons of the sentencing State (to decide on early release, should the detainee make such a request).

19. Italy adopts the continuation system.

SECTION IV – Appendix (mentally disturbed persons).

20. Italy does not have experience of such tranfers, though we had one request from Germany to clarify the legal situation in Italy.

Where no sentence was imposed because of the mental situation of the defendant, who was therefore considered not criminally liable, no transfer seems to be possible (the ETS Convention is a convention on transfer of sentenced persons to continue serving the sentence in their own countries).

Where a sentence was imposed (generally a term of imprisonment together with the security measure to be recovered into a psychiatric institute) it must be clear that accordin to Italian law a new and fresh assesment on the dangerousness of the person concerned has to be made at the time of the procedure to introduce the foreign sentence into an Italian one; last but not least: such a dangerousness is to be periodically reviewed.

Sommaire de la décision
Summary of the decision

Sulla domanda di esecuzione all'estero di una sentenza di condanna a pena restrittiva della libertà personale (art. 743 c.p.p.), alla corte di appello compete soltanto l'accertamento delle condizioni che rendono legittimo il trasferimento all'estero della persona condannata, mentre d'accordo di cooperazione in materia penale con lo Stato estero rientra nella competenza esculsiva del Ministro della giustizia. L'autorità giudiziaria deve limitarsi a statuire sulla sussistenza delle condizioni previste per il trasferimento del condannato (art. 3 Convenzione di Strasburgo, 21 marzo 1983, ratificata con 1.n. 334/88), sulla inesistenza di impedimenti all'esecuzione della condanna (art. 744 c.p.p.) e sulla adeguatezza della pena indicata dal Governo estero non rispetto alla sola condanna ovvero ai criteri dettati dall'art.133 c.p., bensi rispetto ai criteri sanciti dalla citata Convenzione (artt.9 e 10), che conferisce allo Stato de esecuzione la facoltà di optare tra il sistema della continuazione dell'esecuzione e quello della conversione della condanna. Il primo sistema (per il quale ha optato l'Ungheria), comporta, quale regola generale, il vincolo per lo Stato di esecuzione alla natura giuridica e alla durata della sanzione così come stabilita dallo Stato di condanna (art. 10 comma 1), ma è proprio la stessa Convenzione a prevedere l'adattamento della sanzione alla pena o misure previste dalla legge dello Stato di esecuzione per lo stesso tipo di reato, in modo da non eccedere il massimo della pena dalla stessa previsto (art. 10 comma 2). Ne consegue che illegittimamenta la corte di appelo respinge la richiesta di trasferimento da parte del Governo di Ungheria di un detenuto condannato alla pena di anni tredici e mesi sei di reclusione, sulla base della considerazione che, se trasferito in Ungheria per l'esecuzione della pena, il condannato avrebbe beneficiato del fatto che, per il reato commeso, la pena massima ivi prevista è non superiore ad anni 8 di reclusione (1).

LATVIA

I. GENERAL INFORMATION

On March 24, 1997 the *Saeima* (the Parliament of the Republic of Latvia) adopted and on April 9, 1997 the President of the Republic of Latvia proclaimed the following law:

On the Convention on the Transfer of Sentenced Persons

Section 1.
The 21 March 1983 Convention on the Transfer of Sentenced Persons (hereinafter - the Convention) is adopted and ratified by this law.

Section 2.
The Law shall come into force on the day of its proclamation. The Convention in the English language and its translation into the Latvian language shall be proclaimed concurrently with the law.

Section 3.
In accordance with Article 3 of the Convention it is provided that the term "national" in the meaning of the Convention relates to the citizens of the Republic of Latvia and non-citizens who are subjects of the Law on the Status of Former USSR Citizens who are not Citizens of Latvia or any other State.

Section 4.
In accordance with Article 5, Paragraph 3 of the Convention it is provided that in the Republic of Latvia requests for transfer of sentenced persons shall be sent and received by the Prosecutor General's Office.

Section 5.
In accordance with Article 17, Paragraph 3 of the Convention it is provided that requests addressed to the Republic of Latvia, and the documents attached thereto, have an English translation.

Section 6.
The Convention shall come into force at the time and in accordance with the procedures specified in Article 18 thereof, and the Ministry of Foreign Affairs shall give notice thereof in the newspaper Latvijas Vçstnesis.

There is no other specific and detailed law regulating transfer of sentenced persons (including mentally disturbed offenders) in the Latvian legal system. Since all duly ratified international treaties form part of the Latvian domestic legal system, the appropriate provisions of the Convention on the Transfer of Sentenced Persons (hereinafter - the Convention) are directly applicable.

Absence of a treaty is not an obstacle to proceed with incoming and outgoing requests for transfer of sentenced persons. In the absence of an international instrument the principle of reciprocity may be applied and cooperation is based on the principles of the Convention.

Until present time Latvia has practiced transfer of sentenced persons only to/from the following States - the Republic of Estonia, the Republic of Lithuania, the Ukraine, the Russian Federation. Some of them - Estonia, Lithuania, the Ukraine - are Parties to the Convention. Transfer of sentenced persons between Latvia and Russia are governed by bilateral agreement on transfer of sentenced persons.

Latvia is not a Party to any bilateral treaty providing for transfer of sentenced persons without their prior consent.

Latvia has not yet become a Party to the Additional Protocol to the Convention (although signed it on 10 November, 1998) and the duration of provisional arrest pending the arrival of documents supporting a request under Article 2 of the Protocol to the Convention has not been specified either.

The procedure of execution of custodial sentences is regulated by the Punishment Execution Code of Latvia.

The Punishment Execution Code provides for serving custodial sentences in four types of custodial institutions:

- closed prisons,
- semi-closed prisons,
- open prisons,
- correctional institution for juveniles.

Sentences are served by males and females in separate custodial institutions, and separately by adults and juveniles. Subject to their behaviour while serving sentence prisoners can be moved from a higher security type custodial institution to a lower one and vice versa.

II. WHEN LATVIA IS THE SENTENCING STATE

As mentioned above no specific procedure is provided for by Latvian legislation therefore Articles 4, 5 and 6 of the Convention are applicable.

With respect to Article 5, Paragraph 3 of the Convention Latvia has stated that requests for transfer shall be made by or directed to the Prosecutor General's Office.

If request for transfer from either the administering State or the sentenced person is submitted to the Latvian Prisons Administration or to the custodial institution where person concerned is serving his/her sentence the request is handed over to the International Cooperation Division of the Prosecutor General's Office.

The International Cooperation Division requires the following documents from the administration of a custodial institution involved:

- certified copies of judgments including final judgment;
- court's order on execution of the judgment having come into force;
- statement on the "penal" situation of the person concerned (how long he/she has served the sentence, the length of the sentence still to be served);
- statement on execution of additional penalty, if any;
- information on the behaviour of the prisoner while serving his sentence;
- document attesting the nationality of the sentenced person;
- consent of the sentenced person in case the request has been made by the administering State.

Upon receipt of all the above mentioned documents the International Cooperation Division examines a request and documents and decides on presence of sufficient legal grounds for the transfer and on the expediency of the transfer of a sentenced person. If making a decision requires additional documents they are requested from the administering State.

The final decision on the transfer of sentenced persons from Latvia is made by the Prosecutor General of the Republic of Latvia. There are no remedies against this decision.

The final decision is communicated to the administering State. Provided the Prosecutor General authorizes the transfer, supporting documents are sent along with the final decision.

If both the sentencing State and the administering State have agreed on transfer of a sentenced person the Prosecutor General's Office informs thereof the Latvian Prisons Administration tha settles practical organization of transfer with competent authorities of the administering State.

The accomplishment of the transfer of the sentenced person is reported to the Prosecutor General's Office.

Acting upon the request of the administering State does not change the procedure and the time needed for the transfer procedure. The procedure becomes quicker if the administering State transmits the necessary documentation to the Prosecutor General's Office as early as possible.

Failure to comply with the provisions of Article 3 Paragraph 1 of the Convention is a reason for refusal. In practice, in most cases the reason for the refusal has been withdrawal of the sentenced person's consent.

So far Latvia has not requested information on rules applied to early discharge of a prisoner in the administering State.

Upon the request Latvia transmits information to the administering State on the behaviour of the prisoner while serving his sentence in our country.

III. WHEN LATVIA IS THE ADMINISTERING STATE

If request for transfer is received by the Prosecutor General's Office from either the sentencing State or the sentenced person the International Cooperation Division of the Prosecutor General's Office ascertains whether this person is a national of Latvia. At the same time the Prosecutor General's Office requests the sentencing State to provide documents required for the decision on transfer. The following documents are requested:

- certified copy of final judgment,
- statement on the part of the sentence already served and the length of the sentence still to be served;
- statement on execution of additional penalty, if any;
- information on the prisoner's behavior while serving his sentence in a sentencing State;
- document attesting the nationality of the sentenced person;
- copy of the relevant law.

Upon receipt of the above mentioned documents the International Cooperation Division examines them and decides on presence of sufficient legal grounds for and expediency of transfer of a sentenced person.

The final decision on the transfer of sentenced persons is made by the Prosecutor General of the Republic of Latvia. There are no remedies against this decision.

The decision of the Prosecutor General is communicated to the sentencing State. The sentencing State upon its request is provided with documents indicated in Article 6 of the Convention.

If both the sentencing State and the administering State have agreed upon transfer of a sentenced person the Prosecutor General's Office informs thereof the Latvian Prisons Administration that settles the practical organization of transfer with the competent authorities of the administering State. The accomplishment of the transfer of the sentenced person is reported to the Prosecutor General's Office.

The transferred person is kept in an investigation prison while the competent court in conformity with the Punishment Execution Code determines the type of prison in which the transferred person shall start serving his/her sentence in Latvia.

Acting upon the request of either the sentencing State or the sentenced person does not change the procedure and the time needed for the transfer. The procedure for a transfer to Latvia becomes more effective and quicker if the sentencing State transmits the necessary documentation to the Prosecutor General's Office as early as possible and indicates that the person can be transferred to Latvia.

Failure to comply with the provisions of Article 3 Paragraph 1 of the Convention is a reason for refusal.

APPENDIX
(mentally disturbed persons)

The Republic of Latvia has been a Party to the Convention on the Transfer of Sentenced Persons since September 1, 1997. Until August 31, 2000 Latvia has neither received nor sent any request for transfer of mentally disturbed persons, so Latvia has no experience in this field. That is why it is difficult to foresee what kind of problems we might face when dealing with transfer of mentally disturbed offenders.

Regarding information on Latvian law concerning the transfer of mentally disturbed offenders see General Information.

LITHUANIA

GENERAL INFORMATION

Republic of Lithuania has not enacted any specific legislation in order to implement the Convention on the Transfer of Sentenced Persons, but the decision of the Seimas of the Republic of Lithuania on Ratification of the Convention on the Transfer of Sentenced Persons, 9 May 1995. The transfer to and/or from Republic of Lithuania of the sentenced person is impossible in the absence of the treaty. Republic of Lithuania is a party to two bilateral treaties, which contain provisions on the transfer of sentenced persons, i.e. Treaty between the Republic of Lithuania and the Republic of Byelorussia on the Transfer of Sentenced Persons and Persons, whom the measures of compulsory treatment were imposed on and Treaty between the Republic of Lithuania and the Republic of Poland on Mutual Legal Assistance in Civil, Family, Labour and Criminal Matters, thus both said treaties require the consent of the person concerned prior to his transfer.

State system of enforcing custodial sentences

The execution of custodial sentences is regulated by the Code of the Execution of Punishments, whereas a detailed specification thereof is stipulated in the Rules of the Interior Order of the Institutions of Correctional Works. The Code of the Execution of Punishments specifies the types of imprisonment institutions and regimes; regime requirements; prisoners work conditions; the types of reformatory work; the conditions of general education and vocational training; legal status of sentenced persons; material provision and medical care of inmates; the grounds and procedure of the disciplinary responsibility of inmates; the measures ensuring the regime; the procedure of applying conditional release from imprisonment institutions; the grounds and procedure of exemption from a sentence.

The Criminal Code contains general provisions on sentencing. The Criminal Code prescribes that the court determines the punishment within the scope of the sanction specified in the relevant Article which provides for criminal responsibility for the crime committed. When determining the punishment, the court, abiding by legal consciousness, takes into consideration the type and dangerousness of the crime committed, personal characteristics of the offender and circumstances of the crime, which mitigate and aggravate the liability. The Criminal Code stipulates a model list of mitigating and a final list of aggravating liability circumstances; prescribes special rules for imposing penalties in case a person has totally admitted his/her guilt, when a person

has committed several crimes or when having not completed the sentence, a new crime is committed; provides for the rules of cumulating and substituting penalties; defines the grounds, conditions and procedure for imposing a lighter penalties than that prescribed by the law; stipulates the grounds and procedure of releasing from a sentence.

Imprisonment is a principal punishment, which can be imposed by the court in cases prescribed by law from 3 months to 20 years; in case a new crime has been committed when serving the sentence – up to 25 years. If the law prescribes a minimum custodial sentence of 3 years and above for a crime committed, then when imposing this punishment upon a minor before the age of 18, its minimum is calculated at half the minimum penalties stipulated in the law (for instance, if the law prescribes a minimum sanction of 4 years imprisonment, the court may impose on a minor a minimum custodial sentence of 2 years). The maximum custodial sentence for persons, who at the moment of committing a crime have not reaches the age of 18, cannot exceed 10 years.

The court having imposed a custodial sentence must in accordance with the Criminal Code to designate the type of the institution of deprivation of liberty (prison, colony of correctional works, colony of reformatory works or colony-settlement of correctional works) and the regime (common, strengthened or strict). The assignment of a concrete convict to a concrete institution is decided by the Correctional Affairs Department (Prison Department) after an observation period during which the prisoner is subjected to a personality assessment process.

According to law, imprisonment institutions are classified into the institutions of sentence execution and pre-trial detention centers; institutions for juveniles and for adults; institutions for men and for women. According to security level, imprisonment institutions are classified into prisons (high security), colonies of correctional works (normal security) and colonies-settlements (semi-open). The colonies of correctional works, which are the main places for serving the custodial sentences are, according to the forms and the level intensity of inmates' supervision and monitoring, classified into three regimes: common, strengthened and strict.

Procedural coercive measures

Article 22^3 of the Code of Criminal Procedure establishes that all procedural coercive measures that should be imposed on a person, who are to be extradited or transferred from Lithuania, should be imposed according to general provisions of the said Code.

The Code of Criminal Procedure of the Republic of Lithuania specifies the two types of coercive measures which provide for restriction of person's freedom: temporary apprehension and pre-trial detention. The temporary apprehension can be applied by an investigator or prosecutor for the person who is caught during the commission of a crime or shortly afterwards the commission of a crime when there are grounds to believe that such a person may abscond or at the given moment is not possible to ascertain his/her identity. The temporary apprehension can also be applied when there are the pre-trial detention legal prerequisites and could not last more than 48 hours.

Pre-trial detention can be imposed when by other remand measures (e.g., home arrest, pledge not to leave and so on) it is impossible to ensure the defendant's appearance at the proceedings, unhindered investigation of a criminal case, etc. Pre-trial detention can be applied only in the cases of crimes for which the Penal Code provides for a more severe punishment than a custodial sentence of one year. The basis for applying pre-trial detention is a reasonable ground to believe that the accused: 1) will abscond or hide from investigation or court; or 2) will hinder to establish the truth in the case; or 3) will commit new grave crimes. Pre-trial detention on the basis of a prosecutor's application is ordered by a district judge. After the case has been transmitted to the court, the court, which exercises jurisdiction over the case, orders, extends or revokes the pre-trial detention. According to Article 106 of Code of Criminal Procedure Pre-trial detention cannot last longer than six months. Where the case is particularly complex or of great extent, this period of pre-trial detention may be extended by a regional court judge, but the maximum term of the pre-trial detention at the stage of the pre-trial investigation of the case cannot be longer than 18 months. For the purpose of extending the term of pre-trial detention, the same procedure as for ordering the pre-trial detention is applied.

II. WHEN LITHUANIA IS THE SENTENCING STATE (Request for a person to be transferred from Lithuania)

The most common procedure followed by the Lithuanian authorities for transferring sentenced persons pursuant to the Convention on the Transfer of Sentenced Persons (Strasbourg, 21.III.1983) when the Republic of Lithuania is the sentencing state is the following:

The sentenced person (or a family member of the sentenced person)» Ministry of Justice of the Republic of Lithuania»Prison Department»Ministry of Justice of the Republic of Lithuania»Ministry of Justice of the Administering State»Ministry of Justice of the Republic of Lithuania»Prison Department»Police Department

or

Ministry of Justice of the Administering State»Ministry of Justice of the Republic of Lithuania»Prison Department»Ministry of Justice of the Republic of Lithuania»Ministry of Justice of the Administering State»Ministry of Justice of the Republic of Lithuania»Prison Department » Police Department.

The Ministry of Justice of the Republic of Lithuania receives a request for transfer either directly from the sentenced person or through the Prison Department under the Ministry of Internal Affairs of the Republic of Lithuania. (Note: from August 1, 2000 the Prison Department will be transferred under direct supervision of the Ministry of Justice).

Upon the receipt of the request, the Ministry of Justice contacts the Prison Department and requests to supply information pursuant to Art. 3 of the Convention, i.e., on the sentenced person's nationality, the judgment (whether it is final), the remainder part of the sentence to be served (whether it is more than six months) and, in addition, on the payment of damages inflicted as a result of the criminal act committed by the person concerned.

Sometimes, the Ministry of Justice receives requests for transfer from a family member of the sentenced person or from the Ministry of Justice of the administering State. In such a case, the Ministry of Justice requests the Prison Department to produce the sentenced person's letter of consent to be transferred to the administering State.

If the conditions for transfer under Article 3 of the Convention are met and the sentenced person has compensated the damages inflicted as a result of the criminal offense committed by him/her, the Ministry of Justice of Lithuania requests the Prison Department to prepare and forward to the Ministry of Justice the supporting documents provided under Article 6 of the Convention. When all the requisite documents are collected and translated into the language of the administering State, English or French, the Lithuanian Ministry of Justice addresses in writing the Ministry of Justice of the administering State asking to consider a possibility of transferring the sentenced person in question to the administering State. The sentenced person's file with the supporting documents is annexed to the request of the Lithuanian Ministry of Justice.

Upon a receipt of an affirmative answer (the declaration of consent) of the administering State, the Lithuanian Ministry of Justice asks the Prison Department to inform the sentenced person about the administering State's decision and to initiate the practical transfer of the person concerned.

The Prison Department, in its turn, forwards the information to the Police Department under the Ministry of Internal Affairs which contacts its counterpart institution in the administrating State and arranges the practical transfer of the sentenced person, i.e., the exact time, place, etc.

This procedure for transfer neither changes nor takes longer depending on whether Lithuania takes the initiative, or it acts upon the request of either the administering State or the sentenced person.

Usually, the Lithuanian Ministry of Justice and the Prison Department take part in the procedure of transferring sentenced persons. In exceptional cases, the Ministry of Justice requests advice from the Migration department under the Ministry of Internal Affairs, the Ministry of Foreign Affairs or the Ministry of Finance. However, in all cases it is the Ministry of Justice which is the authority taking the final decision on the part of the Republic of Lithuania on the transfer.

In the vast majority of cases, the Lithuanian Ministry of Justice satisfies requests for transfer of sentenced foreign nationals. However, in a few cases it refused the transfer because at the time the request was received the judgment was not yet final, the criminal damages were not compensated and the sentenced person had less than six months of the sentence to serve.

On the assumption that the administering State must be in a position eventually to decide on the early release of the prisoner, the Lithuanian authorities usually do not transmit to the administering State information on the behavior of the prisoner while serving his/her sentence in Lithuania, unless the behavior is egregious or the Lithuanian authorities are specifically requested to do so.

