Comparative Law Yearbook

Issued by
The Center for International Legal Studies

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Foreword

Legal systems basically are nationalistic. An increasing internationalism has, as one of its consequences, that different national systems meet each other on more occasions than in earlier days. From this standpoint it is necessary to develop more international law to meet new situations and events that may occur.

As the world becomes smaller, the demand increases for persons with knowledge of different national legal systems and of the rules of international law. The need for a large, well-educated group of lawyers prepared to deal with all kinds of international legal questions with their roots in the differences between national systems is a great challenge to legal education today.

The Center for International Legal Studies is a respectable enterprise contributing to the international education of young lawyers from throughout the world. The Center has been successful in combining theoretical studies with practical work. It is an undeniable fact that law is really learned only through practise. For this reason it is of great value that it has been possible for the Center to find so many places where young interns can receive a practical training.

One can become broad-minded only by seeing with one's own eyes a legal system which, foreign in many respects to one's own legal concepts, may operate as well or perhaps better than one's own. Only with such experience is it possible to do a good job in practical, international work. Such ideas have been the inspiration to the final act of the Helsinki Conference of 1975 which is looked upon as the European peace-document of this century.

The Center has taken up different lines of action. One is research-work. For work of this kind, a publication is needed and the Center has taken the decision to initiate the *Comparative Law Yearbook*. You now have the first edition in your hands. As you see from the list of contents, the *Yearbook* covers a wide field of legal research. It is our hope that the *Yearbook* will awaken the interest of many readers. We hope, that our *Yearbook* with its specific touch of mixing theoretical studies with the experiences

of our interns who have done practical field work will bring something new to the international legal chorus of voices.

We send our best wishes and hopes that this initiative will prove itself to be a fruitful one.

Gustaf Petrén

Supreme Administrative Court of Sweden
Member of the International Commission of Jurists
Former Ombudsman of Sweden
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Treaties on the Execution of Penal Sentences between the United States and Mexico, and the United States and Canada*

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Introduction

The treaties in question are:

The Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences, signed on 25 November 1976;[1] and the *Treaty between the United States of America and Canada on the Execution of Penal Sentences*, signed on 2 March 1977.[2] (Hereinafter referred to as *Treaties*).

The *Treaties* are predicated on the same assumptions, are intended to accomplish the same objectives, are structured in the same manner and their conditions and requirement are very similar. For these reasons, they are covered jointly.

The *Treaties* purport to establish the legal basis whereby the respective Signatory States can transfer to one another, and receive into custody their respective citizens who have been con-

* This article is based in part on the author's statements and testimony before the Senate of the United States, 95th Congress, 1st Session, Committee on Foreign Relations Hearings 15-16 June 1977, and Committee on The Judiciary Hearings 13-14 July 1977.

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victed and sentenced in the "Sending State" for the purpose of executing their sentences in the "Receiving State", of which they are "citizens".

The designation of the *Treaties* as being for the "Execution of Penal Sentences" implies that the respective parties thereto are to mutually recognize, enforce and execute each other's respective penal judgments as if they were their own, provided that these judgments respectively fall within the terms and provisions of the *Treaties* as implemented by the national legislation. The scope of the *Treaties*, however, extends only to the transfer of "offenders" and for their custody by the "receiving State" on a bilateral basis. Because of such a narrow scope the *Treaties* could have been more appropriately designated as being for "The Transfer and Custody of Offenders".

1. Rationale for the Treaties

The *Treaties* are predicated on three assumptions:

1. That a State has an interest in the treatment of its citizens abroad;[3]
2. That a State has an interest in the future behavior of its citizens;[4]
3. That states have a common and mutual interest in cooperating in the prevention and suppression of criminality.[5]

To this may be added that:

1. A State's interest in the treatment of its citizens abroad is essentially a humanitarian one. Thus, its concern for the manner and conditions of their custodial and detentional treatment is warranted. Such a concern, however, extends beyond this purely humanitarian aspect.
2. A State has an interest in the outcome of its citizens' custodial and detentional treatment abroad because, ultimately, citizens return to their country of nationality, and their future behavior therein is a legitimate concern thereof.
3. Improved international cooperation between States by means of transferring the custody of offenders to their State of citizenship, for example, enhances the prevention, prosecution and control of crime.

