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FORMULATION AND APPLICATION OF UNITED NATIONS  
STANDARDS AND NORMS IN CRIMINAL JUSTICE

Model agreement on the transfer of foreign prisoners  
and recommendations for the treatment of foreign prisoners

Note by the Secretariat

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## INTRODUCTION

1. The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended that "in order to facilitate the return to their domicile of persons serving sentences in foreign countries, policies and practices should be developed by utilizing regional co-operation and starting with bilateral arrangements". 1/
2. Following this recommendation, some basic provisions for the transfer of prisoners were elaborated by the Secretariat for the consideration of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in a paper on United Nations norms and guidelines in criminal justice (A/CONF.87/8, para. 69). The purpose of these provisions was to promote the social rehabilitation of persons convicted of crimes abroad, by facilitating their return to their home country to serve their sentence, which would be based on the consent of both States concerned and of the sentenced person as well, through international co-operation founded on respect for national sovereignty and jurisdiction.
3. The Sixth Congress discussed this issue and adopted resolution 13 on the transfer of prisoners, in which Member States were urged "to consider the establishment of procedures whereby such transfers of offenders may be effected, recognizing that any such procedures can only be undertaken with the consent of both the sending and the receiving countries and either with the consent of the prisoner or in his interest". 2/
4. By the same resolution, the Congress requested the Committee on Crime Prevention and Control to give priority to the development of a model agreement for the transfer of offenders with a view to presenting it to the General Assembly for consideration as soon as possible.
5. At its seventh session, the Committee suggested (E/1982/37, para. 21) that the question of foreign prisoners, and ways and means of meeting their specific needs, including transfer, should be dealt with as a subtopic of item 7 of the provisional agenda of the Seventh Congress, which was endorsed by the Economic and Social Council in its resolution 1982/29 of 4 May 1982.
6. The Committee on Crime Prevention and Control, at its eighth session, considered a draft model agreement on the transfer of foreign prisoners and recommendations on the treatment of foreign prisoners. On the recommendation of the Committee, the Economic and Social Council, by its decision 1984/153 of 25 May 1984, decided to transmit the draft resolution, to which the draft model agreement and recommendations were annexed, to the Seventh Congress. The text of that draft resolution and its annexes is contained in the annex to the present note. In order to assist the Congress in its deliberations, explanatory notes are presented in sections I and II below.

### I. EXPLANATORY NOTES ON THE MODEL AGREEMENT ON THE TRANSFER OF FOREIGN PRISONERS

#### A. General principles

##### Re provision 1

7. The provision reflects the declared objective of the model agreement, as set forth in its Preamble: to develop mutual co-operation between States in the field of criminal justice in order to facilitate the return of foreign prisoners to their home countries to serve their sentences.

8. The model agreement takes no position on whether a prisoner should be transferred to the country of nationality or to the country of residence, if they are different. Thus, the model agreement leaves it to the administering State to accept also non-nationals residing in its territory. In any case, the transfer should be effected at the earliest possible stage with a view to continuing the enforcement of the sentence in the administering State.

Re provision 2

9. A transfer of prisoners is an agreement of States in a single case and is based on mutual confidence. No State has an obligation to request a transfer, or to grant a transfer at the request of another country. If, however, two States agree to such a transfer, that agreement alone is the basis for international co-operation, although the consent of the prisoner should not be excluded.

Re provision 3

10. Another important condition for transfer is the requirement of double criminality (dual criminal liability), which is one of the general principles not only regarding a transfer of prisoners but also regarding extradition or mutual assistance in criminal matters. It implies that the offence for which the sanction is imposed in the sentencing State must also be an offence according to the legislation of the administering State. This condition might be interpreted in the same way as for traditional extradition and mutual assistance, where it has been applied for many years.

11. For the condition of dual criminal liability to be fulfilled, it is not necessary that the criminal offence should be precisely the same under both the law of the administering and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

12. The wording of the model agreement classifies the principles of dual criminal liability further by indicating that the offence has to fall within the competence of judicial authorities. Thus, punishment imposed by administrative authorities would in no case, even if it amounted to deprivation of liberty, fall within the scope of such a transfer agreement.

Re provision 4

13. In accordance with this provision, the decision concerning a transfer lies within the sole competence of the States concerned. Since a transfer agreement is an international instrument, the only subjects with the authority to take a decision are the sovereign States, which have to agree on the means, requirements and circumstances for such co-operation. These States should, however, take into due consideration the wishes of the prisoner and his close relatives regarding a repatriation.