III. WHEN LITHUANIA IS THE ADMINISTERING STATE

The most common procedure of transferring sentenced persons pursuant to the Convention on the Transfer of Sentenced Persons (Strasbourg, 21.III.1983) when the Republic of Lithuania is the sentencing state is the following:

The sentenced person»Ministry of Justice of the Sentencing State»Ministry of Justice of the Republic of Lithuania»Prison Department»Ministry of Justice of the Republic of Lithuania»Ministry of Justice of the Sentencing State»Ministry of Justice of the Republic of Lithuania»Prison Department_ Police Department.

or

Ministry of Justice of the Sentencing State»Ministry of Justice of the Republic of Lithuania»Prison Department»Ministry of Justice of the Republic of Lithuania»Ministry of Justice of the Sentencing State»Ministry of Justice of the Republic of Lithuania»Prison Department»Police Department

The Ministry of Justice of the Republic of Lithuania receives a request for transfer either directly from the sentenced person or through the Ministry of Justice of the sentencing State. Upon the receipt of the request, the Lithuanian Ministry of Justice checks the supporting documents for sufficiency pursuant to Article 6 of the Convention. First, the Ministry checks the data about the person's nationality. Under the reservation made by the Republic of Lithuania in respect of Article 3 of the Convention, nationality is construed as an equivalent to citizenship. In cases when the Ministry is not satisfied with the information supplied by the sentencing State on the sentenced person's citizenship, it contacts the Migration Department under the Ministry of Internal Affairs of the Republic of Lithuania and requests to produce information on the person's citizenship. If it turns out that the sentenced person is not a citizen of the Republic of Lithuania, the Lithuanian authorities may refuse the transfer.

Next, the Ministry of Justice of Lithuania checks the judgment (whether it is final), the time of the remainder part of the sentence (whether it is more than six months) and the payment of damages inflicted as a result of the crime committed by the sentenced person.

Sometimes, the Ministry of Justice receives requests for transfer directly from a family member of the sentenced person. In such a case, the Ministry of Justice of Lithuania informs the Ministry of Justice of the sentencing State about such a request and asks to consider a possibility of the transfer. In case the sentencing State agrees to such a transfer, the Ministry of Justice simultaneously asks to supply all the requisite documents provided by the Convention, including the sentenced person's letter of consent.

If the conditions for transfer under Article 3 of the Convention are met and the sentenced person has compensated the damages inflicted as a result of the criminal offense committed by him/her, the Ministry of Justice of Lithuania issues its formal consent in writing to the transfer of the sentenced Lithuanian citizen addressed to the Ministry of Justice of the sentencing State.

When the Ministry of Justice of Lithuania is furnished with all the necessary documents and information, it transfers the documents to the Prison Department under the Ministry of Internal affairs of the Republic of Lithuania and requests the Department to issue a motion to the district court (the first instance court of general competence) in the jurisdiction of which the sentenced person will be serving the sentence on the determination of the length of the remainder of the sentence and the regime of serving the sentence. The supporting documents received from the sentencing State are appended to the motion.

Simultaneously, the Prison Department is requested to arrange the practical transfer of the sentenced person. The Prison Department, in its turn, forwards the information to the Police Department under the Ministry of Internal Affairs which contacts its counterpart institution in the administrating State and arranges the practical transfer of the sentenced person, i.e., the exact time, place, etc.

Upon a receipt of the motion and the supporting documents, a district court holds an oral hearing in the presence of the sentenced person and issues an order on continuation of enforcement pursuant to Article 10 of the Convention.

The procedure neither changes nor takes longer depending on whether Lithuania takes the initiative, or it acts upon the request of either the administering State or the sentenced person.

The Lithuanian Ministry of Justice, the Prison Department, the Migration Department and the Public Police Department take part in the procedure of transferring sentenced Lithuanian nationals. However, in all cases the Ministry of Justice ultimately makes the final decision on the part of the Republic of Lithuania on whether to allow the transfer or not.

In the vast majority of cases, the Ministry of Justice of Lithuania does not object to the transfer sentenced persons to Lithuania. The most typical reasons for refusal, however, are lack of the Lithuanian citizenship and the short remainder part of the sentence (less than 6 months).

In respect of the "penal situation" of the person concerned, the Lithuanian authorities require information on the part of the sentence already served in the sentencing State, including pre-trial detention.

So far, the Lithuanian district courts have a very limited experience in practical application of the Convention. However in all cases, the courts have chosen to continue the enforcement of the sentence passed by courts of the sentencing States through a court order under Article 9 (a) and adopted the sentence under Article 10.2.

MENTALLY DISTURBED PERSONS

The problem of mentally disturbed offender

The notion of mentally disturbed offender is not used in the Criminal Code of the Republic of Lithuania. Article 12 of the Criminal Code of the Republic of Lithuania establish that a person is incapable of criminal responsibility under criminal laws if in acting in manner which is dangerous for society he/she could not understand the essence of his/her actions or could not control them due to chronic mental disease, temporal mental disorder, mental retardation or other pathological conditions. Such a person should meet the measure of compulsory treatment.

Article 3 of the Criminal Code of the Republic of Lithuania provides that only guilty person can face responsibility for criminal acts he/she committed and only guilty person can be sentenced under criminal laws. According to Article 12 of the Criminal Code mentally disturbed people have got no possibility to understand the essence of his/her actions and to control their actions, i.e. they should not face responsibility for the actions they could not understand and control. Thus mentally disturbed people do not meet criminal sentence in the Republic of Lithuania, such people are recognized as mentally ill. The measures of compulsory treatment that are imposed on mentally disturbed people are not the type of punishment according to the Criminal Code.

Moreover people whom measures of compulsory treatment were imposed on do not belong to the category of sentenced people. Following the aforesaid no one who is mentally disturbed can be sentenced according to criminal laws in the Republic of Lithuania. Mentally disturbed people even if they commit a crime can not be sentenced and that is why their transfer under the 1983 Convention on the transfer of Sentenced Persons is impossible.

Transfer of mentally disturbed offenders under the 1983 Convention on the transfer of Sentenced Persons

On the 9th of May 1995 the Seimas of the Republic of Lithuania ratified the 1983 Convention on the transfer of Sentenced Persons. Generally transfers of sentenced persons is provided according to the procedure established by Convention. Thus transfer from the Republic of Lithuania of mentally disturbed person, who committed a crime, is impossible because people mentioned above are not supposed to be sentenced persons.

The transfer of mentally disturbed offenders into the Republic of Lithuania under the Convention on the transfer of Sentenced Persons is not available because the Republic of Lithuania has not presented a declaration to the General Secretary of the Council of Europe on transfer of mentally disturbed persons under Article 9 part 4 of the Convention.

Agreement between the Republic of Lithuania and the Republic of Byelorussia on the Transfer of Sentenced Persons and Persons, whom the measures of compulsory treatment were imposed on

On the 12th of July 1996 the agreement between the Republic of Lithuania and the Republic of Byelorussia on the Transfer of Sentenced Persons and Persons, whom the measures of compulsory treatment were imposed on was concluded. On the 17th of September 1996 the Seimas of the Republic of Lithuania ratified this Agreement, thus it has the power of law in Lithuania. One of the most important features of this Agreement is that Article 1 presents definition of sentenced person. This definition embraces not only persons whom the liberty is deprived by the court sentence, but also persons whom measures of compulsory treatment related to deprivation of liberty are imposed. This agreement provides the procedure of transfer of persons whom the measures of compulsory treatment related to deprivation (restriction) of liberty were imposed on. This procedure is similar to the procedure of transfer of sentenced persons. The difference is that agreement to transfer a person whom the measures of compulsory treatment related to deprivation of liberty were imposed on is given by legal representative of such person. The transfer of persons whom the measures of compulsory treatment were imposed is possible if not less than 6 month of application of treatment are left. Nevertheless the Agreement establishes possibility by the way of exception to transfer persons whom the measures of compulsory treatment were imposed on not regarding the above mentioned condition of 6 month.

LUXEMBOURG

Luxembourg approved the additional protocol in 2003.

Also Luxembourg has implemented the Council framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The Council framework decision is implemented by a law of 28 February 2011.

The law of 31 July 1987 not only approved the Convention of 21 March 1983 but also regulated the transfer of person sentenced and detained abroad (copy attached).

We have no experience of the transfer of persons who, for reasons of their mental condition, have been held not criminally responsible. Under the legislation in force, the State Prosecutor's Office, which is responsible for the enforcement of sentences, is not empowered to take coercive measures against an offender not considered to be criminally responsible, either abroad or at national level.

In general terms, whether in the context of the implementation of the Convention or in that of the enforcement of sentences, the State Prosecutor's Office aims above all at social rehabilitation.

The law of 26 July 1986 (copy attached) regulates the principle of highly individualised penological treatment.

Sentenced persons have free access to the standard information document relating to the Convention's operation. If a sentenced person wishes to submit a transfer request, the record office of the establishment concerned places at his disposal or completes a preprinted form designed for this purpose.

The request is submitted to the State Prosecutor's representative responsible for the enforcement of sentences, who draws up a formal request containing the information and documents required by the Convention.

The completed file in question is sent by the Ministry of Justice to the foreign authority.

In principle, the question of who takes the initiative in requesting the transfer does not influence the nature or duration of the procedure. In fact, the quickest way is for the sentenced person to take the initiative himself as soon as the sentence is handed down.

The State Prosecutor's Office, responsible for the enforcement of sentences, takes all the necessary decisions.

There are no typical criteria for refusal. We try to apply the Convention to as great an extent as possible. In the past, the State Prosecutor's Office has only issued a refusal if the portion sentence remaining to be served was of no significance or in cases where persons sentenced for very long periods (from ten years up to life imprisonment) would have been released as soon as they returned to their country of origin.

In particular, Luxembourg wishes to receive information relating to conditional release or to different forms of remission.

In cases of long sentences, the State Prosecutor's Office has provided foreign authorities with information relating to the dangerous nature or behavioural disorders of sentenced persons.

Luxembourg has opted for the enforcement of sentences handed down in other countries with the possibility of adaptation by a judicial authority.

In this regard, reference is made to the law of 31 July 1987.

Up to the present time, only one Luxembourg national has been transferred to his home country.

Owing to lack of experience I am unable to say whether the duration of the procedure depends on the person submitting the request.

In cases where a sentence is simply enforced, the State Prosecutor's Office is the responsible authority. In cases where a sentence needs to be adapted to bring it into line national legislation, the matter is referred to the Luxembourg Correctional Court.

There are no typical reasons for refusal.

Since the portion of the sentence remaining to be served is enforced on the basis of national legislation, the State Prosecutor's Office is only interested in the amount of the sentence to be served on the day of the transfer.

NETHERLANDS

I. General information

The Netherlands has enacted specific legislation in order to implement the Convention. This Act is called The Transfer of Execution of Criminal Sentences Act. The Act states that enforcement in the Netherlands of foreign judicial decisions can only take place on the basis of a convention. A transfer of a Dutch criminal sentence to another State need not be based on a Convention. However, if the application can be based on a convention, the provisions of the Convention will be taken into account. The Netherlands is not only a signatory to the Convention on the Transfer of Sentenced Persons, but also to some bilateral treaties that do not require the agreement of the sentenced person (or his legal representative) for a transfer. These are the Convention of the Council of Europe on the International Validity of Criminal Judgements ('s-Gravenhage, 28 May 1970)*, the Schengen Implementing Agreement of 19 June 1990*, and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences (Brussels, 13 November 1991)[1].

When considering application of the Convention on the transfer of sentenced persons by the Netherlands, rehabilitation is the main goal.

A sentenced person who is in the Netherlands and on whom a sanction is imposed by a foreign state to deprive them of their liberty, of which at least three months still has to be enforced, may provisionally be held in the Netherlands if there are sound reasons for expecting that the sanction will be enforced in the Netherlands in the near future. For this a maximum period of holding in police custody of 2 times 48 hours applies, after which the person involved can be remanded in custody. The remand in custody is ordered for a maximum of fourteen days. Within this period the public prosecutor must receive all the required documents. If the documents are not then to hand the remand in custody is terminated.

In the Netherlands prisoners are released early after 2/3 of the sentence has been served. This is a right of every sentenced person. Only under special circumstances are exceptions made. Should such circumstances occur, the State concerned will be informed accordingly.

---

[1] The Dutch government has made a declaration upon ratification of the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences in accordance with Article 21 paragraph 3 of that Convention. On the basis of this provision, pending entry into force, any Member State may declare that the Convention is applicable to its relations with other Members States that have made a similar declaration.

II Transfer from the Netherlands

Dutch law places the initiative for making an application for transfer with the Public Prosecutions Department. In practice however it is usually the detainee who makes an application for transfer. In all Dutch penitentiaries a sentenced person can ask to receive transfer application forms. The penitentiary will forward these to the Justice Department. When a request is received from another State or another person (e.g. a foreign lawyer), then the penitentiary where the sentenced person concerned is held prisoner will be contacted. A request will be made to fill in and forward a form.

The request will be received by the Justice Department (International Legal Assistance Office in Criminal Matters). This Bureau will assess whether the Convention applies to the sentenced person concerned, and whether a transfer is in accordance with the Justice Department's policy. Should it appear that the sentenced person has strong relations with the Dutch community, e.g. through a residence permit or possession of Dutch nationality, the prisoner's request will be dismissed. Furthermore transfer abroad is not usually approved if the sentence to pay the fine imposed to deprive the sentenced person of any unlawfully gained advantage has not been complied with.

If, however, the Convention does apply to the sentenced person, the office of the public prosecutor will be requested to send the required documents as mentioned in Article 4 of the Convention. It will take a few weeks before these documents will be received. The public prosecutor will advise the Minister. The Minister will take the final decision whether or not permission for a transfer will be granted.

After the documents mentioned have been received, they will be translated if necessary. This will take a few weeks. After the required documents have been translated, the request will be sent to the State applied to.

Does NL opt for continuation of the Dutch sentence, or conversion?

The State applied to will be informed that in the Netherlands prisoners are released early after 2/3 of the sentence has been served. Moreover, the State applied to (= the administering state) will be requested to give the information mentioned in Article 6, paragraph 1 of the Convention concerning the transfer of sentenced persons. The administering state will also be asked to indicate what the prisoner is to expect (remission, conditional release, parole).

Summarised, the Netherlands as sentencing state would need:

- a copy of the legal provisions showing that the offence committed is punishable by law;
- a statement of the nature and the length of the sentence which the convicted person would have to serve after his transfer;
- the address and telephone number of the authority which can be contacted by the Dutch public prosecutor in order to make practical arrangements for the transfer.

The sentenced person receives confirmation that such request has been forwarded.

If the State applied to agrees and the papers required have been received, the office of the public prosecutor is requested to have the sentenced person state his definite consent before the examining judge in charge of criminal trials. The examining judge receives the information obtained from the State that has been applied to. With this information the interrogation can take place and the sentenced person can be informed of the consequences of his consent. Should the sentenced person no longer wish to state his consent, the State applied to will be informed thereof. If the sentenced person decides to proceed with the transfer and the Minister of Justice grants permission, the office of the public prosecutor will be asked to contact the authorities concerned to arrange the actual transfer, whereby Interpol channels can be used. An official statement of approval will be sent to the State concerned.

After the transfer it is expected that the administering State provides information concerning the enforcement of the sentence in accordance with Article 15 of the Convention.

III Transfer to the Netherlands

The enforcement in the Netherlands of foreign judicial decisions can only take place on the basis of a convention. In general, the Dutch Justice Department waits for a formal transfer request from the sentencing State, since it is primarily responsible for the enforcement of the sentence. If the sentenced person or a relative turns to the Dutch Justice Department, he or she is advised to apply to the authorities of the sentencing State. Should the procedure appear to take very long in the sentencing State, a letter will be sent to the state concerned, asking for information concerning the transfer request.

After a request is received it will be evaluated. Is it complete, does it contain all the documents required as listed in the Convention. Have the documents been supplied in Dutch, English, French or German? (See Dutch statement Article 17, par. 3 of the Convention) Does the transfer request meet the conditions as stated in the Convention?

Does the sentenced person (even if he has Dutch nationality) have strong enough ties with the Dutch community as far as the European territory is concerned? Is he a “national” as defined in the Dutch statement under Article 3, par. 4 of the Convention?

"national should include all those who fall under the provisions of the Act governing the position of Moluccans of September 9th, 1976 (..), as well as aliens or stateless persons whose only place of residence is within the Kingdom and who, according to a statement to this effect issued to the government of the sentencing State by the Netherlands Government do not, under the terms of the present Convention lose their right of residence in the Kingdom as a result of the execution of a punishment or measures".

If the sentenced person does not have Dutch nationality, the Immigration and Naturalisation Service of the Ministry of Justice will be asked for advice, in which case the procedure will be delayed on the Dutch part for at least four weeks. An application for transfer to the Netherlands is usually dismissed if the person involved has no valid residence permit, or has no (no longer has) ties with the Dutch community.

If a sentenced person has been transferred before and is sentenced again abroad on the basis of a new offence (after the Netherlands procedure has been completed), a second request by the same sentenced person is usually dismissed.

If the decision is basically positive, the applying State receives a reply and is requested to send supplementary documents if necessary. The Dutch judge lays down the requirement that detailed information is available about the ruling on early release applicable to the detainee.

The Supreme Court of the Netherlands (Supreme Court of the Netherlands, 27 January 1998) has ruled that in the case of conversion of the foreign sentence (ex Article 11 of the applicable Convention), the Dutch court should investigate if a possible early or conditional release which the requesting State would 'surely or in all probability' have granted in the case of the applicant's continued stay in that State, would have been of such a nature that the applicant's position - as far as the actual duration of his detention is concerned - would have been aggravated by the sentence imposed upon him in the Netherlands.

The Minister of Justice is of the opinion that this judgement and thus the criterion mentioned therein could also apply to setting the date of release in the Netherlands in the case of a transfer under the continued enforcement procedure referred to in Article 10 of the applicable Convention. To determine the duration of the sentence and to prevent the transfer from adversely affecting the sentenced person's penal position, the sentencing state will be requested to state if, in case of a continued stay in that country, the applicant would have qualified for remission and if so, on what date the applicant would 'surely or in all probability' have been released under such an arrangement for early or conditional release.

Dutch Law offers the possibility to apply both the conversion of sentence procedure (Article 11 of the Convention) and the continued enforcement procedure (Article 10 of the Convention) when foreign sentences are taken over. The preference of the Dutch government is however for the procedure in accordance with Article 11 of the Convention (conversion of sentence). Whatever procedure is implemented, the Dutch legislation concerning early release (after 2/3 of sentence has been served) will apply.

The information required where the State applied to is the Netherlands

- personal data concerning the sentenced person: name, date of birth, place of birth, last place of residence in the Netherlands;
- a certified copy of the judgement of the court;
- a statement that the judgement is final and subject to execution;
- a copy of the legal provisions showing that the offence committed is punishable by law;
- a clear description of the facts; (in case of drugs: type and net amount)
- a statement indicating that the sentenced person has consented to the transfer;
- information on the expected date of release with remission ('surely or in all probability');
- name and address of the authorities with whom the actual transfer can be arranged.

The conversion of sentence procedure in the Netherlands (Article 11 of the Convention)

After the receipt of the documents the public prosecutor in whose judicial district the sentenced person resides is asked to advise the Minister of Justice. In case of a positive advice, the public prosecutor will - after two weeks - determine a date together with the authorities appointed by the applying State. The final decision whether or not permission for a transfer will be granted is taken by the Minister of Justice on the basis of the public prosecutor's advice.

The public prosecutor makes a submission to the court of his jurisdiction to consider the transfer request. The president of the court determines the date of the session during which the matter will be dealt with. According to Dutch law, the sentenced person is to be present at this session of the Dutch court. Therefore, he has to be transferred before the court hearing can take place.

If the judge considers implementation of the foreign sentence in the Netherlands to be admissible, he will grant permission to implement the foreign judgement and he will convert the foreign sentence and impose the punishment or measure that applies to the same offence according to Dutch law. In so doing he will among other things take into account the foreign views regarding the severity of the offence and the sentence considered necessary. The Dutch judge will need to be

informed of the expected date of the early/conditional release in order to be able to apply the conversion of sentence procedure[2] [3].

On the basis of the Netherlands Implementation Act the court will decide that implementation is impermissible if it finds:

a) that the documents submitted do not meet the requirements as stated in the Convention;

b) that the sentenced person could have successfully appealed to a cause which according to Dutch law excludes, but according to the applying State's law does not exclude the liability to punishment and that the sentenced person does not need psychiatric help;

c) that implementation cannot take place in the Netherlands, because the requirements as described in the Netherlands Implementation Act are not met (e.g.: Convention requirement, mutual liability to punishment etc.)

d) that it is dealing with a case in which implementation can be refused according to the convention concerned, that after considering all interests concerned implementation in the Netherlands cannot reasonably (in fairness) be granted.

