

International co-operation in the criminal law field and prison overcrowding

Dr. Stefan BENNER BMVDRJ Abt IV 4 Wien, 22. April 2019



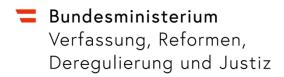
Overview

Co-operation and prison overcrowding

Transfer of supervision and Transfer of prisoners

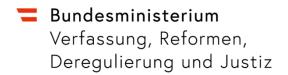
Outstanding issues

Conclusions



International co-operation and prison overcrowding

- International co-operation necessary for the social rehabilitation in the country,
 where the prisoner will live after his/her release
- Focus on "foreign" prisoners (excluded stateless people)
- Should be informed on the legal situation, where transfer arrangement are applicable (only few countries are able to transfer prisoners on the basis of reciprocity)



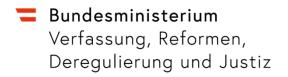
International co-operation and prison overcrowding

- National solutions/strategies against high percentage of foreign prisoners:
 "repatriation"
 - Court decision to terminate the enforcement, based on a deportation order and the willingness of the person concerned to leave the country, while the rest of the sentence remains open
 - Lower requirements than a conditional release
 - Further enforcement, if returning to the sentencing country



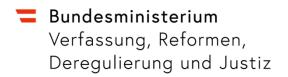
International co-operation and prison overcrowding

- Specific areas of co-operation
 - Transfer of supervision
 - Transfer of sentenced persons



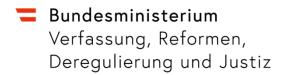
European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964

- Ambitious project
- Not widely accepted Convention by only 20 ratifications
- Target: social rehabilitation by promoting conditional release and transfer of the supervision
- Three options
 - Only transfer of the supervision only,
 - Transfer of both supervision and later necessary enforcement
 - Transfer of the whole responsibility



European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964

- Possible reasons for the lack of acceptance:
 - supervisory measures only in accordance with the law of the requested State,
 but also probation officer and representative of a social service
 - Practical issues (whole documentation necessary)
 - only in cases where the sentenced person has not been transferred



European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964

- In Austria: less than 10 Cases in 4 decades
 - War criminals, sexually motivated offenders, mental handicapped prisoners
 - The transfer of the supervision is a condition of the Court decision on conditional release ("no conditional release without transfer of the supervision")



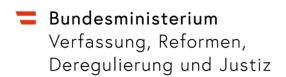
Council Framework Decision 2008/947/JHA Probation

- Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
- Target: more effective than convention 1964
- Replace the Convention between Member States
- Types of probation measures and alternative sanctions
- Using a standard form (certificate)
- Double criminality (except list offences)
- Adaptation of the probation measures or alternative sanctions to be compatible with the law of the administering State



Council Framework Decision 2008/947/JHA Probation

- Not evaluated until now
- Implemented by all Member States except 2 States



European Convention on the International Validity of Criminal Judgments of 1970

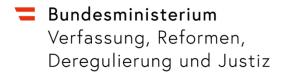
- Only 23 ratifications
- Traditional structure
 - Requirement
 - Grounds of refusal
 - Also against the will of the person concerned

Complex provisions (68 Articles) including fines, confiscation orders and disqualifications



Convention on the Transfer of Sentenced Persons of 1983

- Reaction the poor application of the European Convention on the International Validity of Criminal Judgments
- Large and worldwide accepted basis for cooperation
- Obligation to cooperate and to inform, but to transfer
- 46 ratifications, 22 accessions, 68 Member States
- Consent of the person concerned
- 2 Options continuing enforcement or Adaptation of the sentence



Schengen Agreement 1985

- Judicial part as a result, what can be improved in judicial cooperation
- Supplementing the Convention on transfer of sentenced persons (Article 67 to 69)
- No consent, where the sentenced person escaped from the sentencing State to the administering State, which is the State of nationality
- Reason: No extradition of own nationals and lack of jurisdiction for offences committed abroad
- Interpretation issue: term "escaped"



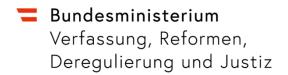
Additional Protocol to the Convention on the Transfer of Sentenced Persons of 1997

- Transfer without consent.
- As an addition protocol still no obligation to transfer, controversial discussions
- 38 ratifications, 1 accession
- No consent necessary:
 - fled from the sentencing State
 - expulsion or deportation order
 - Granted extradition to the administering State



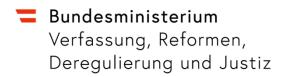
Council Framework Decision 2008/909/JHA

- Council Framework Decision 2008/909/JHA of 27 November 2008 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 purposes of their enforcement
- Compilation of the existing instruments
- Only one Member State did not implement
- Exclusive instrument, Member State will not apply other Conventions



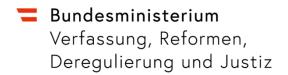
Council Framework Decision 2008/909/JHA

- Obligation to accept prisoners where the conditions enshrined in the Framework Decision are met
- Will be evaluated in the next round of mutual evaluation between EU Member
 States Using a standard form makes it easier to identify the main information
- Time limits for the decision and for the actual surrender
- Definition of an integrated foreigner to be treated as an own national



Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons of 2017

- Definition of the terms "Escaped" or "fled"
- Every existing deportation order, not only those linked with the judgment in question
- Rule of specialty apples with a time limit of 90 days
- Also persons, which refuse to give statements on the question of their transfer



- Length of proceedings
 - No real improvement since decades
 - From the start of the transfer proceedings in the sentencing State until the actual surrender more than one year
 - Even longer, if the sentenced person opposes against his/her transfer in the sentencing and in the administering State
 - Consequence: Only long term sentenced persons will be transferred (4 years and more)
 - Unreasonable: extradition proceedings much more quicker



- Lengthy consultation proceedings with the State of his/her residence of nonnationals
- Separate evolution and decision of the Immigration/Asylum authority in the administering State: "if the sentenced person lives in and has been legally residing continuously for at least five years in the executing State and will retain a permanent right of residence in that State"



- Transfer against the will of the sentenced person
 - Reluctance of Member State: "no social integration or rehabilitation possible against expressive will of the person concerned"
 - Full scale remedies in both States
 - Question of prison conditions following the jurisprudence of the ECHR to be clarified before the surrender



- Practical issues
 - Full translation regime
 - Full set of document, even were a standard form is used
 - Transit permission after the final decision of the administering State
 - In case of air transport: Security issues and reluctance of airlines
 - No European standards or European authority de3aking with the transborder transportation of prisoners



Conclusions

- Existing legal instruments provide a sufficient basis for co-operation
- Co-operation between States can contribute to a reduction of the number of prisoners
- Enhancing social integration and/or rehabilitation leads to an earlier conditional release
- More willingness of Member States to take own nationals,
 - irrespectively of existing links
 - on the basis of a valid deportation order



Conclusions

- Focusing on the content of a standard form
- The consent of the person concerned is still decisive
- Length of the transfer proceedings is still a problem



Thank you for your attention!

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