A sound criminological policy supports the three arguments stated above in that the conditions of custody and treatment of alien offenders in any given State are not a factor in the decision to prosecute the said offenders; whereas such conditions are of interest to the State of nationality of the offenders. The nationali-

ty State may manifest such an interest by placing pressures on the prosecuting State (sometimes as a response to internal pressures) or by making the extradition of its nationals impossible or very difficult. Thus the transfer of offenders would:

Remove pressures which may be placed on the United States of America or on a foreign government prosecuting United States offenders;

Encourage the extradition of nationals to State wherein they have committed offenses for purposes of their trial in such States (and their eventual transfer to the United States for the execution of their sentences);

Enhance the deterrent and rehabilitative processes of criminal justice abroad and domestically;

Provide a cultural context for the detention and custody of offenders (which is more appropriately designed to enhance their rehabilitation and resocialization in their country of origin);

Create a specific device for international cooperation in penal matters and, thus, enhance the climate of international cooperation in the prevention and control of criminality in the context of a more humane concern for the person of the offender, applied within the context of national cultural values and practices.

II. The Processes of Transferring Offenders under the Treaties and United States Implementing Legislation

The basic purpose of the *Treaties* and the United States implementing legislation (in Federal Bill S. 1682 for the enactment of Title 18, Chapter 306, Sections 4100-4114) is to permit persons who are under sentence of courts of a country other than their own to complete their sentences in their respective countries.

(1) The first step toward accomplishment of this purpose is for the "transferring State" or "sending State", to contact the offender's country of nationality, the "receiving State", and indicate its willingness to transfer the offender. Under the Treaty with Canada, the offenders themselves apply to the Government of the sending State to be transferred; whereas under the Mexican Treaty offenders may petition the Sending State for a transfer, but it is up to the Government of the Sending State whether to initiate the transfer process.

(2) The Receiving State would then indicate whether it is willing to accept the individual in question. Nothing in the *Treaties* requires a country to accept any offenders; and the implementing legislation states that the decision on behalf of the United States,

whether to accept a proposed transfer of an individual, is purely a matter of executive discretion.

(3) If the Receiving State agrees to the proposed transfer, the consent of the offender is then verified. The United States, under the implementing legislation, would secure the consent of persons being transferred either to or from it. In the case of tranfers to the United States, a waiver would be secured from the individual of any rights he or she may have had to challenge in United States courts the validity of the foreign conviction and of the sentence imposed by the foreign court. (The issue of consent and waiver of certain rights is a questionable one and will be discussed below.)

(4) The transfer itself is accomplished upon the receipt by the Receiving State of whatever documents it may require in order for it to supervise completion of the offender's sentence. The transfer of the offender consists of the offender's person being placed under the control of the Receiving State for completion of his or her sentence.

(5) While the offender is under the control of the Receiving State, the manner of completing the sentence – including such matters as probation and parole – is governed by the laws of the Receiving State. But under the *Treaties* and the implementing national legislation, all challenges or actions to modify or set aside the conviction or sentence are exclusively under the jurisdiction of the Sending State, which imposed them. (As the following discussion in detail of the arrangements will reveal, it is not clear how jurisdiction can be divided without overlapping, so that the Sending State retains jurisdiction over the conviction and sentence, yet the completion of the sentence is under the laws of the Receiving State; and there is some inconsistency of language in the United States legislation in this regard.)

(6) Should an action by or on behalf of an offender be initiated in United States courts seeking to have him or her released, the court would have to determine first whether it had jurisdiction to hear the matter, and the jurisdictional division referred to in the preceeding paragraph might be crucial. But it is possible that challenges might be made to the constitutionality of the *Treaties*, or the way in which one is applied to the offender. In this case, the court would clearly have jurisdiction over the subject matter; and were it to determine that the transfer of the offender was improper, he or she would be ordered released because there would be no basis for United States authorities to continue to hold him or her.

(7) The *Treaties* are silent as to what would happen were a transferred offender released before completion of his or her sentence,

but the United States legislation would provide for the return of such offenders to the Sending State. To accomplish this, the implementing legislation purports to create a return mechanism that would be a distinct modality of rendition, existing as a process separate from extradition, which would make the return of such offenders virtually automatic upon a request by the Sending State. (There is reason to question whether such a short-cut through due process is valid, and this matter is discussed below.)