The continued enforcement procedure (Article 10 of the Convention)

In this case the recommendation file is sent for advice to the Special Chamber of the High Court in Arnhem. The Court particularly considers whether or not the length of the expected actual imprisonment as enforced abroad is excessive in proportion to the sentence that would apply to the same offence according to Dutch standards. If the Court comes to the conclusion that the length of the foreign sentence is excessively high, negative advice is given, unless there are convincing reasons on the basis of which the transfer of the foreign sentence must still be carried out. This may be the case if the medical condition of the sentenced person requires a transfer. The Court also obtains information concerning the sentenced person and the detention circumstances abroad from the Foreign Affairs Bureau of the Netherlands Federation of Rehabilitation Institutions. In some cases the Court will visit the sentenced person abroad. Furthermore, the Court advises the Minister of Justice on the adjustment of the foreign sentence to a Dutch sentence if the Dutch punishment maximum is exceeded as described in Article 10, par. 2 of the Convention[4].

If the Court's advice is negative, the Minister will dismiss the request. After a positive advice and after approval of the Minister of Justice, the applying State is informed thereof. The sentencing State is requested to give its final approval. After a definite positive answer has been received, the documents are forwarded to the public

---

2 See the judgement of the Supreme Court of the Netherlands of 27 January 1998, as mentioned before.

3 The sentence can be reduced, not increased (Article 11, par. 1.d of the Convention)

4 This takes place in the form of an order taken by the Minister of Justice.

prosecutor in whose judicial district the sentenced person resides in order to arrange the actual transfer.

Appendix IV
(mentally disturbed persons)

The Netherlands can both transfer the execution of a criminal sentence in which an Order for Committal to a Psychiatric Hospital or a TBS Order, is imposed, to another State and take over the execution of such an order from another State.

Transfer from the Netherlands

The TBS Order is in practice mainly imposed in case of serious offences and in such cases is of unlimited duration. The treatment is aimed at preventing/limiting the danger of the person involved to the community (risk of recurrence of the offence). For this reason it is important before the transfer of the order to the country of origin of the person involved that there is sufficient certainty in advance that the person involved will also be treated in that country and that the treatment also has the same purpose as the Dutch TBS Order. This means for example that the security measures must be adequate. From the point of view of the treatment of the person involved it is also desirable for the transfer to be made at as early a stage of the treatment as possible.

Transfer to the Netherlands

In order to take over the (further) execution of a foreign criminal sentence, Dutch law requires that the State concerned is a party to the Convention. Dutch law allows for a Psychiatric Treatment Order imposed in another State to be executed in the Netherlands, provided it is also deemed in the Netherlands that the person concerned should be subjected to such treatment. Because a judge in the Netherlands must also verify whether the person should be held (wholly or partly) not accountable for his actions and decide what Dutch sentence or Order is appropriate, the procedure for conversion of sentence outlined in Article 11 of the Convention on the transfer of sentenced persons will always have to be applied if execution of the foreign sentence is to be taken over.

A person having committed a criminal offence for which he cannot be held responsible by reason of mental defect or mental disease, can be committed to a psychiatric hospital or placed under an Order of TBS. After the person is transferred from another State to the Netherlands, a Dutch court can convert the Order imposed on the person concerned in that other State into one of the Dutch Orders mentioned above. However, if the Dutch enforcement judge takes the position that the offender can be held accountable for having committed the offence, and that none of the above Orders should be applied, the execution of the foreign sentence cannot be taken over. The same applies if the judge is of the opinion that the offender can be partly held responsible for having committed the offence and that a combination of one of the said Orders with a custodial sentence is appropriate. The fact is that the enforcement judge cannot pass a

conviction and impose a sentence on the basis of a foreign court judgement without the guilt of the person concerned having been legally ascertained. The enforcement procedure cannot replace the (Dutch) law of criminal procedure. An application lodged in that case to instigate criminal proceedings against the person in question in the Netherlands will be denied pursuant to Article 68 of the Dutch Criminal Code (the principle of ne bis idem).

In practice, problems that could arise as a result of the foregoing, may be prevented for the greater part by already supplying as much information as possible on the legal basis of the foreign sentence (such as psychiatric reports) at the time of making the request for taking over the foreign Order. In this way it can be estimated to what extent the offender is to be held fully or partially responsible according to Dutch standards, before the conversion procedure has actually started.

[THE APPENDIX MAY IF REQUIRED BE EXTENDED WITH AN EXPLANATION OF THE DUTCH LAW RELATING TO TBS]

NORWAY

I. GENERAL INFORMATION

Has your country enacted specific legislation in order to implement the Convention, or do you proceed on the basis of general legislation that provides for the transfer of sentenced persons? *Specific legislation*

Is transfer to and/or from your country possible in the absence of a treaty? *After a amendment of the Norwegian Transfer of Sentenced Persons Act on 7th July 2000, an ad hoc transfer is possible in special cases*.

Is your country a Party to any bilateral treaty in force, which does not require the consent of the person concerned prior to his transfer? There is an agreement between the Nordic countries regarding the transfer of sentenced persons/ criminal judgements and it states that the sentenced persons shall be heard, but his/ her opinion is not decisive.

When considering the application of the Convention, how do you measure in practical terms the purpose of contributing to the social rehabilitation of the sentenced person against the purpose of ensuring the ends of justice? *This is very difficult to quantify. The social rehabilitation is important but the sentence must be served. It has been the opinion of the Norwegian authorities that a transfer to your home country will, exceptions apart, facilitate the social rehabilitation.*

What is the maximum duration of provisional arrest pending the arrival of documents supporting a request under Article 2 of the Protocol to the Convention? *None*

Please describe your State's system of enforcing custodial sentences. Imprisonment in a closed or an open prison. Normally, the enforcement will start in a closed prison, but in some cases, the sentenced person may start serving his sentence in an open prison.

An inmate will normally be released after serving 2/3 of the sentence, including time spent while remanded in custody. In some cases, if special conditions are met, the inmate may be released after serving ½ of the sentence. There are no rules on automatic remissions, but an inmate can in special cases be pardoned.

Please provide information on relevant case law. *None*

II. WHEN YOUR COUNTRY IS THE SENTENCING STATE
(Request for a person to be transferred from your country)

The prison governor will initially handle applications for a transfer. If sent directly to the Ministry by the inmate or the authorities of the Administering State, the Ministry will send it to the governor. The application with the sentence and information concerning the inmate will be forwarded to the Ministry for consideration. There is no difference in the procedure depending on how the request is put forward. The Norwegian Authorities will normally not take the initiative for a transfer to another country without the explicit wish of the person concerned.

The Ministry will consider if the conditions of the Convention Article 3 a-d are met and will forward the application to the Administering State. If the Ministry find that the condition for a transfer is met, a formal request will be sent to the Administering State. Provided that the two States agree on a transfer, the Ministry will decide that a transfer shall take place and order the inmates release for a transfer. The prison governor will be asked in co-operation with the police to make the necessary arrangements for transport to the nearest airport where the inmate will be handed over to the representatives of the Administering State. (See Appendix I)

PLEASE NOTE that in Norway it is the Ministry that makes the decision and all correspondence should be sent here.

In describing the procedure, please include i.a. information on:

(c) The Ministry has been of the opinion that a transfer should take place in as many cases as possible to promote the social rehabilitation of the inmate. An application for a transfer would under normal circumstances only be denied if the punishment would be significantly reduced in the Administering State.

(d) The Ministry will demand enough information to assess if the term served will be significantly reduced if a transfer takes place, i.e. the normal rules for remission, conditional release, parole etc. We accept that special circumstances may occur during the execution of the sentence and that this may lead to an earlier release, but we need to be informed of the condition for such a release.

On the assumption that the administering State must be in a position eventually to decide on the early release of the prisoner, do you transmit to that State information on the behaviour of the prisoner while serving his sentence in your country? *No such information has been transmitted so far.*

III. WHEN YOUR COUNTRY IS THE ADMINISTERING STATE (Request for a person to be transferred to your country)

The Ministry handles the request. The procedure is the same regardless of where the request comes from. There will in practice be a delay if the request comes from the inmate directly to the Ministry, as it must be forwarded to the Sentencing State for initial handling. We recommend all inmates/ embassies/ families to send the request through the prison governor or the correct authority in the Sentencing State. The formal request from the Sentencing State is forwarded to the public prosecutor for a consideration of "double criminality" and the expected sentence for a similar act committed in Norway. The Ministry takes the final decision on a transfer and the procedure after this consultation.

There are no fixed criteria for refusal and so far we have not refused any request. The most probable cause for a refusal would be that non-Norwegian inmate requests a transfer and that we find that he/she does not have sufficient close ties with Norway to warrant a transfer.

After consultation with, and acceptance from, the Sentencing State, the Ministry will find a prison in which the sentenced person can serve the sentence and ask the public prosecutor to order the sentence to be executed or to start conversion proceedings. The police will handle the practicalities of the transfer. (See Appendix II).

Release will normally take place after serving 2/3 of the sentence (minus time served while remanded in custody). If special conditions are met, an inmate may be released after serving half the sentence. Practice is strict and extraordinary reasons are required.

Norway requires information on the sentence and time served while remanded in custody. It has been the position of the Norwegian Prison authorities that once transferred, you will be treated as any other inmate in Norway, regardless the conditions in the prisons in the Sentencing State.

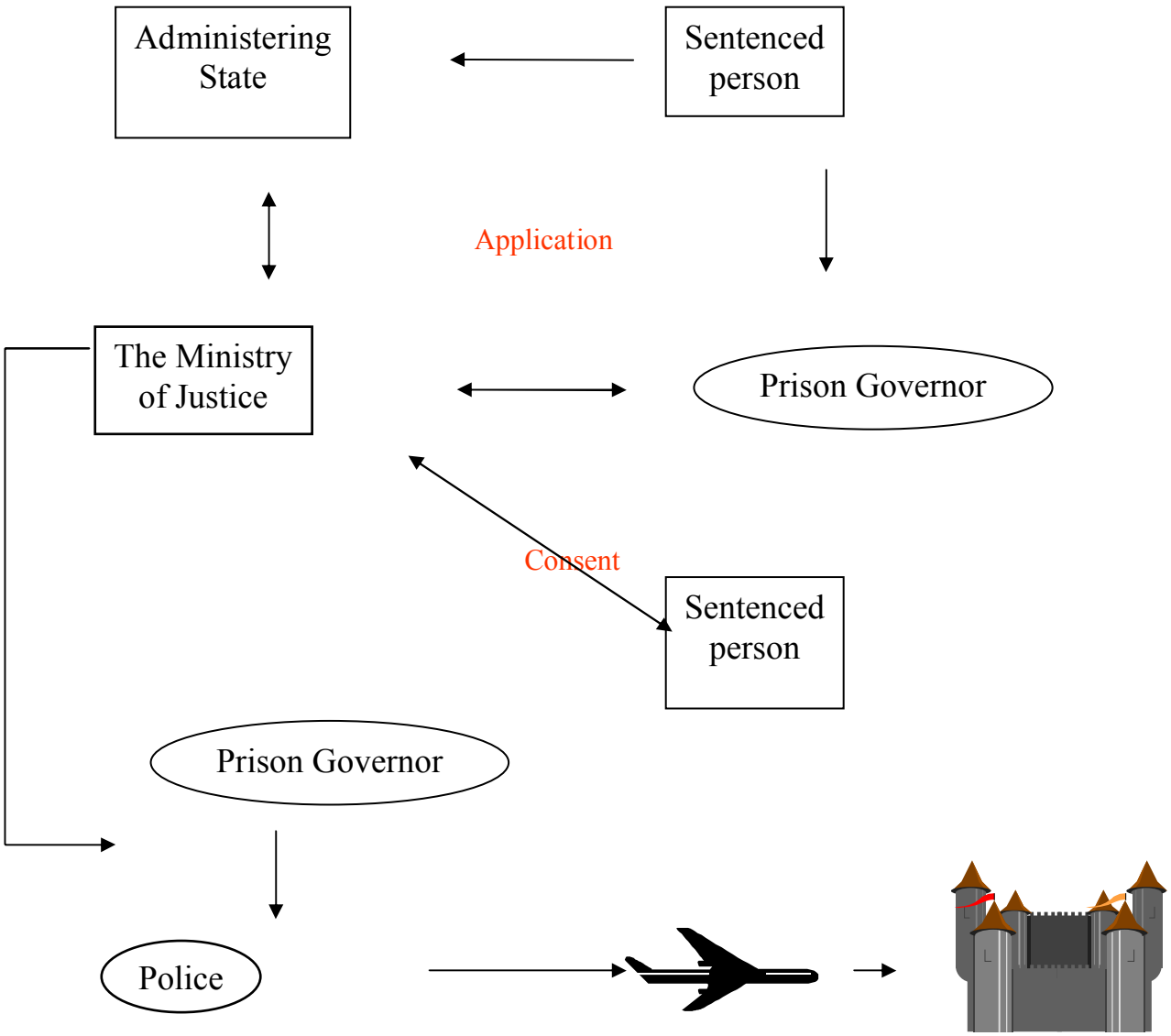
As long as the sentence pronounced in the Sentencing State is not of a longer duration than the legal maximum for a similar offence committed in Norway, it is the policy of the Norwegian authorities that the "continued enforcement procedure" will be followed.

IV. APPENDIX (mentally disturbed persons)

Please provide information on your law and practice concerning the transfer of mentally disturbed offenders to be included in the appendix to this Guide. In so doing, please have in mind document PC-OC (2000) 3. *The answer given in PC-OC 2000 (3) is still valid.*

DET KONGELIGE
JUSTIS- OG POLITIDEPARTEMENT
Roval Ministrv of Justice and the Police

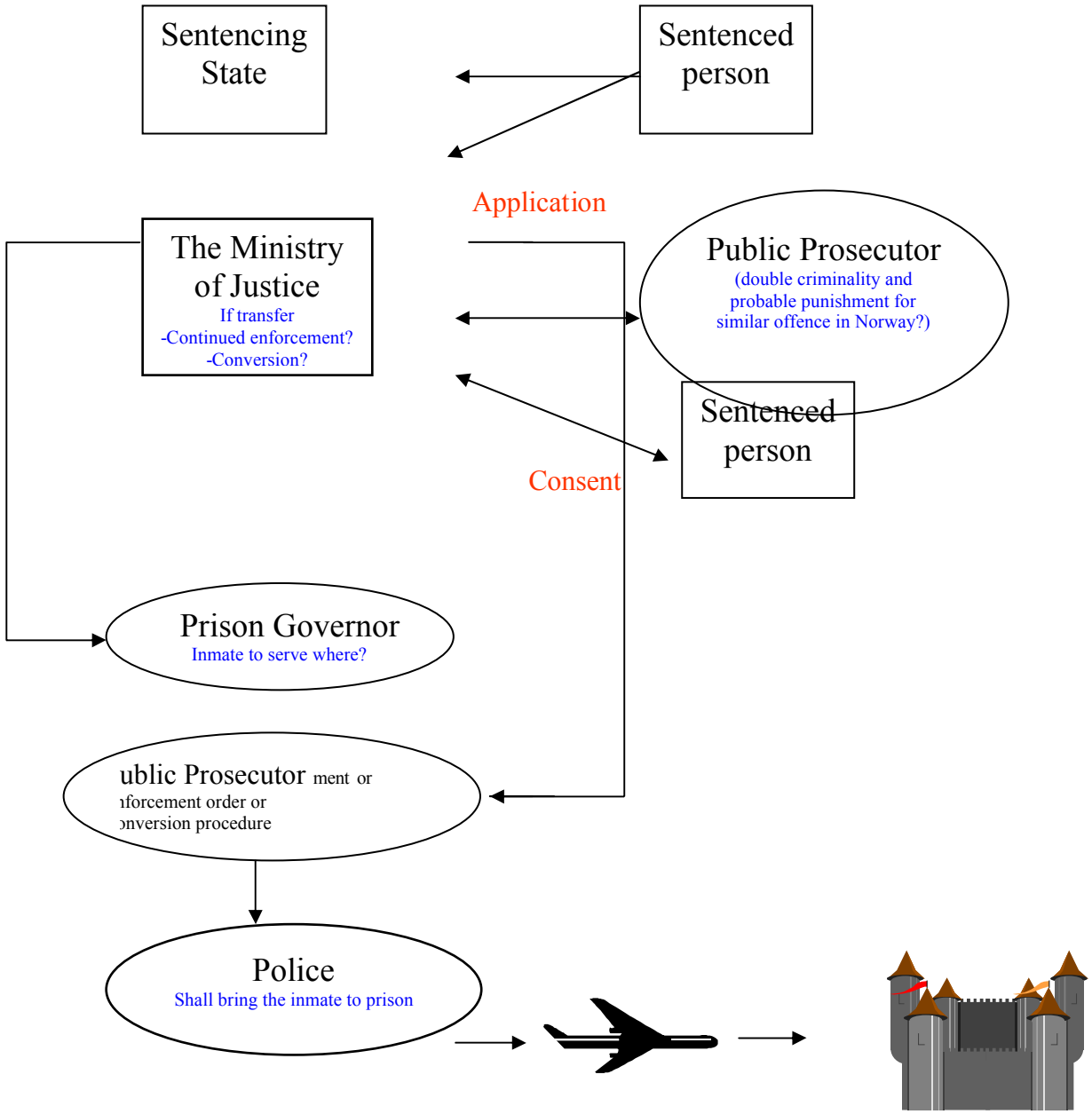
Transfer from Norway



Appendix I

DET KONGELIGE
JUSTIS- OG POLITIDEPARTEMENT

Royal Ministry of Justice and the Police



Appendix 2

Prison

POLAND

I. GENERAL INFORMATION

1. Has Poland enacted specific legislation to implement the Convention, or is there any general legislation which provides for the transfer of sentenced persons?

The Code of Criminal Procedure of 1997, as amended by the Act of 9 September 2000, deals in Chapter 66 (Arts. 608 – 611 f) [text in English attached] with the procedure for transferring sentenced persons. No specific legislation has been enacted on this subject.

2. Is transfer to and from Poland possible if there is no treaty?

The transfer of foreign nationals to their country of origin and the transfer to Poland of Polish nationals who have been sentenced abroad is possible even if there is no treaty. Such transfers are carried out under the provisions of the Code of Criminal Procedure of 1997 (as amended by the Act of 9 September 2000).

3. Is Poland party to any bilateral treaty currently in force which does not require the consent of the person concerned prior to their transfer?

Poland remains a party to the 1978 convention on the transfer of persons sentenced to imprisonment to their countries of origin (the so-called Berlin Convention, signed in Berlin on 19 May 1978).

4. Poland has also signed and ratified the Additional Protocol to the Convention on the Transfer of Sentenced Persons (under Articles 2.3 and 3.1 the consent of the sentenced person is not required).

5. What is the maximum length of pre-trial detention pending receipt of documents supporting a request made under Article 2 of the protocol to the Convention?

The issue of pre-trial detention pending receipt of documents supporting a request made under Article 2 of the protocol to the Convention has not yet been dealt with in Polish law. We therefore apply the general rules governing pre-trial detention,

as set out in the Polish Code of Criminal Procedure (Art. 263 – text in English attached). The length of the detention accordingly depends on the decision made by the competent court.

6. The system of enforcing custodial sentences in Poland.

The custodial sentences available in Poland are as follows (Art. 32 of the Criminal Code):

a. deprivation of liberty (from 1 month minimum to 15 years maximum – Art. 37 of the Criminal Code)
b. 25 years' imprisonment
c. life imprisonment

Release on parole is possible once the prisoner has served half the sentence. Persons sentenced to life imprisonment can be released after serving 25 years of their sentence (Art. 78 § 3 of the Criminal Code).

Sentenced persons can also apply for a pardon.

Life sentences cannot be handed down to persons who, at the time of committing the offence, were under the age of 18.