Re provision 5

14. The model agreement is based on the system of voluntary transfer, as embodied in most regional and bilateral arrangements, and as recommended by the Sixth Congress. <sup>3/</sup> In particular, the requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of

expelling prisoners, or as a means of disguised extradition.\* Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the proposed model agreement on the consent requirement.

Re provision 6

15. Any sentenced person who may be eligible for a transfer should be informed of the possibilities and the legal consequences of such a transfer, to enable him or her to decide whether to express interest in a transfer. In accordance with the Standard Minimum Rules for the Treatment of Prisoners, such information should be given in a language that the prisoner can understand. The prisoner should be informed also whether he or she might be prosecuted for offences committed before the transfer. As this depends also on the domestic law of the administering State, that State should be involved in the information procedure.

Re provision 7

16. The model agreement leaves it to the discretion of the States concerned to decide whether the transfer should be effected to the country of the prisoner's nationality or residence. In any case, the transfer should take place only with the expressed free will or consent of the prisoner. Such consent should refer to the transfer itself and also to the State to which the transfer is to be effected. The requirement of the prisoner's consent to his or her transfer corresponds to the primary purpose of this instrument, that is, to facilitate the resocialization of offenders; transferring a prisoner against his or her will may not accomplish this goal.

Re provision 8

17. As the sentenced person's consent to his or her transfer is one of the basic elements of the transfer mechanism, it seems necessary that the sentencing State should not only ensure that the consent is given voluntarily, and with full knowledge of the legal consequences that the transfer would entail for the person concerned (provision 6), but that the administering State also should have an opportunity to verify that the consent is given in accordance with these conditions. Such verification can be effected with the assistance of the diplomatic or consular corps, or any other official agreed upon between the States concerned.

Re provision 9

18. The model agreement is applicable also to measures involving deprivation of liberty of persons detained in institutions for mentally disturbed offenders who cannot be held responsible for the commission of their offences. It also applies to offenders who, after being sentenced, become mentally disturbed and, therefore, unable to determine their will freely.

19. The reference to the person's legal representative is not meant to imply that the representative must be legally qualified; it includes any person duly authorized by the law of either the sentencing or the administering State to represent the sentenced person, e.g. a parent or somebody authorized to give such a consent. However, it should be required that the legal representative takes a decision after due contact with the sentenced person.

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\*See report of the Thirteenth International Congress on Penal Law, Cairo, 1984, Fourth Section, resolution 16 (forthcoming).

Re provision 10

20. This provision refers to the nature of sanctions subject to transfer and stipulates that the model agreement should be restricted to sentences of imprisonment and to sentences imposing measures involving deprivation of liberty because of the commission of a criminal act. In accordance with most existing treaties, the execution of sentences involving fines, although conceivable, is not included in the model agreement.

B. Other requirements

Re provision 11

21. Another requirement for lodging a request for transfer or initiating such a request is that the sentence should be final and definitive and have executive force. Thus, all available remedies must have been exhausted, or the time-limit for such remedies must have expired without the parties having availed themselves of them. Moreover, a suspended sentence cannot be given as a reason for requesting a transfer. This provision does not, however, preclude the possibility of a later review of the sentence in the sentencing State, in the light of newly produced evidence.

Re provision 12

22. Considering that procedures for a transfer of prisoners need time, the model agreement proposes a flexible time-limit for its application: in general, the person should, at the time of request, have to serve at least six months of the sentence. This limit seems appropriate in view of the aim of the transfer, namely the social resettlement of the offender. States may, however, agree between themselves also to use the transfer instrument in cases where the rest of the enforceable sanction is lower than six months.

Re provision 13

23. The requirement of ne bis in idem comprises the most important effect of a transfer on the jurisdiction of the administering State: that State shall be bound by the conviction of the sentencing State and, thus, may not try the transferred person again for the criminal act for which the sentence underlying the transfer was imposed.

C. Procedural regulations

Re provision 14

24. According to this provision, any competent judicial or administrative authority may decide on a request for transfer. Whereas the administering State is clearly bound by the facts established by the sentencing court, the model agreement provides for two alternative procedures regarding the imposed sanction, following two different practices existing in different Member States:

(a) The continued enforcement of the sentence, either immediately or through a court or administrative order (principle 15);

(b) The conversion of the sentence, also known as the exequatur procedure (principle 16).

Re provision 15

25. In the continued enforcement procedure, the length of imprisonment as imposed in the sentencing State is, in principle, to be enforced in the administering State. A restricted adaptation is, however, also included in this procedure: where sanctions imposed in the sentencing State exceed the maximum penalties of the administering State, the maximum penalty of the administering State is to be applied.