(8) If the request for return of such an offender is processed as prescribed by the implementing legislation, the offender may challenge the validity of his or her return in court, and thereby obtain a court ruling on the validity of the procedure under the implementing legislation. If the decision were favorable to the offender, he or she could not be detained by United States authorities nor returned to the Sending State. Were the decision otherwise, the offender would be returned to the Sending State on condition that he or she be given credit for time spent under control of United States authorities. The offender would then complete his or her sentence in the Sending State.

III. Applicability of the Transfer Procedures to Offenders

Section 4100(b) of the United States implementing legislation provides that only offenders who are citizens or nationals of the United States may be transferred to the United States, and that only citizens or nationals of a potential Receiving State may be transferred to such a country. Likewise, Section 4102(7) encompasses only citizens and nationals.

1. *Mexican Treaty Purportedly Excludes "Domicilarias"*

This language is in direct conflict with Article II (2) and (3) of the Mexican Treaty's provisions which calls for transfer of offenders on the basis of their being nationals of the Receiving State, but excludes domiciliaries of the Sending State.

Domiciliary is defined in Article IX of the Treaty with Mexico as:

> "A person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently there."

This conflict results in United States citizens who are domiciliaries of Mexico, but neither citizens nor nationals, not being eligible under the Mexican Treaty for transfer to the United States

even though the implementing legislation makes no such distinctions.

2. *Canadian Treaty Purportedly Excludes "Permanent Residents"*

The Treaty with Canada in Article II(b) provides that the transfer of offenders between the two States shall apply to their respective nationals and citizens. While this provision differs from that of Article II(2) of the Treaty with Mexico, but is consistent with Sections 4100(b) and 4102(7) of the proposed legislation, it excludes permanent residents of the United States as defined in title 8 U.S.C. Section 1001 I.N.A. of 1965.

By implication, the Mexican Treaty would also exclude permanent residents of the United States who are not citizens or nationals of the United States; the rationale being that such persons are not entitled to the United States diplomatic protection abroad under traditional international law doctrine and practice. However, this begs the issue of the applicability of United States law to permanent residents.

Considering that decisions of the United States Supreme Court have given such permanent residents substantially the same rights as United States nationals[6] the question of their exclusion raises the issue of "equal protection" which could be the basis of a legal action by such individuals to challenge the constitutionality of the Canadian Treaty and implementing legislation with regard to their arbitrary exclusion from the benefits of the procedure of transfer of offenders. Such exclusion would in point of fact be in contravention of the underlying criminological purposes of the *Treaties* and implementing legislation, as discussed above in the rationale for the process.

IV. Allocation of Jurisdiction Subject Matter between the Sending and the Receiving States

The *Treaties* and implementing United States legislation seek to establish concurrent jurisdiction over offenders by strictly allocating the subject matter of the jurisdictions of Sending and Receiving States.[7] In Canadian Article V and Mexican Article VI, the Sending State retains exclusive jurisdiction over all "proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State." (The Canadian Treaty adds that, "Each Party shall regulate by legislation the extent, if any, to which it will entertain collater-

al attacks upon the convictions or sentences handed down by it in the case of Offenders who have been transferred by it.") Yet, in Canadian Article IV(1) and Mexican Article V(2) it is stated:

> "Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise," demands an impossible comparison.

Under the implementing legislation, Section(s) 4114 (amending Chapter 153 title 28 U.S.C. Section 2256) (1) and (2) echo the Treaty provisions on Sending State jurisdiction, but under (3) the United States, as a Receiving State, is given jurisdiction over "all proceedings... pertaining to the manner of execution in the United States of the sentence imposed by a foreign court," and (5) provides for United States jurisdiction over challenges to the validity or legality of transfers of offenders to the United States. This allocation of jurisdictional subject matter also appears in Section 4107(b) (1) (2) which provides:

> "(b) The consequences of consenting to the transfer which must be brought to the attention of the offender are:
> (1) only the country in which he was convicted and sentenced may modify or set aside the conviction or sentence and any proceedings seeking such action may only be brought in the courts of that country, and by his consent he waives all rights he might have had to institute proceedings in the courts of the United States seeking to challenge, modify, or set aside his conviction or sentence;
> (2) the sentence shall be carried out according to the laws of the United States and those laws are subject to change."