Under Art. 69 of the Penal Enforcement Code, custodial sentences can be served in the following institutions:

1) prisons for young offenders (Art. 115 § 10 of the Criminal Code: a "young offender" is someone who was under the age of 21 at the time of committing the criminal offence and under the age of 24 when tried at first instance),
2) institutions for first-time prisoners,
3) prisons for repeat offenders,
4) military prisons.

Under Article 70 § 1, the institutions listed above are divided into 3 categories:

1) closed prisons
2) semi-open prisons
3) open prisons.

§2 The institutions referred to in paragraph 1 vary according to the level of security and isolation employed, and according to the prisoners' rights and duties as regards freedom of movement inside and outside the prison.

Under Art. 84 § 1 of the Penal Enforcement Code, young offenders' prisons are intended for persons under the age of 24; in certain circumstances, however, persons over the age of 24 can be housed there as well.

Article 87 of the same code provides that female prisoners must serve their sentences separately from male prisoners.

II. WHERE POLAND IS THE SENTENCING STATE

8 – 12 The procedure

On receiving a request for a transfer (in cases where the request is made by the sentenced person), the Ministry of Justice (Department of International Co-operation and European Law):

1. forwards the request together with the information referred to in Art. 4 §§ 2 and 3 of the Convention to the administering state,
2. On receiving a reply from the administering state indicating that it may agree to the transfer, the Ministry forwards the documents specified in Art. 6 § 2,
3. At the same time, it asks for the relevant documents specified in Article 6.1, read in conjunction with Article 9.2.

Where a foreign national sentenced in Poland sends the request for a transfer directly to the authorities in their country of origin, the administering state is supposed to send the Polish Ministry of Justice notification of the request and a declaration indicating that the sentenced person has consented to the transfer, together with the documents specified in Article 6.1 of the Convention. In practice, the procedure tends to be shorter/faster if the sentenced person notifies their consent directly to their national authorities. Once all the information required under the Convention has been furnished, the procedure will in that case normally take less time.

The final decision, in any event, lies with the Minister of Justice. If the court has ruled that the transfer is admissible, the Minister of Justice may still oppose it and deny the request. If, on the other hand, the court has ruled that the transfer is inadmissible, the Minister is bound by the court's opinion and has no option but to deny the request. The transfer cannot then proceed.

11.c. The Minister of Justice will deny a request for transfer if: the court has ruled that the transfer is inadmissible or if the sentenced person has dual nationality, including Polish nationality, or if the length of the sentence to be served is too short.

12.d. When deciding whether to allow the transfer of a foreign national sentenced in Poland, the Polish courts consider two factors: the statutory treatment of the offence in the country of which the sentenced person is a national and the person's nationality. Occasionally, the court will ask for information about the rules governing remission or release on parole in the administering state.This is not standard practice, however. Normally, the court requires merely information about the law in the administering state and the document confirming the person's nationality.

Relevant law

Art. 610 § 1 Where a final sentence has been passed on a foreign national by a Polish court, the Minister of Justice may send the competent authorities in the country of which the sentenced person is a national a request for a transfer in order that the custodial sentence may be served in that country.

§ 2 Prior to sending the said request, the Minister of Justice shall apply to the competent court for a ruling on the admissibility of the transfer of the judgment for execution abroad.

§3 On receiving a request for the transfer of a foreign national who has been sentenced to imprisonment by a Polish court, the Minister of Justice shall apply to the competent court for a ruling on the admissibility of the transfer of the judgment for execution abroad.

Art. 611 § 3 In the cases referred to in Article 610 § 2 and § 3, the regional court within whose jurisdiction the relevant judgment was delivered shall be competent.

13. On the assumption that the administering state must be in a position to decide eventually on the early release of the prisoner, does Poland provide that state with information on the behaviour the prisoner exhibited while serving their sentence in Poland?

Where the administering state is called upon to decide whether to grant the prisoner early release, we provide information about the behaviour the prisoner exhibited while serving their sentence in Poland, at the request of the administering state.

III. WHERE POLAND IS THE ADMINISTERING STATE

14 – 18 The Department of International Co-operation and European Law has found that, in practice, transfer takes on average 9 to 12 months, and that the length of this procedure depends on how long it takes the sentencing state to send the relevant information.

The procedure followed in Poland normally begins when the Polish national sentenced abroad submits their request to be transferred to Poland. Polish nationals who have been sentenced abroad seldom send their request to the authorities in the sentencing state.

In most cases, the request is sent directly to the Polish Ministry of Justice. As soon as it reaches the Department of International Co-operation and European Law, we ask the authorities in the sentencing state to send us the documents specified in Art. 6.2 of the Convention. At the same time, we check to ensure that the person in question is actually a Polish national (ie do they have Polish citizenship?). Once the documents listed in Art. 6.2 and the document confirming that the person is a Polish national are

complete, the Department applies to the Regional Court for a ruling on the admissibility of the transfer.

In practice, it takes around 2 months for the court to make this ruling, which is then sent to the Department. In the event of a favourable ruling, the Department will prepare a summary of the case and submit it to the Minister of Justice, who can either allow the transfer or oppose it.

The Minister will deny a request for a transfer if:
- the court has ruled that the transfer is inadmissible

or
- the sentenced person has no family or social ties with Poland.

Requisite information in respect of the person's "penal position":
- how much of the sentence has already been served,
- the length of the pre-trial detention (the precise date of the arrest),
- the conditions governing remission.

19. The effects of the transfer for Poland, under Article 9:

a. Enforcement of the sentence is continued pursuant to an order made by the Regional Court within whose jurisdiction the sentenced person recently resided.The court makes its decision once the person has already been transferred;
b. We adapt the sentence within the meaning of Article 10.2 in cases where the sentencing state has entered reservations or made statements asking for the sentence to be continued, or has expressly requested this in its application;
c. sentences are converted pursuant to an order made by the Regional Court. The court converts the sentence after the sentenced person has been transferred.

Relevant law

Article 608 § 1 Where a Polish national is sentenced by a foreign court to a custodial penalty which is liable to enforcement, the Minister of Justice may send the competent authority a request to have the sentenced person transferred in order that they may serve their sentence in the Republic of Poland.

§ 3 Prior to sending the request referred to in paragraph 1, the Minister of Justice shall apply to the competent court for a ruling on the admissibility of the transfer of the judgment for execution in the Republic of Poland.

Art. 609 § 1 On receiving a request from a foreign state to execute a custodial sentence in respect of a Polish national, the Minister of Justice shall apply to the competent court for a ruling on the admissibility of the transfer of the judgment for execution in the Republic of Poland.

Art. 611 § 1 In the cases specified in Art. 609 § 1, the regional court within whose jurisdiction the sentenced person recently resided shall be competent.

Art. 611 a § 1. The court shall rule on the admissibility of the transfer of execution of the sentence at a hearing which may be attended by the sentenced person if they are present in the Republic of Poland and also by their defence counsel. If the sentenced person is not present in the Republic of Poland and does not have a defence counsel, the president of the competent court may appoint an ex officio counsel for the defence.

§ 2 If the information contained in the request is insufficient, the court may order additional information to be provided. The court in that case may adjourn the hearing.

§ 3 If the court has ruled the transfer of execution of the judgment to be inadmissible, the transfer may not proceed.

§ 5 The decision of the court shall be subject to appeal.

§ 6 If the proceedings concern the transfer of execution of a judgment, the court may order a preventive measure.

Art. 611 b § 1 The transfer of a judgment for execution in the Republic of Poland shall be inadmissible in the following cases:
1) the judgment is not final or is unenforceable;
2) execution of the judgment might impair the sovereignty, security or legal order of the Republic of Poland;

3) the sentenced person does not consent to the transfer;
5) the act referred to in the application does not constitute an offence under Polish law;
6) circumstances referred to in Art. 604 § 1 sub-paragraphs 2, 3 or 5 occur.

Art. 611 c § 1 Once execution of the judgment has been transferred, the court shall rule on the legal classification of the offence according to Polish law and on the sentence to be executed.

IV. APPENDIX (mentally disturbed persons)

There is no specific legislation on this subject.

The transfer of mentally disturbed persons who have been sentenced abroad is carried out in accordance with the Convention on the Transfer of Sentenced Persons (cf Art. 3.1 d of the Convention, according to which the sentenced person's legal representative must consent to the transfer if, in view of the person's mental condition, one of the two states considers such consent necessary).

As regards offenders held to be not responsible for their actions in view of their mental condition, who are not sentenced, the "transfer" can be effected under *ad hoc* arrangements.

Such individuals can also be transferred as mentally ill persons under an administrative procedure.

"Chapter 66

Taking over and transmitting judgements for execution

Article 608.

§ 1. In the case of a final sentencing of a Polish citizen by the court of a foreign state to the penalty of deprivation of liberty subject to execution, or a final adjudication in respect of a Polish citizen of a measure involving deprivation of liberty, the Minister of Justice may submit a request to the competent authority of that state for the taking over of the sentenced person or the person in respect of whom the measure has been adjudicated, in order for the penalty of deprivation of liberty, or the measure, to be executed in the Republic of Poland.

§ 2. In the case of a final sentencing by the court of a foreign state of a Polish citizen, a person who is permanently resident, possesses property or conducts professional activity in the territory of the Republic of Poland, to the penalty of fine, or in the case of adjudicating in respect of him a ban on occupying specific posts, practicing a specific profession or conducting a specific business activity, or a ban on driving motor vehicles, forfeiture, or a security measure which does not involve deprivation of liberty, the Minister of Justice may submit a request to the competent organ of that state for taking over the judgement to be executed in the Republic of Poland.

§ 3. Before submitting a request referred to in § 1 or § 2, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of taking over the judgement for execution in the territory of the Republic of Poland.

Article 609.

§ 1. In the case of receiving a request of a foreign state for execution in respect of a Polish citizen, or a person permanently resident in the territory of the Republic of Poland, of a finally adjudicated penalty of deprivation of liberty, or a security measure involving deprivation of liberty, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of taking over the judgment for execution in the territory of the Republic of Poland.

§ 2. In the case of receiving a request of a foreign state for execution in respect of a Polish citizen, a person who is permanently resident, possesses property or conducts professional activity in the Republic of Poland, of a finally adjudicated fine, a ban on occupying specific posts, practicing a specific profession or conducting a specific business activity, a ban on driving motor vehicles, forfeiture, or a security measure involving deprivation of liberty, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of taking over the judgement for execution in the Republic of Poland.

§ 3. If the judgement referred to in the request is not final, or the person covered by the request referred to in § 1 is not a Polish citizen, or does not permanently reside in the territory of the Republic of Poland, the Minister of Justice shall return the request.

Article 610.

§ 1. In the case of a final sentencing of a foreigner by the Polish court to the penalty of deprivation of liberty subject to execution, or adjudicating in respect of him a measure involving deprivation of liberty, the Minister of Justice may submit a request to the competent authority of the state of citizenship of the sentenced person or the person in respect of whom the measure was adjudicated, for taking him over in order for the penalty to be served or the measure enforced.

§ 2. Before submitting a request referred to in § 1, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of transmitting the judgement for execution abroad.

§ 3. In the case of receiving a request of a foreign state for taking over a foreigner sentenced by the Polish court to the penalty of deprivation of liberty subject to execution, or in respect of whom a measure involving deprivation of liberty has been validly adjudicated, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of transmitting the judgement for execution abroad.

§ 4. In the case of a final sentencing by the Polish court of a person who is permanently resident abroad, or has property or conducts professional activity abroad, to a fine, or in the case of a final adjudication in respect of him of a ban on occupying specific posts, practicing a specific profession or conducting a specific business activity, a ban on driving motor vehicles, forfeiture, or a security measure which does not involve deprivation of liberty, the court competent in respect of execution of the penalty or the measure, may submit a request, through the Minister of Justice, to the competent authority of the state in whose territory the sentenced person or the person in respect of whom the measure was adjudicated permanently resides, possesses property or conducts activity, for execution of the judgement.

§ 5. In the case of receiving a request of a foreign state for taking over for execution of a final sentencing by the Polish court of a person who is permanently resident, possesses property or conducts professional activity in that state, to a fine, or in the case of final adjudication in respect of him of a ban on occupying a specific post, a ban on practicing a specific profession or conducting a specific business activity, a ban on driving motor vehicles, forfeiture, or a security measure which does not involve deprivation of liberty, the Minister of Justice shall apply to the competent court for rendering a decision on admissibility of transmitting the judgement for execution abroad.

Article 611.

§ 1. The court competent to examine cases specified in Article 608 § 3, in connection with § 1, and in Article 609 § 1shall be the district court in the territory of whose competence the sentenced person has recently been permanently or temporarily resident.

§ 2. The court competent to examine cases specified in Article 608 § 2, in connection with § 2, and in Article 610 § 5 shall be the district court in the territory of whose competence the sentenced person has recently been permanently or temporarily resident, and if this has not been established, where the executable property is located, or where the sentenced person conducts the banned activity.

§ 3. The court competent to examine cases specified in Article 610 § 2 and 3 shall be the district court in the territory of whose competence the judgement referred to in the request was rendered.

§ 4. If the competence cannot be established according to the principles specified in § 1, the case shall be examined by the District Court in Warsaw.

§ 5. If the competence cannot be established according to the principles specified in § 2, the case shall be examined by the court competent in respect of the Śródmieście District of the Centrum Borough.

Article 611a.

§ 1. The court shall examine the question of admissibility of taking over or transmitting a judgement for execution at a session which may be attended by the sentenced person if he stays in the territory of the Republic of Poland, as well as by the sentenced person's defense counsel, if he appears at it. If a sentenced person who does not stay in the territory of the Republic of Poland does not have a defense counsel, the president of the court competent to examine the case may designate an ex officio counsel for the defense.

§ 2. If the data included in the request is insufficient, the court may order that it be supplemented. For this purpose the court may adjourn the examination of the case.

§ 3. If the court has rendered a judgement on inadmissibility of taking over or transmitting a judgement for execution, the taking over or transmission may not be effected.

§ 4. In the case specified in Article 610 § 4 the court shall render an order that a request be submitted to the authority of a foreign state for taking over the judgement for execution.

§ 5. The order of the court on taking over or transmitting a judgement for execution is subject to complaint.

§ 6. If the proceedings concern taking over a judgement for execution, the court may adjudicate a preventive measure.

Article 611b.

§ 1. Taking over a judgement for execution in the Republic of Poland shall be inadmissible if:

- the judgement is not final, or is not subject to execution,
- its execution might impair sovereignty, security or legal order of the Republic of Poland,
- the person sentenced to the penalty of deprivation of liberty or a person in respect of whom a measure involving deprivation of liberty was adjudicated, does not consent to the taking over,
- the person sentenced to a fine or in respect of whom forfeiture has been adjudicated, not being permanently resident in the territory of the Republic of Poland, does not possess property in its territory,
- the act indicated in the request does not constitute a prohibited act under the Polish law,
- circumstances referred to in Article 604 § 1 points 2, 3 and 5 occur.

§ 2. The transmission of a judgement for execution in a foreign state shall be inadmissible if:

- the judgement is not final, or is not subject to execution,
- the person sentenced to the penalty of deprivation of liberty, or a person in respect of whom a measure involving deprivation of liberty has been adjudicated, does not consent to the transmission,
- the person sentenced to the penalty of deprivation of liberty or a person in respect of whom a measure involving deprivation of liberty was adjudicated, is a person specified in Article 604 § 1 subparagraph 1,
- circumstances referred to in Article 604 § 1 subparagraphs 1 and 5 occur.

Article 611c.

§ 1. After taking over a judgment for execution, the court shall specify the legal qualification of the act according to the Polish law, as well as the penalty and the measure subject to execution.

§ 2. When specifying the penalty or the measure subject to execution, the court shall apply the provision of Article 114 § 4 of the Penal Code accordingly.

§ 3. When specifying the amount of fine, the court shall convert the fine adjudicated as a fixed sum or a daily rate denominated in a foreign currency, into the national currency according to the average exchange rate specified by the National Bank of Poland as of the date of rendering the judgement in the foreign state. If the amount of fine has been specified as a fixed sum, then the quotient of the daily rate and the number of daily rates may not exceed the amount so converted.

§ 4. The court shall examine the case at a session. The provisions of Article 352 and 611a § 1 and 5 shall apply accordingly.

Article 611d.

§ 1. If during the proceedings circumstances occur which justify the rendering of a judgement to furnish security on property due to imminent forfeiture of objects or property which constitute financial benefits from the commission of a crime, and such objects or constituent elements of this property are located in the territory of a foreign state, then the court, and in a pre-trial proceeding the prosecutor, may apply, through the Minister of Justice, to the competent authority of this state for furnishing security on the objects or property threatened with forfeiture.

§ 2. If an authority of a foreign state applies for execution of a final judgement on security on a property, where the property subject to security is located in the territory of the Republic of Poland, the competent authority to execute the judgement shall be the district court or the prosecutor in whose district of competence the property is located.

Article 611e.

If a person sentenced with a final sentence or in respect of whom a final measure has been adjudicated leaves the territory of the sentencing state and arrives in the territory of the state of his citizenship before serving the adjudicated penalty, or before the measure adjudicated against him is executed, the provisions of this chapter shall apply accordingly. The provisions of Article 611b § 1, subparagraph 3, and § 2, subparagraph 2, shall not apply.

Article 611f.

The provisions of this chapter shall apply accordingly to taking over and transmitting for execution judgements on fiscal penalties".

PORTUGAL

1. GENERAL INFORMATION

1. Portugal has not enacted specific legislation in order to implement the Convention. Even before it ratified the Convention transfers of sentenced persons were already permissible under the general legislation governing all forms of judicial co-operation in criminal matters, Legislative Decree No. 43/91 of 22 January 1991, which was, however, repealed by Act No. 144/99 of 31 August 1999. With regard to transfers, sections 114 to 125 of Act No. 144/99 establish rules similar to those laid down in the Convention, on which Legislative Decree No. 43/91 was moreover based.

2. Under Act No. 144/99 transfers to and/or from Portugal are not conditional on the existence of a treaty. The sole requirement is that the other State concerned should agree to the transfer. Where there is no treaty, Portugal may, in accordance with section 4 of Act No. 144/99, require guarantees of reciprocity from the other State. The Act makes reciprocity a general principle, applicable to all forms of judicial co-operation in criminal matters.

3. Portugal is not party to any bilateral treaty obviating the need for the sentenced person's consent to being transferred.

4. In applying the Convention, Portugal draws a distinction between the objective of social rehabilitation of sentenced persons and that of administration of justice through two separate mechanisms: where Portugal is the sentencing State, the administering State is asked for information on enforcement of the sentence, in accordance with Article 15 of the Convention and section 124 of Act No. 144/99; where Portugal is the administering State, the foreign court's decision is subject to review and, after the transfer has taken place, the sentenced person is assigned to a prison as near as possible to that person's last address in Portugal or to his or her family's current home.

5. Portugal has not yet ratified the protocol to the Convention on the Transfer of Sentenced Persons.

6. Under Articles 40 et seq. of the Criminal Code, the system of enforcing custodial sentences is based on the following rules:

Under no circumstances can the sentence be excessively severe in relation to the offender's degree of guilt.

The Criminal Code prescribes minimum and maximum limits for sentences.

In principle, a prison sentence cannot last more than 20 years or less than 1 month. Exceptionally, in cases specifically governed by law, the maximum term may be extended to 25 years.

Life sentences and the death penalty are prohibited.

In determining the length of the sentence, the court must take into consideration the offender's degree of guilt, prevention requirements and all aggravating or mitigating circumstances, including the way in which the offence was committed, the seriousness of its consequences, the criminal record of the person concerned, and so on.

A court may decide to grant exceptional mitigation of the prescribed penalty, reducing it by 1/3 in the case of the maximum sentence or at least 1/5 in that of the minimum sentence.

Exceptional mitigation is compulsory by law in the case of young offenders between the ages of 18 and 21.

Under the Portuguese system the following custodial sentences can be imposed: traditional imprisonment, imprisonment at weekends, and semi-detention, which enables the person concerned to leave prison for the sole purpose of continuing his or her education or occupation. These last two forms of imprisonment are available only where the sentence is for less than three months. They are therefore, in principle, of no relevance to the Convention.

As to enforcement, the following criteria are applied in accordance with Articles 61 to 64 of the Criminal Code:

After having served half, 2/3 or 5/6 of a sentence (the fraction depends on the length of the sentence), a prisoner is granted conditional release. On no account can a prisoner be released if he or she has not served at least six months in prison.