Re provision 16

26. The conversion of sentence procedure is based on the assumption that the sentencing country transfers its responsibility regarding the execution of the sentence to the receiving country. The administering State is bound by the facts as they derive explicitly or implicitly from the foreign judgement, but it has the right, on the basis of the sentence, to reduce further the imposed sanction following current sentencing practices. Such adaptation is, however, restricted in the model agreement by excluding the substitution of a fine for imprisonment. In any case, no aggravation of the prisoner's penal situation is permitted.

Re provision 17

27. Irrespective of which procedure is followed in a given case, the administering State is bound by the establishment of facts by the sentencing court, as far as they are explicitly stated or appear from the judgement. The reason for this is that, even when using the conversion procedure, this does not imply a modification of the judgement. The administering State has no freedom to evaluate differently the facts on which the judgement is based; this applies to objective facts relating to the commission of the act and its results, as well as to subjective facts relating, for example, to premeditation and intent on the part of the convicted person. Consequently, the competence for a review of the sentence lies with the sentencing State.

Re provision 18

28. This provision applies to the sentence already served in the sentencing State as well as to provisional detention served prior to conviction or prior to detention served during transit.

Re provision 19

29. The penal situation of the prisoner must in no case be aggravated. This rule refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: thus it must not be harsher than that imposed in the sentencing State, e.g. forced labour could not be substituted for imprisonment. The principle of non-aggravation also implies that the administering State cannot enforce a minimum penalty for the same offence under its own laws if the sanction already imposed in the sentencing State is less than this minimum. Moreover, the conditions in the States concerned regarding conditional release should be taken into due consideration for the benefit of the prisoner.

Re provision 20

30. This provision does not regulate the question of enforcement expenses. It is to be understood that both States should bear these costs as far as they incur on their territory. As to transportation and transit costs, the model agreement suggests that these costs should be borne by the administering State, unless otherwise agreed by both the sentencing and the administering States.

D. Enforcement and pardon

Re provision 21

31. This provision should be understood in a wide sense. It is meant to include regulations of treatment and prison régime and it also refers to rules concerning eligibility for conditional release. In this latter respect, however, the competent authorities should take into consideration any more favourable conditions in the sentencing State so as to avoid aggravation of the prisoner's situation.

Re provision 22

32. Whereas provision 21 renders the administering State solely responsible for the enforcement of the sentence, pardon and amnesty may be granted by both the sentencing and the administering States.

E. Final clauses

Re provision 23

33. The model agreement, and the agreements based on it, should also be applicable to sentences that have been passed or that have become final before the entry into force of such agreements, thus enlarging its scope for the benefit of the prisoner.

Re provisions 24-26

34. Although the model agreement includes, for the sake of completeness, a preamble and final clauses referring to bilateral solutions only, it is intended to be used also for multilateral negotiations.

II. EXPLANATORY NOTES ON RECOMMENDATIONS FOR THE TREATMENT  
OF FOREIGN PRISONERS

35. In formulating the Recommendations on the Treatment of Foreign Prisoners, the Committee on Crime Prevention and Control took into account the fact that among the foremost measures for alleviating the problems of foreign prisoners abroad, including those whose transfer cannot be effected, would be the provision of information and contacts, the intensification of the role of consular authorities and the international co-operation of probation and rehabilitation services.\*

36. One way of lessening tension and uncertainty and of preventing foreign prisoners from feeling isolated that is employed in various countries is to give them information in their own language, or in one that they can under-

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\*See, for example, the report of the international seminar on the foreign offender, organized by Les Rencontres européennes de la probation, in co-operation with the Council of Europe, and held at Brunn am Gebirge, Austria, from 21 to 25 September 1981.



stand, on prison regulations and régimes, the law and legal procedure, their right to legal representation and to assistance from their consul, and on channels of information that can answer any pertinent question they may have. It may not always be sufficient to supply the information in writing, as some prisoners may be illiterate. Thus, another way of assisting prisoners is to provide interpreters, not only at the trial but at any other time when important questions may arise. It could also be of great benefit to foreign prisoners to be visited by other nationals living in the vicinity, who could serve as volunteers in order to help overcome prisoners' isolation.

37. Other means of helping foreign prisoners include the facilitation of communication with prison staff, the provision of access to medical and religious services and the encouragement of personal contacts with the outside world and, in particular, with the prisoner's family. Consideration could be given to possible ways of compensating foreign prisoners for the lack of visits from relatives. Efforts could further be made to modify possible restrictions in order to make foreign literature and newspapers available to prisoners.