It must be noted that Section 4114(3) appears inconsistent with Section 4106, which grants jurisdiction to the Receiving State over parolees, and Section 4104, which grants jurisdiction to the Receiving State over probationers, if probation and parole are deemed part of jurisdiction over the sentence and not jurisdiction over its execution.

The attempt to provide the United States as a Receiving State with jurisdiction over questions relating to the manner of execution of sentences, while leaving jurisdiction over all challenges to the validity of conviction and sentence in the Sending State, leaves the status of challenges relating to the eligibility of offenders for parole of probation in some doubt; in that, such determinations require consideration of the character of the offense committed. The difficulty of dividing jurisdiction in this manner without leav-

ing a potential overlap in jurisdiction is demonstrated by the difficulty faced by drafters of the implementing legislation in framing Section 4103 regarding the applicability of United States laws. Section 4103 provides that:

> "All laws of the United States, as appropriate, pertaining to prisoners probationers, parolees and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise."

By describing jurisdiction in terms of persons covered rather than nature of proceedings covered, Section 4103 departs from the framework for dividing jurisdiction created in the *Treaties* and under Section 4114(3). It speaks of apples whereas the *Treaties* and other legislative provisions speak of oranges, so that its concluding clause, "unless a treaty or this chapter provides otherwise," demands an impossible comparison.

Thus, Section 4103, rather than resolving the problem of jurisdictional overlap, confounds it. Moreover, it creates a whole new issue: whether United States laws remain applicable to "prisoners, probationers, parolees, and juvenile offenders" should be conveyed beyond United States territorial jurisdiction. (Clearly such laws apply to the return procedures under Section 4114, and all procedures relating to probation, parole and related matters, by virtue of Section 4103.)

The legislative intent, in selecting this form of drafting scheme, was apparently to avoid any danger that the transfer processes embodied in the proposed legislation and in the *Treaties* would be found unconstitutional, on the grounds that it would deprive persons under United States jurisdiction of fundamental constitutional rights.

Elimination of such a fundamental right as *habeas corpus* presents serious difficulties, and principles of treaty interpretation, which provide for maximizing individual rights under treaties, would encourage the courts to avoid such an issue by viewing the jurisdictional allocation as inherently allowing for an overlap.[8] Thus, collateral attacks in the United States on foreign sentences would be greatly facilitated.

As a result of this approach, the preservation of the Sending State's jurisdictional prerogative must rely not so much on the allocation of jurisdiction, provided under the *Treaties* and legislation, as on the use of consent and waiver by offenders of their rights to make challenges in United States courts that are purportedly reserved to the Sending State's jurisdiction.

V. Collateral Challenges in the United States to Completion of Sentence

As the preceding discussion on the allocation of jurisdictional subject matter demonstrated, the *Treaties* provide that completion of sentences of transferred offenders shall be in accordance with Receiving State laws, while creating an overlap with the purportedly "exclusive" jurisdiction of the Sending State over all challenges to the convictions or sentences of such offenders. The existence of this overlap is attested to by the language of Section 4103, wherein the impossibility of separating jurisdiction over "sentence" from "completion of sentence" is demonstrated by resorting, in reference to the applicability of United States laws, to "prisoners, probationers, parolees and juvenile offenders". Thus, in a challenge to the completion of a sentence, the issue of the relation of the sentence yet to be served to the continued confinement or supervision of an offender and the conditions of his or her supervision would inevitably turn upon the character of the offender as shown in part by past behavior.[9] That inquiry could lead to an administrative and even possible judicial examination of the conviction and the sentence. Thus, in effect, a United States administrative agency or United States court would be weighing the conviction and sentence to determine the eligibility of the offender for parole, probation or other forms of conditional release.

The jurisdictional overlap created by the *Treaties* and the proposed legislation makes it possible for an offender to file for a writ of *habeas corpus* as a collateral attack on the completion of the sentence.