The authorities initiate the conditional release procedure of their own motion where the sentence exceeds six months, but the sentenced person must consent to being released.

(The relevant articles of the Criminal Code are appended hereto.)

II. WHEN PORTUGAL IS THE SENTENCING STATE

Transfer of foreign nationals sentenced in Portugal to their home country

The procedure is as follows:

1. Receipt of the request to transfer the sentenced person.

Foreign nationals submit their requests to a variety of institutions: the courts, the Directorate General of Prisons, the Ministry of Justice, the Ministry of Foreign Affairs, which then forward these requests to the Principal Public Prosecutor's Office. It is that office which prepares the file relating to the transfer.

2. If a request received from a sentenced person makes no reference to the proceedings which resulted in the prison sentence, the Directorate General of Prisons must be asked for information on the court(s) which passed sentence, the case-file number(s) and whether other proceedings are pending against the person concerned.

3. After obtaining this information, the court which passed sentence is asked for the "certificate of judgment", details of how the prison sentence was calculated and information on any other proceedings pending against the person concerned.

4. The judgment, the calculation of the sentence, the sentenced person's request, the relevant legislation and any other documents of importance to the transfer are then translated into the language of the administering State, or any other language which it accepts.

5. Except where the sentenced person has appealed, in which case it is necessary to wait for the final judgment on appeal, the transfer request is sent to the administering State with the following documents:

a) the sentenced person's request, with his or her personal particulars and address, if any, in the administering State. If the transfer request was submitted by the administering State, a declaration indicating the sentenced person's consent to the transfer must be provided;

b) certified copies of the judgment and of the calculation of the sentence, with translations of these documents;

c) a copy of the law on which the sentence is based. At this stage the administering State is requested to provide the documents mentioned in Article 6.1 of the Convention and the relevant transfer authorisation.

6. After the documents mentioned in Article 6.1 of the Convention and the administering State's authorisation have been received, the file is transmitted to the office of the Minister for Justice to obtain the agreement to the transfer.

7. The Minister for Justice's order authorising the transfer is sent, inter alia, to the Interpol National Central Bureau, the Directorate General of Prisons and the administering State.

8. When these formalities have been carried out, the file is sent to the relevant Court of Appeal (having jurisdiction for the prison where the sentenced person is being held), to have that court confirm the transfer order.

9. Once the Court of Appeal has given a final decision, the confirmation is sent immediately to:

- the person concerned,
- the administering State,
- the Interpol National Central Bureau,
- the court of first instance having jurisdiction for the prison where the person concerned is being held,
- the Directorate General of Prisons,
- the prison where the sentence is being served,
- the office of the Minister for Justice.

10. The requesting party is systematically kept informed of the action taken at each stage and sub-stage in the transfer procedure.

11. The sentenced person is handed over to the authorities of the administering State by the Portuguese police and prison authorities. The Principal Public Prosecutor's Office is informed of the date and place of the transfer.

12.a. Whether Portugal takes the initiative or acts in response to a request from the administering State or the sentenced person makes no difference to the procedure itself.

12.b. The authorities taking part in the procedure are the Principal Public Prosecutor's Office, which prepares the transfer file, the Minister for Justice, who authorises the transfer, the Court of Appeal, which confirms that authorisation, and the police and prison authorities responsible for handing over the sentenced person. The final decision lies with the Court of Appeal.
The sentenced person is currently required to appear in the Court of Appeal before it takes its decision, so as to express his or her consent directly in person.

12.c. The principal ground for refusing requests under the Convention is that proceedings are still pending in Portugal against the person concerned. In such circumstances, the transfer request must wait until the proceedings are discontinued or a final judgment is pronounced.

12.d As the sentencing State, Portugal normally does not require information concerning early release in the administering State, to determine whether a transfer is advisable.

13. At the request of the administering State, with a view to an eventual decision on the early release of the sentenced person, the Portuguese authorities provide that State with information on the person's conduct while being detained in Portugal.

III. WHEN PORTUGAL IS THE ADMINISTERING STATE

1. The transfer request received either through the Ministry of Justice or directly by the Principal Public Prosecutor's Office is registered by that office, which deals with the initial stage in the procedure.

2. After the request has been registered, its receipt is acknowledged and, in view of the condition laid down in Article 3.1 a) of the Convention, confirmation of the sentenced person's nationality is requested from the central records office.

3. Once it has been confirmed that the sentenced person is a Portuguese national, the following documents, mentioned in Article 6.2 of the Convention, are requested from the sentencing State: a certified copy of the judgment and the law on which it is based; a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission and any other factor relevant to the enforcement of the sentence; a declaration containing the consent to the transfer, where applicable.

In view of the declaration made by Portugal, these documents must be supplied in Portuguese or in French.

4. After these documents have been received, it is ensured that the conditions set out in Article 3 of the Convention are fulfilled, a brief report is drawn up, and the file is sent to the office of the Minister for Justice for authorisation of the transfer.

5. The transfer authorisation is sent to the sentencing State. At the same time, the transfer authorisation issued by that State's authorities is requested, and the documents mentioned in Article 6.1 of the Convention are supplied: a document indicating that the sentenced person is a Portuguese national; a copy of the Portuguese legislation providing that the acts or omissions on account of which the sentence has been imposed constitute a criminal offence under Portuguese law; a copy of the provisions of the Criminal Code and the Code of Criminal Procedure dealing with enforcement of sentences and conditional release; and a declaration indicating the procedure to be followed, in accordance with Article 9.2 of the Convention.

6. As soon as the sentencing State has supplied the transfer authorisation, the file is sent to the relevant Court of Appeal, so that it can review and confirm the sentence in accordance with Article 9.1 a) of the Convention.

7. When the Court of Appeal's decision becomes final, the sentencing State, the office of the Minister for Justice, the Interpol National Central Bureau, and the Directorate General of Prisons are informed without delay so that the sentenced person's transfer can take place as soon as possible.

8. As required under section 118.5 of Act No. 144/99 and Article 4.5 of the Convention, the requesting party is systematically kept informed of any action taken.

9. The sentenced person's transfer is arranged and agreed upon between the Portuguese police and prison authorities and the authorities of the sentencing State. The Portuguese police and prison authorities inform the Principal Public Prosecutor's Office of the place, date and practical aspects of the transfer.

10.a Whether Portugal takes the initiative or acts in response to a request from the sentencing State or the sentenced person makes no difference to the procedure itself. The availability of accurate personal data concerning the sentenced person (surname, forenames, parents' surnames and forenames, date and place of birth) always makes it easier to verify his or her nationality.

10.b The authorities taking part in the procedure are the Principal Public Prosecutor's Office, which prepares the transfer file, the Minister for Justice, who authorises the transfer, the Court of Appeal, which confirms that authorisation, and the police and prison authorities responsible for the transfer of the sentenced person. The final decision lies with the Court of Appeal.

10.c Transfer requests are most frequently refused on the ground that the person concerned is not a Portuguese national.

10.d The information in respect of the "penal situation" of the person concerned, to be supplied by the sentencing State, is that provided for in Article 6.2 b) of the Convention.

11. On ratifying the Convention, Portugal made a number of declarations, three of which directly concern the effect of the transfer to Portugal. A foreign judgment will be enforced on the basis of a judgment by a Portuguese court, declaring it enforceable, after its prior review and confirmation. Where Portugal is the administering State, it will apply the procedure described in Article 9.1 a) of the Convention. In cases where a foreign sentence must be adapted, Portugal will - depending on the circumstances - convert the foreign sentence to bring it into line with Portuguese law or reduce the length of the sentence where the prison term imposed exceeds the maximum permissible under Portuguese law.

12. We have no experience of transferring persons not held criminally responsible for an offence on account of their mental condition.

In the event of absence of criminal responsibility, Articles 91 to 97 of the Criminal Code provide for the application of security measures. These measures entail detaining the person concerned in the psychiatric wing of a prison or in a mental health institution for the purpose of treatment, given the public danger that he or she represents.

Some prisons have special psychiatric wings where such persons can be detained.

A court which orders a security measure in respect of a person suffering from a mental disorder periodically reviews the file and monitors developments in the person' state of health on the basis of medical reports.

Lifting of the court order depends on how the person's condition evolves.

(The provisions of the Criminal Code concerning offenders suffering from a mental disorder are appended.)

From a legal standpoint, there is no impediment to the transfer of a person suffering from a mental disorder.

A practical problem is raised, however, where the lack of facilities makes it difficult to place a person in a specialist institution.

SLOVAKIA

I. GENERAL INFORMATION

Slovakia has not enacted specific legislation to implement the Convention. However, at the time of ratification by the Czech and Slovak Federal Republic, the Code of Criminal Procedure has been slightly amended, even though the actual reason for the amendment was not directly connected with the ratification of the Convention.

The possibility of transfer of a sentenced person is, however, bound to an existence of a treaty obligation. Transfer is not possible in absence of such a treaty. Slovakia has specific treaties with the Czech Republic (as an extension to the said Convention allowing also transfer when the person is already on the territory of the administering State), Austria (also allowing for transfer when the person is already on the territory of the administering State) and former Federal Socialist Republic of Yugoslavia (and consequently with all the successor States).

The consent of the sentenced person is always required.

When considering application of Convention, the main aim is the social rehabilitation of sentenced persons. Therefore primarily sentenced person which have their habitual residence in Slovakia are transferred.

Slovakia has not ratified the Additional Protocol to the Convention and no provisional arrest pending the arrival of documents supporting a request may be ordered.

System of enforcement of custodial sentences

The enforcement is ordered by the court and the sentence is then enforced by the Corps of Court and Prison Guards (subordinate body to the Ministry of Justice) . The sentences are enforced in penitentiary facilities („correctional and educational institutions“) with three degrees of security, separately by men and women, and separately by adults and juveniles. The court in its judgement on merits, besides the length of the sentence , decides also upon the degree of security. The decision on the actual placement of the sentenced in a certain penitentiary facility having the ordered degree of security is then taken by the Headquarters of the Corps taking into account the social rehabilitation of the prisoner (vicinity to his/her place of residence, etc.). Subject

to their behaviour while serving sentence, the sentenced can be moved from a higher security to lower security facility and vice versa based on a decision of the court in each individual case and circumstances.

II. WHEN SLOVAKIA IS THE SENTENCING STATE

Slovakia as a sentencing state only seldom takes own initiative to remove a foreign prisoner from its territory . The Corps are provided with the Information on the Convention provided by the Council of Europe from Member States (on the basis of the Standard text) with the purpose of informing the sentenced foreigners of the possibility for them to be transferred.

The procedure does not substantially change nor takes longer whoever is the initiator of the transfer. When the Ministry of Justice receives a request either by a foreign prisoner in Slovakia to be transferred to his/her home country or by the administering State, it collects the necessary documents from the court and the Corps of Court and Prison Guards, including the consent of the prisoner in case where he/she is not the initiator, and takes a decision . The decision is based solely on the grounds of applicability: the transfer is not approved if the Convention cannot be applied to that person (e.g. the person is not a "national" of the administering State), or if circumstances do not favour transfer ("unfinished business" in Slovakia). The Ministry of Justice then contacts the Ministry of Justice of the administering State asking for the approval of the transfer, or informing it about its approval if the request was made by the administering state. When necessary approvals are given, the person is surrendered to the foreign authorities by the Corps at an agreed place and time.

Since the policy of the Slovak Republic is to follow the aim for social rehabilitation, the conditions for early discharge of a prisoner in the administering State do not have a bearing on the decision (consent) taken by Slovakia and thus information on the applicable rules in this respect is not required by Slovakia.

Slovakia does not usually transmit on its own initiative information on the behaviour of the prisoner while serving sentence to the administering state when dealing with the issue of transfer. But supplies such an information when requested by the administering State.

III. WHEN SLOVAKIA IS THE ADMINISTERING STATE

When Slovakia is the administering State , the procedure does not substantially change whoever is the initiator of the transfer.

The length of the procedure, however, changes. The shortest is the procedure when the request is made by the sentencing State, because in that situation all the necessary documents are presented. When the request is made by the sentenced person and/or Slovakia is making its request to the sentencing state usually no full set of necessary documents (in particular the full judgement itself) are available and must be

requested from the sentencing State before any consent by the Ministry of Justice can be given (a foreign decision has to proclaimed enforceable by the Supreme Court of the Slovak Republic before the Ministry of Justice can take any initiative as to the transfer).

The Ministry of Justice has adopted internal rules containing reasons for refusal. The typical grounds for refusal are: no habitual residence in Slovakia and/or no family or social ties.

In respect of the penal situation of the sentenced, Slovakia requires information on the length of pre-trial detention and on how much of the sentence has already been served in the sentencing State.

When enforcing a decision of a foreign court, Slovakia converts the sentence (Art. 11 of the Convention). After the decision of the Supreme Court on the recognition of a foreign judgement (and after the sentenced person has been transferred to Slovakia), the competent court of first instance orders a hearing, where the sentenced has to be represented, and upon the hearing renders a judgement converting the foreign sentence.

IV. Transfer of mentally disturbed persons

Slovakia has, up to date, no practical experience with the transfer of mentally disturbed sentenced person. Neither as a sentencing nor as an administering State under the Convention.

In the lack of a precedent (i.e. recognition of a foreign measure by the Supreme Court) to that effect, it can only be presumed that transfer under the Convention to Slovakia would be possible if it involved persons who committed a crime and were, because of their mental capacity, not held responsible for their action, or became ill after having committed such crime and were sentenced by the court to a measure depriving them of their liberty.

However, if the measure imposed by a foreign court would be other than a „protective treatment“[1] known under the Slovak law, the Slovak court would have to turn the imposed sanction into „protective treatment“ (in application of Art. 9.1 b/ and 11 of the Convention).

If the measure under administrative law were ordered by an administrative authority. In such a case the Convention itself would not apply (Art. 1.a. states „ordered by a court“).

If, however, the measure were ordered by the court in application of administrative law (if such procedure is possible in certain countries; it is not possible in Slovakia) it would be an interesting question: the Convention would, in principle, apply, but Slovakia would be unable, under the present wording of its domestic law, enforce such a measure. This is, however, again only a hypothetical in lack of a ruling by the Supreme court to that effect. The draft Criminal Code, under preparation, might solve the problem, because it is intended to specify only the requirement of „ordered by a court“ (as in Art. 1.a. of the Convention), but not the character of the proceeding (or applicable law) where the order was given.

---

[1] The situation under the valid Slovak law is as follows:

1.1. If the offender at the time of commission of the offence , due to a mental disturbance, could not assess the danger for the society of his action or could not control his action, ***he is not held criminally liable***.

1.2. If the mental capacity of the offender is diminished, the court may refrain from imposing a sanction other than a protective measure which is called „protective treatment“ (i.e. placement under an in-patient or out-patient medical supervision).

1.3. In cases under 1.1. the court **must place** the person into „protective treatment“ if his free movement presents a threat (to himself or to others). In cases of diminished mental capacity (1.2.) the court **may place** the person into „protective treatment“ if his free movement is dangerous.

1.4. Protective treatment may be imposed as an independent criminal sanction or as an additional sanction to a „regular“ criminal sanction or **instead** of a „regular“ criminal sanction (when the court refrains from imposing such sanction).

1.5. If the offender became mentally ill **after** the commission of the crime and the authorities (the investigator or the court, depending on the stage of criminal proceedings) will **stay** the proceedings.
If the person became mentally ill during the service of prison sentence, the person would be placed into a (medically) specialised prison and this circumstance may be a ground for the court to suspend or even terminate the prison sentence.

1.6. **Only court can order a protective measure (protective treatment)** as a sanction in reaction to the commission of a crime by a mentally ill person.

SLOVENIA

The multilateral Convention on the Transfer of Convicted Persons (ETS 112) signed in Strasbourg on 21 March 1983 came into force in the Republic of Slovenia on 1 January 1994. Slovenia did not enter any reservations during its accession to the Convention.

In ratifying the above Convention Slovenia did not have to adopt new or modify existing legislation, the provisions of the Convention being in accordance with Sloven law.

Since coming into force, the Convention has been used in the Republic of Slovenia as the basis for carrying out the transfer of the execution of a sentence in six cases (it should be recalled that Slovenia has acceded to five bilateral conventions regulating the issue of implementing foreign penal judgments with Austria, Turkey, Denmark, the Czech Republic and Slovakia, and observes these bilateral conventions in relation to these countries).

To date, in the implementation of the Convention, there have been no cases of convicted persons for whom it would be necessary, in accordance with point d) of the first paragraph of Article 2 of the Convention, to obtain consent from their legal representative for a transfer of the execution of a sentence on the grounds of their age or mental or physical state.

The Republic of Slovenia acceded to or signed the above Convention and other conventions regulating the implementation of foreign penal judgments primarily for the purpose of achieving a higher level of social rehabilitation of these persons by enabling them to serve their sentence in their native environment. Slovenia, in carrying out sentences of imprisonment and other forms of sentence, pays particular attention to the principles of limiting repression, encouraging the social rehabilitation of convicts and observing their human rights.

A request for the transfer of a convicted person may be submitted in the country in which the sentence was pronounced, or in the country in which the convict serves the sentence.

When a foreign person is convicted in a Sloven court and submits a request to serve his/her sentence in the country of which he is a citizen, the country where he is to serve the sentence must at a request of the Sloven court send appropriate documentation (a document or statement confirming that the convict is a citizen of that country : a copy of

legal provisions which demonstrate that the criminal offences on which the conviction was based in the country where the sentence was pronounced are also considered criminal offences in the country in which the convict is to serve the sentence) and, once the procedure is completed, send a copy of the decree by which the sanction pronounced in the country in which the sentence was passed is replaced by a sanction envisaged for that act in the legislation of the country submitting the request.

In the event of a Sloven citizen being convicted in a foreign court and wishing to serve his/her sentence in the Republic of Slovenia, the procedure for transferring the execution of the sentence is carried out in accordance with the provisions of the Convention and the Law on Criminal Procedure.

In accordance with the Law on Criminal Procedure, Sloven courts may grant a request by a foreign organ for transfer of the execution of a sentence to a foreign court only if so determined by an international agreement or if reciprocity applies.

The conditions for the transfer of the execution of a sentence are set out in the above multilateral Convention and are consistently observed by the competent Sloven organs both in cases where a request is submitted to Slovenia for the transfer of the execution of a sentence, i.e. when a foreign person is convicted in a Sloven court, and where Slovenia makes a request for the transfer of the execution of a sentence when a Sloven citizen has been convicted in a foreign court. In both cases matters are resolved on a priority basis.

Implementation of the procedure for transfer of convicted persons in the Republic of Slovenia is the responsibility of the Ministry of Justice, the competent court and the Ministry of Internal Affairs.

The decision as to whether a foreign sentence should be executed is passed by the competent court, which executes the legal sentence pronounced by the foreign court in the form of a sanction in such a way that the competent court in the Republic of Slovenia pronounces a sanction according to Slovenian penal legislation. In the sentence the court records the type of sentence and the name of the foreign court, and pronounces the sentence. In the explanation of the sentence the court cites the reasons that were observed in the pronouncement of the sentence. The european Convention determines that the court may not pronounce a harsher sentence (sanction) than that pronounced by a foreign court. A complaint may be lodged by the Public Prosecutor, the convicted person and his/her legal representative.

A request or demand for the transfer of the execution of a sentence may be rejected if certain conditions set out in the Convention are not fulfilled :

- if the convicted person is not a citizen of the country in which he/she asked to serve the sentence ;

- if the sentence is not legal ;

- if the sentence to be served by the convicted person is not longer than six months, starting from the day on which the demand for the transfer was received ;

- if the convicted person does not give his/her consent for the transfer ;

- if the criminal offence committed by the convicted person is also a criminal offence in the country which requested for a transfer.

In the procedure for the transfer of the execution of a sentence, the Republic of Slovenia has so far not requested additional documentation to that specified in the European Convention from countries submitting requests, nor has it demanded information different to that determined by the Convention. In cases where the sentence was pronounced in Slovenia all provisions of the Convention relevant to the procedure for sending documentation have been observed.