38. It is also important that consulates and the diplomatic corps should give effective material and non-material assistance to foreign prisoners abroad; this may be done in co-operation with probation agencies in the home country, but only if the prisoners wish to receive such assistance.

39. Several of the issues referred to are mainly relevant with respect to foreigners whose stay in the host country is only temporary, and who will eventually return to their country of origin after they have served their sentence, or who are eligible for transfer to their country of origin to serve their sentence there. Prisoners who will remain in the country of imprisonment indefinitely after their release are in a different category altogether.

40. Many of them may be members of minority groups, or of groups whose social and economic position is weak; many may come from noticeably different cultural backgrounds and sometimes may be subject to discrimination. Their integration into society may be far from problem-free, and the same would be true for their families. For all these reasons, it would be best to arrange programmes for them in prison in order to familiarize them with the prevailing culture and teach them subjects that will help to improve their prospects in an otherwise often alien society.

#### Notes

1/ Report of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1-12 September 1975 (United Nations publication, Sales No. E.76.IV.2), chap. I, para. 23(j).

2/ Report of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980 (United Nations publication, Sales No. E.81.IV.4).

3/ Report of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980 (United Nations publication, Sales No. E.81.IV.4), resolution 13.

Annex

DRAFT RESOLUTION ON THE MODEL AGREEMENT  
ON THE TRANSFER OF FOREIGN PRISONERS

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

"Recalling resolution 13 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1/ in which States Members of the United Nations were urged to consider the establishment of procedures whereby transfers of offenders might be effected,

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

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

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

"1. Adopts the model agreement on the transfer of foreign prisoners, as set out in annex I to the present resolution;

"2. Approves the recommendations on the treatment of foreign prisoners, as set out in annex II;

"3. Urges Member States to facilitate the return of foreign prisoners to their countries, on the basis of the model annexed hereto, and to keep the Secretary-General regularly informed of any progress on this matter;

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

"Annex I

"MODEL AGREEMENT ON THE TRANSFER OF FOREIGN PRISONERS

"PREAMBLE

"The \_\_\_\_\_ and the \_\_\_\_\_

"Desirous of further developing mutual co-operation in the field of criminal justice,

"Believing that such co-operation should further the ends of justice and the social resettlement of sentenced persons,

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"1/ See Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report prepared by the Secretariat (United Nations publication, Sales No. E.81.IV.4), chap. I, sect. B.

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

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

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

"Have agreed on the following:

#### "I. GENERAL PRINCIPLES

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

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

"3. A transfer of prisoners should be effected in cases where the offence giving rise to conviction is punishable by deprivation of liberty by the judicial authorities of both the sending (sentencing) State and the State to which the transfer is to be effected (administering State) according to their national laws. Offences of a political nature as well as merely fiscal and military offences may be excluded.

"4. A transfer may be requested by either the sentencing or the administering State. The prisoner, as well as close relatives, may express to either State their interest in the transfer.

"5. A transfer shall be dependent on the agreement of both the sentencing and the administering State, as well as on the consent of the prisoner.

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

"7. A transfer, to either the country of nationality or of residence, should be effected only with the expressed free will of the prisoner.

"8. The administering State should be given the opportunity to verify the free will of the prisoner.

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

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

#### "II. OTHER REQUIREMENTS

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

"12. At the time of the request for a transfer, the prisoner shall, as a general rule, have to serve at least six months of the sentence; a transfer should, however, be granted also in cases of indeterminate sentences. The decision whether to transfer a prisoner shall be taken without any delay.

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

### "III. PROCEDURAL REGULATIONS

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

"15. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, this State may adapt the sanction to the punishment or measure prescribed by its own law for similar offences.

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

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

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

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

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

### "IV. ENFORCEMENT AND PARDON

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

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

### "V. FINAL CLAUSES

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

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

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

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

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

#### "Annex II

##### "RECOMMENDATIONS ON THE TREATMENT OF FOREIGN PRISONERS

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

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

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

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

"5. The religious precepts and customs of foreign prisoners should be respected, with reference, above all, to food and working hours.

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

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

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

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

This archiving project is a collaborative effort between United Nations Office on Drugs and Crime and American Society of Criminology, Division of International Criminology. Any comments or questions should be directed to Cindy J. Smith at [CJSmithphd@comcast.net](mailto:CJSmithphd@comcast.net) or Emil Wandzilak at [emil.wandzilak@unodc.org](mailto:emil.wandzilak@unodc.org).