In such *habeas corpus* proceedings, the validity of the continued detention of an offender by United States authorities would be determined in connection with: (i) the validity of the *Treaties*, (ii) the validity of the transfer and detention of the offender under the *Treaties*, and (iii) the validity of the transfer and detention of the offender under applicable United States laws, including the Constitution.[10]

These are some issues concerning the constitutionality of the *Treaties*; but, assuming the validity of all treaty provisions, the validity of continued United States custody of a transferred offender is likely to cause a court to delve into an examination of the conviction and sentence imposed by the Sending State. Thus, in effect the treaty and statutory scheme of allocation of jurisdictional subject matter would not foreclose a United States court from collaterally reviewing the foreign conviction and sentence as

the necessary for considering the validity of United States detention, custody and control of the transferred offender.

VI. Consent to Transfer and the Problems of Waiver and Right to Counsel

In keeping with the *Treaties* and the legislative scheme of allocating jurisdictional subject matter, and in order to avoid constitutional challenges to the process of transfer, the *Treaties* and the implementing legislation seek to avert constitutional challenges by predicating the transfer process on the "consent" of the offender transferee.

Section 4108 provides for verification of an offender's consent to transfer, and Section 4109 provides for availability of counsel as an assurance that such consent shall have been given the proper advice of counsel. Each of these provisions, however, is fraught with constitutional problems.

The adequacy of counsel, required by the sixth amendment, and the "due process" clause, of the fourteenth amendment, in a process whereby an individual disposes of his or her constitutional rights in criminal proceedings are satisfied by Section 4109(b). [11]

The waiver of rights provided for in Section 4108, however, faces several other difficulties.

(1) It appears as one of the consequences of which an offender must be informed before his or her consent to transfer is obtained, under Section 4108(b) (1). Its exact wording is: "and by his consent he waives all rights he might have had to institute proceedings in the courts of the United States seeking to challenge, modify, or set aside his conviction or sentence." Thus, it is possible to view this language as a presumptive conclusion of law of which an offender must be advised, rather than as a waiver.

As discussed above with respect to the allocation of jurisdictional subject matter, the validity of this proposition as a valid presumptive conclusion of law is questionable. Merely acknowledging that such a proposition is believed to be true might not constitute a waiver. But, if it were deemed a waiver, then the elements of "voluntariness" and "knowledge" embodied in the decision of the United States Supreme Court would also have to be satisfied.[12]

Separating the waiver from the consent to transfer and putting it in a more conventional form, while requiring execution of both as a pre-condition to transfer, might be an effective solution to this potential problem. Whereas no offender may be transferred

without his or her consent under the *Treaties*, there is no requirement that a Receiving State accept all offenders who consent, and the decision whether to accept a proposed transfer is expressly made a non-reviewable decision under Section 4100(e) of the legislation. Accordingly, it would be possible to condition acceptance of a transfer on execution by the offender of a waiver.

(2) In any case, a waiver of a constitutional right must not only be knowingly made with advice of competent counsel, but also be given voluntarily. Voluntariness is satisfied even where an element of coercion exists, but only where the degree of coercion is relatively small and the benefit to the person making the waiver is proportionately great and the element of coercion cannot readily be eliminated. [13]

But, in the case of an offender who is imprisoned in circumstances that may be significantly below minimum United States standards of confinement, in a strange land, far from the society he or she knows, facing the prospect of completion of a sentence under hardship circumstances unless he or she waives any rights to challenge his or her continued confinement in the United States as condition to transfer, the element of coercion would appear to create a Hobson's choice sufficient to hold the waiver involuntarily given.

As stated above, the *Treaties* with Mexico and Canada do not require such waivers, so that their existence is not crucial to United States performance of its treaty obligations, but are a legislative requirement in an effort to make up for any inadequacy in the *Treaties'* provisions on limitations of United States jurisdiction with respect to the conviction and sentence.

VII. Distinction between Recognition, Enforcement and Execution of Sentences

Since the *Treaties* are based on the implicit recognition of foreign penal judgments as a premise for the execution of foreign penal sentences which are the object of the transfer for the execution of the sentences, a distinction between these concepts must be made.

The term "recognition" means that a foreign penal judgment's legal existence and validity is recognized. [14] It does not necessarily imply that the foreign penal judgment shall be enforced in whole or in part, nor that by its enforcement certain facts thereof shall be executed as if it were a national judgment. Thus, a foreign penal judgment can be recognized for its juridical existence