Where the country in which the convicted person is to serve the sentence assumes custody of that person, execution of the sentence is halted in the country in which the sentence was pronounced. For the serving of the sentence the legislation of the country in which the convicted person serves the sentence is applied, that country being the only country competent to undertake all relevant measures. In accordance with the provisions of the Convention, the Republic of Slovenia sends to the country where the sentence was pronounced information on the execution of the sentence (the course of the execution of the sentence, the escape of the convicted person before he/she has served out the sentence, and other forms of information on request).

SPAIN

I. GENERAL INFORMATION

1. Existence of specific legislation to implement the Convention on the transfer of sentenced persons.

There is no specific legislation.

2. Procedures specifically applying, by reason of their mental condition, to certain sentenced persons.

The general rules are applied in such cases. The general register of penal establishments lists psychiatric institutions which can provide special treatment for persons "not criminally responsible".

3. Relative priority given to social rehabilitation, deterrence, prevention and other crime policy aims.

In Spain, the main aim considered when applying the Convention is social rehabilitation, in accordance with the Constitution and the law on prisons.

4. Description of the Spanish system for enforcement of custodial sentences:

The system is detailed in Section 72 of the Prisons Act, which states that:

a. Custodial sentences are to be enforced, in accordance with the Criminal Code, on the basis of graded penalties, adapted to the nature of the offence, the lowest being conditional release.

b. Second and third degree penalties are to be executed in ordinary and semi-detention establishments respectively. Under Section 72 (1), persons sentenced to first degree penalties are to be transferred to closed establishments.

c. A prisoner may at once be placed at the higher level, without necessarily passing through the lower levels first, if his observed conduct and classification warrant this.

e. No prisoner may be held at a lower level, if his progress merits a higher one.

II. WHEN SPAIN IS THE SENTENCING STATE

5. Description of procedure followed by Spain.

This question is answered below.

6. Whether the procedure changes, or takes longer in practice, depending on whether Spain takes the initiative or acts upon the request of either the administering state or the sentenced person.

The procedure is the same as that set out below, but the person concerned must apply to the sentencing state.

7. Which authorities take part in the procedure and which authority ultimately takes the final decision?

The following authorities take part in the procedure: the Directorate-General for Codification and International Legal Co-operation, the courts giving judgment and the prison authorities. The Council of Ministers takes the final decision.

8. Typical reasons for refusal, if any.

There are none.

9. What kind of, and how much, information does Spain require concerning the rules applied in the administering state on early discharge of prisoners?

No special requirements. Only a general outline of the administration of penalties is required. However, the person concerned usually asks for an (approximate) indication of the dates on which sentence is completed and conditional release may be granted.

10. Assuming that the final decision on early release of the prisoner must lie with the administering state, does Spain send it information on the prisoner's conduct while serving his sentence on Spanish territory.

Yes. An administrating state which is able to grant early release on these conditions must be informed of the prisoner's conduct while serving his sentence on Spanish territory.

III. WHEN SPAIN IS THE ADMINISTERING STATE

11. Description of the procedure followed.

This question is answered below.

12. Does the procedure change, or take longer in practice, depending on whether Spain takes the initiative, or acts at the request of either the sentencing state or the sentenced person?

The procedure is the same as that set out below, but the person concerned must apply to the sentencing state to have it implemented.

13. Which authorities take part in the procedure and which authority ultimately takes the final decision?

The authority involved in the procedure is the Directorate-General for Codification and International Legal Co-operation. The Council of Ministers takes the final decision, and the file is forwarded to the Criminal Chamber of the Audiencia Nacional.

14. What are the typical reasons, if any, for refusal?

There are none.

15. What kind of information does Spain require on the "penal situation" of the person concerned?

Spain requires information on the penalty or penalties imposed, the length of time spent in prison, and penal or custodial remission deductible from the penalty. It goes without saying that account is also taken of periods spent on remand and counting as part of the penalty.

16. What are the effects of the transfer of persons sentenced in Spain?

The penalty imposed in the sentencing state is continued (Article 9 of the Convention), i.e. without converting the sentence through judicial or administrative decision, but in accordance with Spanish regulations on enforcement of criminal and prison sentences.

PROCEDURE FOLLOWED IN DEALING WITH APPLICATIONS FOR TRANSFER OF SENTENCED PERSONS

Foreign nationals sentenced in Spain

1. The person concerned applies for transfer.

2. The Directorate-General of Prison Establishments is asked for further information.

3. A certified copy of the final judgment and sentence of the sentencing court or courts is requested.

4. The judgment is received.

5. The judgment is sent to the administering state, together with a request for the relevant documentation, as provided for in the Convention.

7. The above documentation is received.

8. All the documentation is examined, and a proposal on a decision sent to the Council of Ministers.

9. The Council of Ministers issues a decree approving the transfer.

10. The decree is communicated to the judicial, consular, prison and police authorities.

Finally, in addition to the action taken by these authorities, Interpol in each of the countries effects the transfer.

Spanish nationals sentenced abroad

In this case, Spain is the administering state. Briefly stated, the procedure here moves directly from stage 1 to stage 5. The sentencing state is asked for the documentation referred to in 3, and is sent a declaration of nationality, the relevant legal provisions, and details of the arrangements for continued enforcement of the sentence. Stages 6 to 9 are the same in both cases.

DIAGRAM OF THE PROCEDURE FOR TRANSFER OF PRISONERS

1. Foreign nationals sentenced in Spain

Application by the party concerned

Justice and Interior Ministry

Directorate-General for Sentencing court or courts

Prison Establishments

Additional information Verification of the sentence

Justice and Interior Ministry

Judicial Consular Penal Police

Transfer of prisoner

II. Spanish nationals sentenced abroad

Application by the party concerned

Justice and Interior Ministry

Sentencing state

Decision of sentencing state

Communication from the Justice and Interior Ministry

Judicial authorities Consular authorities

Transfer of prisoner

SWEDEN

GENERAL INFORMATION

1. The implementation of the Convention is regulated by the Act on International Cooperation in the Enforcement of Criminal Judgments (1972:260). Reference is made to that act in the following text.

Transfer between Nordic States is regulated by a special law.

From October 1, 2000, the Ministry of Justice will be the central authority and requests for transfer shall be addressed to the Ministry of Justice, which will then also be responsible for communicating replies.

2. Yes, when there are extraordinary reasons for so doing, the Government may order that a sentence pronounced abroad be served in Sweden and that a Swedish sentence be served abroad, even in the absence of a treaty, according to Sec. 3 of the above mentioned act.

3. Sweden has only concluded one bilateral treaty concerning transfer of sentenced persons and that is with Thailand. According to that treaty the offender must agree to the transfer.

Regarding transfer between the Nordic countries there is a special law according to which no consent to the transfer is necessary.

4. Sweden attributes great importance to both ends of the Convention. In order to realise the purpose of the social rehabilitation of the sentenced person, it must be shown that the person concerned has strong family ties with Sweden, so that from an objective point of view it can be said that the possibilities of a successful social rehabilitation in Sweden outweigh those of the sentencing state. From a practical point of view this can be established by the person showing that his/her parents, wife/husband and children are living in Sweden Other factors to take into consideration are e.g. the time spent abroad prior to conviction, that the sentenced person has good working opportunities in Sweden and that the sentenced person on balance will have a better chance of pursuing his life as a law-abiding citizen after having served the remainder of his/her sentence in Sweden.

5. The maximum time is 40 days, Sec. 25 e, which will enter into force on October 1st, 2000.

6. Imprisonment is imposed for a fixed time or for life in accordance with what is provided for the crime. A fixed term of imprisonment may not exceed ten years, unless it is a joint punishment for several crimes and/or in case of recidivism, when a maximum of eighteen years' imprisonment may be imposed.

A person serving imprisonment for a fixed term shall be conditionally released when two-thirds of the sentence, but at least one month, has been served. If the sentenced person seriously violates the conditions for the serving of the sentence in a prison, the date for conditional release may be postponed. After conditional release there shall follow a probationary period corresponding to the remaining portion of the sentence, but of at least one year. In connection with the conditional release it may also be decided that the person concerned shall be placed under supervision. This may also be combined with other conditions such as place of residence and that the sentenced person will submit himself/herself to special treatment or non-institutional care.

If the person concerned has been sentenced abroad before January 1st, 1999, older regulations will, however, be applied. According to those regulations a conditional release may be granted to the sentenced person either after he/she has served half or two-thirds of his/her term. If the sentenced person concerned has been convicted of a particularly heinous or serious offence and there is a manifest risk of recidivism, two-thirds of the sentence must be served before he/she may obtain conditional release.

7. The Swedish system is not based upon case law and this point is therefore not relevant for Sweden.

II. WHEN YOUR COUNTRY IS THE SENTENCING STATE

8. When Sweden is the sentencing State, the normal procedure is that the sentenced person expresses his or her interest in being transferred to the prison administration where he/she is incarcerated. The prison administration then submits this wish from the prisoner to the National Prison and Probation Administration, NPPA. NPPA makes a preliminary assessment of whether the prerequisites for transfer which includes, inter alia, the information mentioned in Articles 4.3 a-d of the Convention, a summary of the effects of enforcement for the prisoner and his or her conduct, and also a request for information in accordance with Article 6.1.

The application is submitted to the Swedish Ministry of Justice for translation and despatch to the appropriate authority in the country of enforcement. The prisoner is advised of this step.

When NPPA has received a reply from the country of enforcement, including information under Article 6.1, NPPA assesses whether the prerequisites for transfer are fulfilled in the light of information from the country of enforcement. If this is the case, the documents are forwarded to the prison for service on the prisoner. On the basis of the information supplied, the prisoner must subsequently decide whether he wants to give his or her final assent to the transfer. If he/she does, the prison is responsible for recording his or her final assent. The prison shall then send the assent document to NPPA.

Following such assent by the prisoner, NPPA finally resolves the matter by deciding to issue its final approval of the transfer of the prisoner and declaring that the transfer may be executed. The administering State is informed of the decision through the Ministry of Justice. The practical arrangements for the transport are usually handled through Interpol.

9 (a) It is impossible to determine whether the way in which matters have been handled differs depending on who raised the issue. It might be assumed that the procedure may be slightly more rapid if the administering State initiates the issue and simultaneously submits the relevant documents.

10 (b) Normally it is NPPA which makes the final decision regarding transfer of persons sentenced in Sweden. In exceptional circumstances NPPA may, however, submit a case to the Government. A decision taken by NPPA not to make a request for transfer can be appealed against to the Government.

11 (c) Section 34 a of the Act states one ground for rejection, i.e. that an application may not be presented if it may be assumed that there is an impediment to enforcement in the foreign state.

Otherwise there are not statutory criteria for rejection. It is exceptionally rare for NPPA to consider declining to consent to transfer. Where this has happened, it has been the result of, inter alia, the following circumstances. In one case there was too little time left to serve in prison. In another case the issue related to a prisoner who would have been able to benefit from the legislation concerning amnesty applicable in the administering State, which would have resulted in immediate release. The same would apply when the administering State is unable to apply Article 10 of the Convention on continued enforcement and because of great differences in the penal system too light a sentence would be given to the person transferred. Some other cases related to instances of double nationality where NPPA considered the connection with Sweden much stronger than that with the administering State and that consequently there was no reason for transfer.

Finally it should be mentioned that the sentenced person may at any stage of the procedure revoke or withdraw his/her application to be transferred.

12 (c) As regards the rules relating to release in the administering State, it should be sufficient for NPPA to obtain information concerning the earliest time at which a transferee may be released and/or what normally applies in this connection. If it should prove that the transferee would normally be released after a substantially less time in prison than would be the case if enforcement continued in Sweden, this may be a reason for the NPPA to refer the matter to the Government for its decision.

13. Whenever appropriate, Sweden as sentencing State would provide the administering State with information on the behaviour of the sentenced person while he/she was serving his/her sentence in Sweden.

III. WHEN YOUR COUNTRY IS THE ADMINISTERING STATE

14-16. In most cases a transfer to Sweden is initiated by the sentenced person informing the Swedish Embassy/Consulate about his/her interest in being transferred under the Convention. The sentenced person should also inform the prison where he/she is incarcerated about his/her wish to be transferred. If the sentencing State informs Sweden about a specific case providing Sweden with the judgement and other relevant information and at the same time is indicating its willingness to consent to a transfer, the whole procedure is considerably facilitated and can be accomplished within a shorter time. The decision to agree to the transfer to Sweden is taken by the Swedish Government. The Government can also on its own motion after having been informed by e.g. the sentenced person make a request for transfer to the sentencing State.

17. There are no fixed criteria for refusal when a request is made according to the Convention. The Government has discretionary power whether or not to agree to the requested transfer. The Swedish position is that one of the main purpose of the Convention is the social rehabilitation of the sentenced person. This aim can best be achieved by giving the sentenced person the opportunity to serve his/her sentence within his/her own society. Sweden therefore attaches great importance to the sentenced person's connection with Sweden in deciding whether or not to agree to the transfer.

18. Sweden would require all information that shall be provided according to Article 6.2 b.

19. As far as the effects of the transfer are concerned, Sweden has so far applied only continued enforcement. As for the situation mentioned in Article 9.4, only conversion of sentence would be applied.

IV. APPENDIX (mentally disturbed persons)

20. The above mentioned Act also provides for the possibility of transfer of mentally disturbed offenders both to and from Sweden.

Sweden has little experience as to cases concerning the transfer to Sweden for further treatment of persons who for reasons of their mental condition have been held not criminally responsible for the commission of an offence. However, a possible request for transfer of a mentally disturbed offender sentenced abroad would be duly considered by the Swedish Government. In such a case, if Sweden agrees to the requested transfer, Sweden would in accordance with its declaration under Article 9.4 of the Convention apply the conversion of sentence procedure.

The competent authority to make a request for transfer from Sweden concerning the enforcement of a court order to surrender an offender to forensic mental care is the National Board of Health and Welfare. The board may, if there are special reasons, refer the case to the Government for a decision.

SWITZERLAND

I. GENERAL INFORMATION

A. NATIONAL LEGISLATION

Switzerland has not enacted *any specific legislation* to implement the Convention on the Transfer of Sentenced Persons, which is an integral part of Swiss law.

Switzerland does, however, have federal legislation on mutual assistance in criminal matters (MACP). This came into force on 1 January 1983 and deals with various forms of international co-operation such as the enforcement of decisions (sections 94 to 108), including acceptance by Switzerland of foreign decisions and delegation of the enforcement of Swiss decisions abroad. The MACP only applies where the Convention does not expressly or implicitly provide for another form of regulation.

The MACP enables Switzerland to enforce a foreign criminal judgment and delegate the enforcement of a Swiss criminal judgment to a foreign state, in the absence of a treaty. At a foreign state's request, the implementation of a final and enforceable decision is possible in the following circumstances:

- the sentenced person is normally resident in Switzerland or has committed a serious offence there;
- the conviction concerns an offence committed abroad that, had it been committed in Switzerland, would also have been an offence;
- extradition is not possible or it appears appropriate to enforce the foreign decision in Switzerland in the interests of the sentenced person's social rehabilitation.

Switzerland may ask a foreign state to accept delegated responsibility for enforcing a decision, if:

- respect for the binding force of the decision is guaranteed;
- the delegation would assist the social rehabilitation of the sentenced person or Switzerland cannot secure extradition.

B. TRANSFER WITHOUT THE SENTENCED PERSON'S CONSENT

Switzerland has ratified the Additional Protocol of 18 December 1997 and concluded a bilateral treaty with Kosovo on this subject.

C. PURPOSE OF TRANSFER

The *social rehabilitation* of convicted offenders is one of the main objectives of penal policy. Prisoners who remain close to their family environment are more likely to reintegrate into their own community than ones who are held for a prolonged period abroad.

Transfer also very often reflects the *interest of the prison service*. The language, cultural and social difficulties faced by foreign prisoners often create serious practical problems for the establishments concerned. Returning foreign prisoners to their countries of origin helps to smooth over these difficulties and reduce the discrimination that foreign prisoners suffer.

In implementing the Convention, the criteria are assessed and the various interests taken into consideration on a case-by-case basis. The main considerations in favour of transfer are of a *humanitarian nature*. Incarceration abroad can be particularly onerous for prisoners who, isolated from their families and subject to unfamiliar environmental conditions, encounter language, social, cultural, religious, moral and even dietary barriers. As such, they are unjustifiably penalised compared with other prisoners. As a general rule, the main criterion for requesting or accepting a request for transfer is that it will assist the sentenced person's rehabilitation.

D. ENFORCING CUSTODIAL SENTENCES AND OTHER FORMS OF DETENTION

1. General

Under the Swiss Criminal Code, there are two main categories of criminal penalties: custodial sentences and rehabilitation or social protection measures.

In accordance with the Swiss federal system, the implementation of sentences and other decisions *is a cantonal responsibility* (articles 3 and 64b of the federal Constitution). The Swiss parliament has opted not to legislate on the subject.

At federal level, Switzerland has only had a uniform criminal law since 1942. The Swiss Criminal Code (CC) and its delegated legislation contain outline provisions concerning the implementation of sentences and other decisions, particularly with regard to the objectives sought, the formalities involved, the various penalties and the different types of custodial establishment.

2. Sentences

The Swiss Criminal Code distinguishes *crimes* and *délits* (lesser offences) according to the severity of the sentence by which the offence is punishable. For crimes, a custodial sentence of over three years is prescribed. For lesser offences, the term does not exceed a limit of three years.

Regulatory fine offences are those punishable by a fine whose maximum amount may not exceed 10 000 CHF. With the offender's agreement, the court may order community service to be performed for a term of three months at the most instead of the fine.

In the event of a crime and lesser offence, the Swiss Criminal Code provides for three types of sentence: custodial sentence, pecuniary penalty, and community service. Each of these may be suspended or partly suspended for a specified period.

- The custodial sentence is a penalty involving withdrawal or limitation of individual freedom of movement. In accordance with articles 40 ff. of the Swiss Criminal Code, the duration of a custodial sentence is six months minimum and twenty years maximum as a general rule.
- The pecuniary penalty is ordered by the judge as an alternative to a custodial sentence of up to six months. The judge settles the number of day-fines according to the culprit's guilt and the amount of the day-fine according to the culprit's personal and financial situation.
- The court may order community service as an alternative to a custodial sentence of up to six months or in lieu of a pecuniary penalty. However, the culprit must accept this sanction and undertake to perform the community service for the benefit of social institutions, charities or needy persons.

In practice, when the sentenced person has served at least two-thirds of the sentence, subject to a minimum of three months, he may be released *conditionally*, provided that his conduct in custody offers no grounds for opposing this and there is no reason to fear that he may commit further crimes or offences (art. 86 (1) CP). This final stage of enforcement of the sentence provides for a trial period of one to five years during which the released prisoner may be returned to prison in the event of misconduct while released.

Support known as *probationary assistance* is usually ordered for this period (art. 87 (2) CP). This is intended to safeguard the assisted persons from committing further offences and to aid their social integration (art. 93 (1) CP). At present, the probation departments of almost all cantons are specialised social services forming part of the prison administration. The mandate assigned to probation includes, firstly, services relating to the standard areas of everyday life, that is obtaining a dwelling, a job and financial stability.

3. Measures

The Swiss Criminal Code provides for the following measures: therapeutic measures (art. 59 ff CP), preventive detention (art. 64 to 64b CP) and other measures (art. 66 ff CP).

Measures are distinguished from penalties by the fact that their duration is not in proportion to the culprit's wrongdoing but dependent on the aim of the measure. A measure should normally last for as long as its application is indispensable in order to avert a danger of reoffending and provided that it has evident chances of success (art. 56 CP). A measure is a sanction ordered by the judge, as a general rule, in addition to a penalty. But it may also be ordered on an individual basis. The judge must be guided by an expert appraisal to order a therapeutic measure or preventive detention.

- Therapeutic measures (art. 59 ff CP): The Swiss Criminal Code provides for four types of therapeutic measures: treatment of mental disorders (art. 59 CP), treatment of addictions (art. 60 CP), measures applicable to young adults (art. 61 CP) and outpatient treatment (art. 63 to 63b).

- Preventive detention (art. 64-64b CP): This measure is essentially a security measure. It is intended to protect others against fresh offences by persons under a criminal sentence. The preventive detention measure permits deprivation of liberty for an indefinite period in order render the offender harmless. Although this measure seeks to keep the sentenced person away from society, the principle of rehabilitation, valid for all custodial sentences, is also applicable here. Offenders concerned are entitled to serve their sentences under ordinary living conditions as far as possible. Two conditions must be concurrently met for a preventive detention measure to be ordered. The offence must be serious, as for example murder or hostage-taking, and its perpetrator must have intended to harm others. The second condition relates to the legal forecast concerning the offender, who it is feared may commit other offences of the same kind.

- Other measures (art. 66 ff CP): In addition to a penalty, a therapeutic measure or a measure of preventive detention, the judge may order other measures as follows: exclusion from an occupation, disqualification from driving, publication of the judgment, confiscation of dangerous items or assets, compensation claims and grant to the victim. The judge may also make use of preventive deposits, a separate arrangement corresponding neither to a sentence nor to a measure.

Under article 62d of the Swiss Criminal Code, the *lifting of a measure*, and possible *conditional release*, must be considered by the competent authority at least once a year. In serious cases, it is also necessary to have an independent expert's appraisal and the opinion of a board consisting of the prosecuting authorities, the authorities responsible for enforcing sentences and measures, and the psychiatric professions. The probationary

period in the event of conditional release varies from 1 to 5 years depending on the type of measure ordered.

In accordance with article 90 of the Swiss Criminal Code, persons subject to a measure cannot be placed in uninterrupted solitary confinement unless exceptional circumstances apply. The also take part in planning the execution of the measure. Furthermore, if fit for work, they must receive incentives to work. The prescribed measure may be enforced, after a certain time, under an arrangement of outside work and accommodation.

E. CASE-LAW RELATING TO TRANSFERS

Since sentenced persons have no right of appeal against transfer decisions there is no case-law on the subject (where cases of application of the Additional Protocol are concerned, the number of instances of judicial decisions is very limited).

II. SWITZERLAND AS THE SENTENCING COUNTRY

A. THE PROCEDURE

1. The sentenced person's wishes

Sentenced persons can request transfers, in writing, to:

- the director of the Swiss prison in which they are detained;
- diplomatic or consular representatives of their country of origin;
- the authority responsible for the enforcement of sentences and other measures of the canton where the sentence was handed down;
- the Federal Office of Justice of the Federal Department of Justice and Police, in Bern (the fastest method).

Where appropriate, the authorities or the prison of the canton concerned draw up a written document in which the sentenced person requests a transfer to his or her country of origin.

2. Exchanging information on possible transfers with the potential administering state

The authority responsible for channelling information between Switzerland and the potential administering state is the:

Federal Office of Justice
International Judicial Mutual Assistance Division
Extraditions Unit
3003 Bern

When the competent authority of the canton concerned is notified of a sentenced person's wish to be transferred, it informs the Federal Office of Justice and supplies, with the necessary translations:

- the original of the document indicating that the sentenced person is requesting such a transfer, with a preliminary opinion from that authority:
- two certified copies of the sentence, with grounds, and of the relevant legal provisions;
- certified proof that the sentence is enforceable, including the date when it took effect;
- where appropriate, the sentenced person's address in the potential administering state.

3. Formal applications for transfer

a. Applications from Switzerland

Transfers are requested by the competent authority of the canton concerned. It is then the responsibility of the Federal Office of Justice to decide whether a formal request should be submitted to the potential administering state. The Office informs the individual concerned of the steps taken and any decisions taken by either country.

If the Federal Office of Justice and the potential administering state approve in principle the idea of a transfer, the competent cantonal authority must supply in support of the application:

- information on the period of sentence already served in Switzerland, including details of any detention on remand, remission of sentence, conditional release or other decisions concerning the serving of the sentence;
- a declaration by the sentenced person, or his or her legal representative, consenting to the transfer;
- where appropriate, a medical or social report on the sentenced person, information on treatment received in Switzerland and recommendations on any treatment in the potential administering state.

In the majority of cases, these documents will already have been supplied for the original exchange of information (see 2. above).

b. Application from an administering state

The Federal Office of Justice, after consulting the canton concerned, is responsible for authorising or refusing applications for transfers from abroad, once:

- the competent cantonal authority and the administering state have approved the transfer;

- after viewing the documents supplied by the administering state, the sentenced person has given his or her voluntary and written consent to the transfer, in a formal document drawn up by a judicial authority.

Decision conferring authority to execute (exequatur)

The Swiss authorities further request in all cases the production of a decision conferring authority to execute, taken by the competent judicial authorities of the administering state, where legally feasible according to the law applicable in that state.

Withdrawal of consent

In Switzerland, sentenced persons may withdraw their consent to a transfer at any time until the Federal Office of Justice has ruled on the application. Once this decision is taken, the consent cannot be withdrawn.

No right of transfer

Since sentenced persons have no entitlement to be transferred, there is no right of appeal against a refusal of transfer.

4. Enforcement of transfer decisions

When a transfer is granted, the Federal Office of Justice orders its enforcement, in agreement with the administering state, and after consulting the canton concerned.

B. GROUNDS/CRITERIA FOR REFUSAL

Transfers may be refused in the following circumstances:

- the administering state is likely to reduce considerably the length of the sentence;
- it is not possible to estimate how long the transfer procedure will last and the balance of the sentence remaining to be served is too brief, having regard to the length of the procedure, to justify such a transfer;
- the events that gave rise to the conviction did not relate to ordinary offences;
- transfer could threaten Switzerland's sovereignty, security, public order or other vital interests;
- the events on which the conviction was based are also the subject of proceedings in the potential administering state;
- the individual concerned has been granted a pardon or is the subject of an amnesty in one of the two countries.

Generally speaking, the cantonal authority or the Federal Office of Justice can refuse transfer requested for other reasons. No appeal is possible in the context of a transfer procedure.

C. INFORMATION REQUIRED ON EARLY RELEASE IN THE POTENTIAL ADMINISTERING STATE

The potential administering state must specify the *form* of early release that a sentenced person would be entitled to and the earliest *date* when this could come into effect.

At the potential administering state's request, a report may be submitted on a sentenced person's conduct during his or her period in custody in Switzerland.

III. SWITZERLAND AS THE ADMINISTERING STATE

A. THE PROCEDURE

1. The wishes of Swiss sentenced persons

When sentenced persons apply to a Swiss diplomatic or consular representative to be transferred, the latter informs the Federal Office of Justice and the competent authority of the canton concerned then proceeds as described under II.A.1.

2. Exchange of information with the sentencing state

If the Swiss authorities support the transfer, the competent authority of the canton concerned supplies the sentencing state, via the Federal Office of Justice, with information on:

- the nature and length of the sentence remaining to be served in Switzerland after transfer;
- the system for serving sentences in Switzerland (relating to the case in point).

3. Formal transfer application

If neither of the two countries opposes a transfer, at the request of the sentencing state the competent authority of the canton concerned supplies:

- a document certifying that the sentenced person is a Swiss national;
- a copy of the relevant Swiss legal provisions under which the events giving rise to the foreign conviction would also have been a criminal offence in Switzerland.

As a rule, these documents are supplied at the time of the exchange of information (see 2. above).

B. ENFORCEMENT OF THE FOREIGN DECISION IN SWITZERLAND

Switzerland has opted to *continue the enforcement of the foreign sentence*, pursuant to Article 9.1.a of the Convention.

The maximum time remaining to be served after transfer to Switzerland corresponds to the balance of the term to be served in the sentencing state after deducting all remission granted in that country before transfer.

If the sentence passed in the sentencing state is longer than that incurred for the same offence in Switzerland, or if the two sentences are different in kind, the competent cantonal judicial authority adapts the foreign penalty to one that most closely corresponds to the same sort of offence under Swiss law. This authority's ruling must take the form of a decision to confer enforcing authority (exequatur) . However, the Swiss sentence may not be longer or more severe than the one passed or being served in the sentencing state, or exceed the maximum laid down in Swiss law. The person sentenced abroad is notified of the exequatur decision. The request for transfer will only be accepted by Switzerland once this decision has become final.

Upon arrival in Switzerland, the sentenced person is placed in custody for the purpose of enforcing the foreign sentence. It rests with the competent authority of the canton concerned to rule on the prospective prison regime and custodial establishment.

C. GROUNDS/CRTERIA FOR REFUSAL

Apart from the grounds referred to in II.B, transfer can be refused in the following circumstances:

- the time limit for a criminal prosecution under Swiss law would have been passed at the time of conviction;
- the sentence would have lapsed through time under Swiss law, if a Swiss court had passed sentence at the same time;
- the offence is also an offence under Swiss law but is not liable to any penalty;
- the duration of the transfer procedure cannot be forecast owing to the length of the procedure, as the balance of the convicted person's sentence is too short for a transfer to be justified by that stage;
- criminal proceedings are currently under way in Switzerland relating to the same events.

D. INFORMATION REQUIRED FROM THE SENTENCING STATE CONCERNING THE PENAL SITUATION OF THE SENTENCED PERSON

The sentencing state must indicate:

- the length of detention on remand and of the sentence served by the sentenced person;
- the period of sentence remaining to be served in the sentencing state;
- where relevant, remissions of sentence granted by the sentencing state.

APPENDIX to the guide to procedures for the transfer of sentenced persons

Transfer OF MENTALLY DISORDERED OFFENDERS

1. LEGAL OPTIONS IN SWITZERLAND FOR DETAINING MENTALLY DISORDERED OFFENDERS

In criminal law

a. In the absence of criminal responsibility

Under the Swiss Criminal Code (CC), the courts may order custodial measures for offenders who lack or have diminished criminal responsibility (Articles 10 and 11 CC). The Swiss Criminal Code identifies the following measures:

- Preventive detention of habitual offenders (Article 42 CC)

The preventive detention of habitual offenders is essentially a safety measure. It does not apply to offenders who have been declared totally irresponsible. The conditions for detention are:

- the offender must have intentionally committed numerous crimes or lesser offences liable to at least two years' imprisonment;
- the offender must have intentionally committed another crime or lesser offence in the five years following his or her definitive release, thus demonstrating a tendency to reoffend.

Preventive detention may take place in open or closed establishments. In practice, such detention normally takes place in prisons for previous offenders.

- Measures concerning mentally disordered offenders (Article 43 CC)

These measures serve two purposes: to protect the community against dangerous psychiatrically disturbed offenders and to offer them appropriate treatment or care. Their detention in a "hospital or hospice" is authorised if the following conditions are met:

- offenders must have committed an offence liable to *emprisonnement* or *réclusion* (medium to long-term sentences);

- there must be a relationship between their disordered mental state and the offence committed;
- the offenders' mental state must require medical treatment or special care;
- the risk of further offending will be removed or reduced by detention.

Those concerned are usually detained in establishments designated for this purpose, or exceptionally in psychiatric clinics. For offenders who do not pose a threat to others, the courts may order outpatient care.

- Measures concerning alcoholics and drug addicts (Article 44 CC)

These measures are concerned with curing alcoholics and drug addicts. As in the case of mentally disordered offenders (Article 43 CC), there must be a relationship between the offence and their dependence. The measures differ in that:

- alcoholics are placed in special establishments for alcoholics or in hospital;
- drug addicts are placed in special institutions, such as registered detoxification centres for drug addicts, non-penal detention establishments or even private institutions.

b. Mental disorders arising after an offence has been committed

There are no specific provisions in Swiss law concerned with mental disorders arising after an offence has been committed.

The Swiss Criminal Code authorises the investigating authorities or the courts to order persons facing charges to be examined if their criminal responsibility is in question or if information on their physical or mental state is necessary to determine whether some form of preventive measure is called for (Article 13 CC).

Article 13 relates to the time when an offence was committed. The experts must decide whether an individual facing charges was criminally responsible at the time of the offence and whether and how one of the additional measures provided for in criminal law should be applied. The experts' report should help the courts to reach a judgment (dismissal, acquittal or reduced sentence) and to decide on any additional measures that might be ordered under the Criminal Code.

Civil and administrative law

There is no specific provision in Swiss administrative law for detaining offenders.

Under certain circumstances, the Civil Code authorises the detention of individuals for the purposes of rendering assistance (Article 397 a-f Civil Code). Such measures are ordered quite independently of any criminal proceedings and apply to persons of full age deprived of legal capacity who must be placed or maintained in an appropriate establishment for reasons of mental illness or disability, alcoholism, drug addiction or serious neglect and for whom the necessary personal assistance cannot be provided any other way.

The decision is the responsibility of the supervising authority of the relevant individual's home or, in an emergency, the supervising authority of the place of residence. The individual concerned or a close relative can appeal against the decision.

2. POSSIBILITIES OF TRANSFER TO SWITZERLAND

Switzerland has opted to "continue the enforcement of the foreign sentence", pursuant to Article 9.1.a of the Convention. If the Swiss authorities approve the transfer of a Swiss national whose detention is not part of a criminal sentence, the foreign order is enforced in accordance with Swiss law. The implementation of such measures, which is a cantonal responsibility, is governed by the federal legislation on mutual assistance in criminal matters (Section 94 ff) and the Swiss Criminal Code.

a. In the absence of criminal responsibility

Subject to these considerations, it is possible to transfer to Switzerland persons who as a result of mental disorders cannot be deemed criminally responsible for their actions, if:

- the individual concerned has been detained in accordance with the provisions of the criminal law of the "sentencing" state, or
- the individual has been detained in accordance with the administrative law of the "sentencing" state, on condition that Swiss law does not preclude the application of the administrative measure ordered abroad and the canton concerned is prepared to implement the measure.

b. Mental disorders arising after an offence has been committed

There are no specific provisions in Swiss law concerned with mental disorders arising after an offence has been committed.

3. PROCEDURES

a. The enforcement of non-criminal measures in Switzerland

The enforcement of non-criminal measures is a cantonal responsibility (Articles 3 and 64b of the federal Constitution). It is therefore for the competent cantonal authority to decide whether a conditional or trial discharge or release should be ordered and, if so, when (Article 45 CC). The relevant reviews take place automatically every year, as follows:

- in the case of the preventive detention of habitual offenders (Article 42 CC), those concerned are released conditionally if they have been detained for a period equal to two-thirds of their sentence, and for at least three years, and if the measure no longer appears necessary. After release, those concerned are required to undergo three years' supervision.

Exceptionally, detained persons may be released before three years have elapsed, if they have served two-thirds of the sentence and the continuation of the measure is no longer justified.

- In the case of mentally disordered offenders (Article 43 CC), the measure is suspended and the detainee released once it is deemed successful. In the event of partial success, the competent authority has the power to order trial release. The only difference from conditional release is that in the former case the trial period is not specified in advance.

- In the case of alcoholics and drug addicts (Article 44 CC), those concerned are released when they appear to have been successfully treated. They may initially be released conditionally and subject to one to three years' supervision. The detention can last for a maximum of two years.

b. Specific procedures

There are no specific procedures or conditions in Swiss law other than the ones in the Convention on the Transfer of Sentenced Persons, as they relate to mentally disordered offenders. The matter is dealt with exclusively in Article 3, paragraph 1d and Article 7 of that Convention. However, when transfer requests are lodged, it is desirable, and even essential, to supply all relevant information about the individuals concerned, their mental state, including psychiatric assessments and other medical reports, and the types of establishment where they are detained.

Bern, 15 August 2000

TRINIDAD AND TOBAGO

Click here for PDF version

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

I. GENERAL INFORMATION

1. The Republic of Macedonia deals with the transfer of sentenced persons by applying the Convention, bilateral treaties and the Criminal Procedure Act.

2. No.

3. No.

4. The overriding principle is that of social rehabilitation; the procedure must, however, conform to the legislation and regulations in force in Macedonia.

5. 40 days.

6. With due regard for the seriousness of the offence and the length of the sentence, sentenced persons are placed in closed, semi-open or open prisons and detention centres, depending on the security risk they pose and the restrictions imposed on their liberty. Where semi-open prisons are concerned, the principle of housing sentenced persons as close as possible to their place of residence is applied, in accordance with the law.

7. In practice, transfers take place without any trouble, through application of the relevant regulations and the Criminal Procedure Act.

II. WHEN MACEDONIA IS THE SENTENCING STATE
(request for a person to be transferred from Macedonia)

8. If a sentenced person of foreign nationality informs the Macedonian government that he or she wishes to be transferred to another state, the justice ministry of the state to which the person may be transferred (with his or her consent) sends the Macedonian Justice Ministry a request for transfer.

The Macedonian Justice Ministry refers the request to the competent court, which communicates its final judgment to the ministry and decides whether the statutory conditions are met. The Justice Ministry informs the prison that the conditions for transfer are met, provides the justice ministry of the foreign state with all the necessary documents (the final judgment, the decision, the request submitted by the prisoner, etc.) and requests information such as the date on which the prisoner will be transferred and the officials responsible for the transfer.

As soon as the justice ministry of the administering state provides the relevant information, the Macedonian Justice Ministry informs the court, the prison and the Internal Affairs Ministry so that the prisoner may be escorted to the airport and handed over.

9. a. The courts give priority to requests submitted to Macedonia by administering states; the procedure takes between 1½ and 4 months, following which the prisoner is transferred immediately.

The procedure takes longer when Macedonia takes the initiative.

10. b. The procedure is carried out by the courts, the Justice Ministry takes the final decision and the transfer is supervised by the Internal Affairs Ministry (INTERPOL), which orders the foreign prisoner to be taken to the border or another location where it has been agreed that the prisoner will be handed over.

11. c. To date, Macedonia has not rejected any requests for transfer.

12. d. Macedonia requires information on practices in other countries regarding pardons, parole, etc.

13. Macedonia forwards information on early release but not on the behaviour of the prisoner concerned.

III. WHEN MACEDONIA IS THE ADMINISTERING STATE (Request for a person to be transferred to Macedonia)

14. If a sentenced person submits a request for transfer to Macedonia, the foreign prison sends information on the person concerned (nature and length of the sentence), together with the relevant documents, via the requesting state's justice ministry to the Macedonian Justice Ministry. The Macedonian Justice Ministry asks the Internal Affairs Ministry to check whether the sentenced person is a Macedonian national; if so, the ministry, in accordance with the relevant legislation, forwards all the documentation to the court for acceptance and execution of the foreign state's judgment.

The court decides whether to recognise the judgment and forwards its decision to the Macedonian Justice Ministry, which gives its written consent and sends it, along with the Macedonian court's decision, to the justice ministry of the requesting state, with a copy to the prison.

The Macedonian Justice Ministry requests information on the practical details of the transfer (date and time, officials responsible for the transfer, etc.).

After receiving the information supplied by the requesting state, the Macedonian Justice Ministry asks the Internal Affairs Ministry (INTERPOL) to appoint a person to oversee the transfer, authorising that person to act on its behalf.

As soon as the sentenced person is transferred to Macedonia, the Justice Ministry informs the competent court and sends the relevant documents to the prison where the person is to serve the remainder of the sentence.

15. a. The procedure always takes longer when Macedonia is the requesting state.

16. b. The procedure is carried out by the courts. The Justice Ministry takes the final decision.

17. c. In cases where the sentenced person has absconded.

18. d. Macedonia requires all information concerning the "penal situation".

19. a. As soon as sentenced persons are transferred to Macedonia, the enforcement of their sentence continues immediately.

b.c. Yes, sentences are adapted or converted to conform to national legislation by means of a judicial procedure.

IV. APPENDIX (mentally disturbed persons)

20. Macedonia does not have any specific legislation on mentally disturbed offenders; there have been no cases involving the transfer of such persons.

TURKEY

Click here for PDF version

UNITED KINGDOM

Click here for PDF version

UNITED STATES OF AMERICA

I. GENERAL INFORMATION

1. Has your country enacted specific legislation in order to implement the Convention, or do you proceed on the basis of general legislation that provides for the transfer of sentenced persons?

The implementing legislation for transfer of prisoners to or from foreign countries is codified in Chapter 306 of Title 18 of the United States Code, which comprises Sections 4100-4115.

Section 4102 of Title 18 of the United States Code authorizes the Attorney General to act as the central authority for international prisoner transfer. Section 4102 (11) authorizes the Attorney General to delegate her authority to officers of the Department of Justice. These regulations, which are published in the Code of Federal Regulations at Title 28, Sections 0.64-1 and 0.64-2, provide that the Office of Enforcement Operations of the Justice Department's Criminal Division is responsible for the implementation of the prisoner transfer treaties and conventions to which the United States is a party.

When a sentenced person has been convicted by a state of the United States of crimes under the laws of that state, and is in the custody of the authorities of that state (as opposed to having been convicted in the federal courts of a crime under the United States Code, in which case the sentenced person is in the custody of the Attorney General), the United States will not approve a transfer unless the state first gives its consent. As of this writing, 45 states have enabling legislation to permit participation in the international prisoner transfer program, and several others are considering such legislation; see Appendix A for a list of the states with enabling legislation. In deference to the federal structure of the United States, this had always been the position taken by the United States in respect to state prisoners; in September 1997, the United States filed a formal Reservation and Declaration to the Convention to this effect with the Council of Europe.

2. Is transfer to and/or from your country possible in the absence of a treaty?

No

3. Is your country a Party to any bilateral treaty in force, that does not require the consent of the person prior to his transfer?

No.

4. When considering the application of the Convention, how do you measure in practical terms the purpose of contributing to the social rehabilitation of the sentenced person against the purpose of ensuring the ends of justice?

In evaluating applications by prisoners in the United States for transfer to their country of citizenship, the United States considers whether a transfer would further the ends of justice and the social rehabilitation of the prisoner. Each case, obviously, is evaluated on an individual basis.

(1) Likelihood of social rehabilitation

Beyond the practical concerns of alleviating prison overcrowding and dealing administratively with foreign national prisoners, many of whom have very limited English language ability, the central rationale behind transferring foreign prisoners to their home countries is to facilitate the prisoner's social rehabilitation. Rehabilitation is, of course, one of the principal purposes of incarceration in civilized societies. Prisoner transfer assumes that such social rehabilitation is more likely to occur in the prisoner's home country, closer to his family and within his own language and culture. In addition, since many foreign national prisoners will be deported when their sentences have been served, it makes sense to further their adjustment to the society into which they will be released.

In evaluating whether the generally agreed-upon goal of social rehabilitation really will be furthered by transferring a prisoner from the country where he committed his crime to the country of his nationality, the United States considers a number of factors. These include: acceptance of responsibility (the usual condition precedent for rehabilitation), criminal history, seriousness of the offense (the critical factor in any sentencing decision and equally important in evaluating whether serving out all or most of his sentence in the United States will do more for the prisoner's rehabilitation than transferring him to what may be a less punitive and possibly less lengthy incarceration), criminal ties to the sending and receiving countries (transfer should facilitate reintegration into a prisoner’s civil, rather than criminal, society), family and other social ties to the sending and receiving countries (a critical factor for two reasons; first, because prisoner transfer assumes that social rehabilitation is most likely near the prisoner's family, and least likely far away, and, second, it may also be assumed that a prisoner will reunite with his family, and if that family remains in the sending country, it is highly likely that the released prisoner will attempt to return to the sending country as well, which will negate not only any social rehabilitation benefits from transfer but also the prisoner's deportation), length of time in the United States (if the prisoner has been in the United States for such a long time that he has in fact become a member of this society, his social rehabilitation will not be facilitated by sending him to a different one), and, finally, special humanitarian concerns which might justify a transfer which

would otherwise not be approved, such as the terminal illness of the prisoner or a member of his immediate family.

(2) Ends of Justice

Social rehabilitation is not the only purpose of incarceration, and therefore cannot be the sole consideration in evaluating prisoner transfer requests. The United States also takes into account the needs of domestic law enforcement and the ends of justice concerns, regardless of the possible consequences for the prisoner's social rehabilitation. Some of these considerations are the normal ones in any sentencing or parole decision and include: seriousness of the offense, the amount of time already served and remaining to be served, public sensibilities, public policy, the potential for renewed criminal activity in receiving country, and the possibility of reprisal or intimidation. Others are the consequences of a transfer, such as possible disparities in the actual length of time that will be served in the United States and the receiving country and any unpaid court-ordered assessments, fines, or restitution (because all supervisory authority over the prisoner is terminated when the prisoner transfers, financial obligations do not transfer with the prisoner and must be settled prior to transfer). Finally, possible law enforcement and prosecutorial needs must be explored before transfer, including such questions as whether the prisoner's testimony still may be needed in other cases and whether there are any pending or unresolved appeals or charges against the prisoner himself.

(3) Likelihood of Return to the United States

Allowing a foreign national prisoner to serve out the remainder of his United States sentence in his own country only makes sense if the prisoner will remain in his own country after his release. Therefore, a critical consideration in evaluating a transfer request is whether in fact the prisoner will stay in the receiving country, or will return to the United States. In making this determination, the United States looks at a number of factors. In addition to family ties already discussed, these include such existing ties to the United States as home ownership and permanent resident status, potential residential and occupational ties to the receiving county, and any previous deportations and illegal reentries. A previous prisoner transfer is an absolute bar.

5. What is the maximum duration of provisional arrest pending the arrival of documents supporting the request under Article 2 of the Protocol to the Convention?

The United States does not participate in Article 2 of the Protocol.

6. Please describe your state's system of enforcing custodial sentences.

The international prisoner transfer enabling legislation, in Section 4105(a) of Title 18 of the United States Code, authorizes the Attorney General to confine persons serving a sentence of imprisonment in a foreign country "under the same conditions and for the same period of time" as an offender who had been given that sentence by an American court.

The United States Parole Commission determines what portion of the foreign sentence the transferred prisoner will be served in prison and what portion will be served in the community under supervision.

When a prisoner is transferred to the United States, the U.S. Probation Office for the federal district court in which the prisoner is incarcerated prepares a Postsentence Report for the Parole Commission. The Postsentence Report is similar to the Presentence Report prepared for offenders convicted in the United States for federal offenses, discussed above at III (4).

As in a Presentence Report, there is a tentative computation, based on the Sentencing Guidelines, of the offense level, using the most closely analogous United States Code offense to the offense for which the offender was convicted. For transferred prisoners, the Parole Commission sets a release date and a period and conditions of supervised release as if the offender were convicted in a United States district court. The Commission will determine what offense level should be applied and will conduct a hearing to resolve disputed sentencing guideline issues. The Parole Commission may also give consideration to prison conditions, where appropriate, and may depart from the applicable guideline range. The result is a release date from prison set by the Parole Commission.

The enabling legislation, in Section 4105(c)(1), specifically provides that prisoners transferred to the United States keep all credits "for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer." The United States Bureau of Prisons will then apply these credits to the release date set by the Parole Commission.

It is the current practice of the United States not to seek the costs of transfer back to the United States from the returning American prisoner.

7. Please provide information on relevant case law.

The essential principle governing international prisoner transfer is that the governing legislation placed transfer decisions within the Attorney General's discretion, that that discretion is unfettered, and that when that discretion is exercised to deny a transfer, the Attorney General's decision is not reviewable by the courts. This principle has been affirmed as to the Convention in *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C.Cir. 1991) ("[T]he Act and the [Convention] give the Attorney General unfettered discretion with respect to transfer decisions... A broad grant of discretionary authority is particularly appropriate to prisoner transfer decisions, depending as they do on a variety of considerations.") and in *Scalise v. Thornburgh*, 891 F.2d 640, 645 (7th Cir. 1989) ("The Act...does not...provide substantive guidelines by which the Attorney General should exercise his discretion... [T]his discretion which Congress has bestowed upon the Attorney General in carrying out his duties under the act is reasonable in light of the unique nature of prisoner transfer decisions.").

This same principle has been applied to the bilateral transfer treaty with Mexico, *Marquez-Ramos v. Reno*, 69 F.3d 477 (10th Cir. 1995) and to the bilateral transfer treaty with Canada, *Brancaccio v. Reno*, 964 F.Supp. 1 (D.D.C. 1997).

II. WHEN YOUR COUNTRY IS THE SENTENCING STATE

8. Please provide in detail the procedure followed (also covering Questions 9-12).

As noted above, the Attorney General is authorized to act as the central authority for international prisoner transfer. Pursuant to law and regulation, she has delegated that authority to the Criminal Division's Office of Enforcement Operations. The Director and Associate Directors of that Office make the final decision as to whether to approve or deny a transfer request.

The International Prisoner Transfer Unit (IPTU), a part of the Office of Enforcement Operations in the Criminal Division of the Justice Department, is responsible for the implementation of the prisoner transfer program.

The mail address is:

International Prisoner Transfer Unit
Office of Enforcement Operations
United States Department of Justice
P.O. Box 7600
Ben Franklin Station
Washington, DC 20044-7600
TEL: 01-202-514-3173.

We welcome telephone inquiries from our colleagues in other government offices, both within and outside of the United States. Because of the volume of applications which we receive, it is unusual for an IPTU staff member to remember a particular case. In most cases staff members will need to locate the file in order to discuss a particular case. Prisoners and their families should be advised that their communications with us must be in writing, not by telephone. Our fax number is 01-202-514-9003.

The IPTU web site is at *www.usdoj.gov/criminal/oeo/index.htm.*

In considering whether to transfer a foreign national, the Department of Justice reviews an application package prepared by prison authorities. That package includes:

(1) A form signed by the prisoner indicating interest in a transfer, and a form authorizing release of confidential information to the Justice Department;

(2) Birth certificate or copy of passport (for proof of citizenship), when available (these are normally provided by the prisoner);

(3) The judgment and sentence of the court, which for federal prisoners is a Judgment and Commitment Order signed by the sentencing judge;

(4) The Presentence Report, which for federal prisoners is prepared by the Probation Office for the sentencing court. This is a comprehensive document and includes, broadly speaking, two types of data. First, there is identifying data about the defendant: information about any codefendants and related cases; details of the charges and disposition, whether by conviction at trial or plea agreement; a detailed description of the offense conduct; aggravating or mitigating factors such as obstruction of justice or acceptance of responsibility; the defendant's criminal history; the personal and family characteristics of the defendant including family ties, family responsibilities, and community ties; mental and emotional health; physical condition, including drug or alcohol abuse; educational and vocational skills; and employment record. Second, and based on the first, there is a tentative computation of the offense level pursuant to the federal Sentencing Guidelines (the sentencing judge makes the final determination after reviewing the report and ruling on any objections from either side), which covers both the base level for the offense and adjustments to that level for such factors as use of a weapon, role in the offense, victim-related adjustments, criminal history, acceptance of responsibility and timely plea, cooperation with the authorities, and, for drug offenders, a possible exemption from mandatory minimum sentences for non-violent, minor offenders with no criminal history.

Both the prosecutor and the defendant are permitted to review and comment on, and request corrections to, the Presentence Report before the actual sentencing, and any unresolved disputes are decided by the sentencing judge.

Presentence reports are very important in IPTU's evaluation of a transfer request. Where the prisoner or the home government knows that circumstances, such as family location, have changed since the time of the presentence report, this information should be brought to IPTU's attention in writing.

The Presentence Report is a confidential court document, meant for court use in sentencing. IPTU has been advised by the Administrative Office for the United States Courts that it is not authorized to release the Presentence Report to the administering country. However, the prisoner is permitted to have a copy of his Presentence Report.

(5) Federal Bureau of Investigation (FBI) fingerprint card and current photograph;

(6) Sentence calculation; IPTU updates this sentence calculation when a transfer is approved, and sends a document on the administration of the sentence up to that point to the administering State when it notifies the administering State of its preliminary approval of a transfer. This document states the length of the sentence, the starting date of the sentence, jail time up to the date before the sentencing date, good conduct time earned, the full tern release date (that is, the maximum sentence), the time served from the date of sentence to the date of the document, and the projected United States satisfaction date.

(7) Prison progress report, which is included in the part of the social data section of the Certified Case Summary (see below);

(8) Family and residence information, which is included in the personal data section of the Certified Case Summary (see below);

(9) Certified Case Summary. This document is initially prepared by the prison authorities. It has sections on personal data, sentence data, and social data. The social data section contains information relating to the prisoner's incarceration, including security level, disciplinary reports, prison jobs, program participation, psychological evaluation, current medical condition, and history of substance abuse. It is reviewed and, when necessary, edited by the IPTU. This is the primary informational document sent to the administering country, and is generally the only information the administering country will receive about the actual facts of the prisoner's case (as noted above the United States normally does not send the Presentence Report). A model Case Summary is attached as Appendix B.

The application package described above is assembled by the prisoner's case manager in the federal system. The process of assembling the application package is begun either at the request of the prisoner himself, or at the request of the IPTU. IPTU will request that the prison authorities prepare an application package when a request is received from an administering state and the prisoner himself has not yet applied for transfer. IPTU will begin working on the transfer application when it receives the application package. In addition, in every case, IPTU will independently request information about the prisoner's immigration status from the Immigration and Naturalization Service.

The criteria used in reviewing a transfer application are set out above, under Question 4, General Information.

Once preliminary approval for a transfer is given, the United States requests the administering State to provide, in addition to the Supporting Documents specifically mentioned in Article 6 of the Convention, a statement indicating the nature and duration of the sentence which the prisoner will serve if transferred, including information and arrangements for remission and conditional release.

The Convention requires consent by the transferred person. Section 4107 of Title 18 of the United States Code requires that prior to a prisoner transfer the fact that the offender consents to the transfer and that the consent is voluntary and given with full knowledge of its consequences be verified by a United States judicial officer.

As soon as both countries have approved a prisoner transfer, the IPTU will move to arrange this consent verification hearing. The hearings are conducted by a United States Magistrate Judge, usually in a court near the institution housing the prisoner. IPTU arranges to have the prisoner brought to the court for the hearing.

The enabling legislation also provides, in Section 4109 of Title 18, that (as in any American judicial proceeding) the prisoner has the right to advice of counsel and the right to court-appointed (and court-paid-for) counsel if the prisoner cannot afford a lawyer. In practice, this means that the prisoners are usually represented by Assistant Federal Public Defenders, whose presence IPTU will also arrange. The Assistant Public Defender consults with the prisoner before the hearing, as well as appearing with the prisoner at the hearing itself.

At the hearing, the Magistrate Judge will question the prisoner and his counsel to ensure that the prisoner understands what he is doing and that his consent is freely and voluntarily given. The prisoner will be advised that only the sentencing country can modify his conviction or formal sentence, that his sentence will be administered by the receiving country according to its own rules, and that his consent, once given in the hearing, is irrevocable. The hearing is recorded, and the recording is maintained by the Department of Justice.

13. Do you transmit to the administering State information on the behavior of the prisoner while serving his sentence in your country?

Yes. Information concerning the behavior of the prisoner is contained in the Certified Case Summary which is sent to the administering State after the United States has given preliminary approval for a transfer (as noted above, a model Case Summary is attached as Appendix B).

III. WHEN YOUR COUNTRY IS THE ADMINISTERING STATE

14. Please describe in detail the procedure followed (also covering Questions 15-18).

As a general rule, the United States will accept American citizens incarcerated abroad who wish to return home. The authorities involved are the same as when the United States is the administering State. The consent verification procedure is the same as for foreign national prisoners transferring from the United States. In the case of an American incarcerated abroad, the Magistrate Judge will hold the hearing in the foreign prison facility with the permission of the foreign government.

When it is the administering State, the United States requires the same information as to "penal situation" of the prisoner, that is, as to the administration of the sentence, as it provides when it is the sentencing State. The information required is the length of the sentence, the starting date of the sentence, jail time up to the date before the sentencing date, good conduct time earned, the full term release date (that is, the maximum sentence), the time served from the date of sentence to the date of the document, and the projected satisfaction date, as well as any information about eligibility for parole, remission, or other early release (which are no longer available to prisoners serving federal sentences in the United States).

19. Please explain in detail what the effect of the transfer is for your State, under Article 9.

The United States continues enforcement of the foreign sentence.

The prisoner transfer enabling legislation, in Section 4105(a) of Title 18 of the United States Code, authorizes the Attorney General to confine persons serving a sentence of imprisonment in a foreign country "under the same conditions and for the same period of time" as an offender who had been given that sentence by an American court.

The United States Parole Commission determines what portion of the foreign sentence the transferred prisoner will be served in prison and what portion will be served in the community under supervision.

When a prisoner is transferred to the United States, the U.S. Probation Office for the federal district court in which the prisoner is incarcerated prepares a Postsentence Report for the Parole Commission. The Postsentence Report is similar to the Presentence Report prepared for offenders convicted in the United States for federal offenses, discussed above.

As in a Presentence Report, there is a tentative computation, based on the Sentencing Guidelines, of the offense level, using the most closely analogous United States Code offense to the offense for which the offender was convicted. For transferred prisoners, the Parole Commission holds a hearing for the transferred prisoner and sets a release date and a period and conditions of supervised release as if the offender were convicted in a United States district court. The Commission will determine what offense level should be applied and will conduct a hearing to resolve disputed sentencing guideline issues. The Parole Commission may also give consideration to prison conditions, where appropriate, and may depart from the applicable guideline range. The result is a release date from prison set by the Parole Commission. The transferred prisoner may appeal the release date to the appellate court, under the same terms as a United States prisoner may appeal a sentence imposed by a trial court.

The enabling legislation, in Section 4105(c)(1), specifically provides that prisoners transferred to the United States keep all credits "for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer." The United States Bureau of Prisons will then apply these credits to the release date set by the Parole Commission.

It is the current practice of the United States not to seek the costs of transfer back to the United States from the returning American prisoner.

STATES WITH LEGISLATION AUTHORIZING
THE TRANSFER OF FOREIGN PRISONERS*

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Florida
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont (Canada only)
Virginia
Washington
Wisconsin
Wyoming

* The U.S. territory of the Northern Marianna Islands also has legislation authorizing the transfer of foreign prisoners.

APPENDIX B

CERTIFIED CASE SUMMARY OFCITIZEN PERSONAL DATA

1. Committed Name: Inmate's name in correctional system's records; also true name if different, and any aliases.

2. Inmate identification number in Correctional System:

3. Date of Birth: Birth certificate date (if available).

4. Marital Status/Number of Children: This section indicates whether an inmate is single, married, in a common-law or other relationship, widowed, separated, or divorced, and includes information about any children and the other parent. This section may also include the location of parents, siblings, spouse and children, how often any of them visit the inmate, if any will relocate to inmate's country after transfer, and how long the inmate has lived in US.

5. Place of Birth: From birth certificate, if available.

6. Nationality: (Usually nation to which inmate wishes to transfer.)

7. Employment Prior to Incarceration:

8. Current Place of Imprisonment: Institution name and city and state where located.

SENTENCE DATA SUMMARY

1. Sentence:

2. Date Sentence Imposed:

3. Sentencing Court:

4. Criminal Docket Number:

5. Current Offense: Offense(s) for which inmate has been committed.

6. Description of Current Offense:

7. Fine/Assessment/Restitution: This section includes any monetary penalty imposed and amount paid to date.

8. Prior Record:

9. Detainers or Pending Charges:

10. Good Conduct Time Earned: Days of credit (remission time) provided by law.

11. Meritorious Good Time Earned: Days of credit earned by individual acts of good conduct (this was the former remission system and has been replaced by good conduct time, and is not available for inmates whose offenses were committed on or after November 1, 1987).

12. Projected Release Date:

13. Full Term (Release) Date:

14. Time served to Application Date: Days served between entry of judgment and transfer application date.

15. Prior Credit Time: Days spent in custody between arrest date and judgment date (days spent on bond or other pre-trial release are not counted).

SOCIAL DATA

1. Psychological Evaluation: Includes known mental or emotional disabilities and any current medication.

2. Security Level: For federal inmates, includes security level and custody status.

3. Level of Education Achieved:

4. History of Alcohol Abuse/Illegal Drug Use:

5. Current Medical Condition: This section includes medical status, any known medical disabilities, any current medication, and any medical restrictions on work assignments or other prison activities.

6. Institution Work Experience: This section includes the inmate's prison work assignment history and may include performance ratings as well.

7. Type and Number of Incident Reports Received: This section lists reported incidents of prison misconduct, including violation dates, rules violated, and sanctions imposed.

8. Program Participation: Prisoners may participate in educational courses [for example, General Educational Development (GED) courses leading to a GED (high school equivalency) diploma, English as a Second Language, Adult Basic Education], drug education courses, parenting courses, and vocational training. This section includes completion dates and courses currently being taken.

Prepared By: Case Manager Name/Telephone Number

Reviewed By: Case Management Coordinator Name/Telephone Number

Warden's Signature