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NOTES

“EVER BEEN IN A [FOREIGN] PRISON?”¹ THE IMPLEMENTATION OF TRANSFER OF PENAL SANCTIONS TREATIES BY U.S. STATES

David S. Finkelstein

INTRODUCTION

Transfer of penal sanctions treaties allow people who are arrested, tried, and convicted of crimes abroad to serve their sentences in their home countries.² The United States is party to one multilateral agreement³ and numerous bilateral treaties⁴ which govern the transfer of penal sanctions. The purpose of these treaties and the federal legislation pertaining to them “is to facilitate the transfer of foreign prisoners to their home countries by establishing procedures that can be initiated by prisoners who prefer to serve their sentences there.”⁵

1. *Airplane!* (Paramount 1980).

2. See Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species?*, 24 *Vand. J. Transnat'l L.* 449, 451-52 (1991) [hereinafter Abramovsky, *Endangered Species*] (discussing the purpose of the transfer of penal sanctions treaty with Mexico).

3. Council of Europe Convention on the Transfer of Sentenced Persons, *done* Mar. 21, 1983, 35 U.S.T. 2867, 22 I.L.M. 530 (entered into force July 1, 1985) [hereinafter Convention with Europe]. The United States has also signed a multilateral agreement open to members of the Organization of American States. Inter-American Convention on Serving Criminal Sentences Abroad, *done* June 9, 1993, S. Treaty Doc. No. 104-35 (1996), Hein's No. KAV 4762 (signed on behalf of the United States on Jan. 10, 1995) [hereinafter Inter-American Convention]; Maureen T. Walsh & Bruce Zagaris, *The United States-Mexico Treaty on the Execution of Penal Sanctions: The Case for Reevaluating the Treaty and Its Policies in View of the NAFTA and Other Developments*, 2 *Sw. J. L. & Trade* 385, 426 (1995). The Inter-American Convention has not been ratified by the Senate and, thus, is not yet in force, but President Clinton has urged the Senate to ratify it. Letter of Transmittal from William J. Clinton, President of the United States of America, S. Treaty Doc. No. 104-35, at III (1996), Hein's No. KAV 4762. Because the Inter-American Convention represents the most recent example of a transfer treaty, this paper will refer to provisions of the Inter-American Convention.

4. The United States has separate bilateral treaties with: Mexico, Canada, Bolivia, Panama, Turkey, Peru, France, and Thailand. Walsh & Zagaris, *supra* note 3, at 390.

5. Letter of Submittal from William J. Clinton, President of the United States of America, S. Treaty Doc. No. 104-35, at V-VIII (1996), Hein's No. KAV 4762; see also Convention with Europe, *supra* note 3, pmbL., 35 U.S.T. at 2870, 22 I.L.M. at 530 (stating that foreigners who are convicted of a “criminal offense should be given the opportunity to serve their sentences within their own society”); H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3146 (“The purpose of the act is to provide the implementation procedures for offender transfer treaties with Mexico and Canada as well as for similar future treaties.”).

The transfer of penal sanctions treaties are substantially alike;⁶ each treaty provides for a similar set of requirements and procedures for transfer. First, the prisoner⁷ must be a national of the receiving state in order to qualify for transfer.⁸ Second, the act for which the prisoner was convicted must be a crime under both the transferring and receiving states,⁹ although some treaties except prisoners convicted of certain crimes from eligibility for transfer.¹⁰ Third, the treaties require that the prisoner consent to his transfer.¹¹ The treaties differ over whether the prisoner, receiving state, transferring state, or any of these parties may initiate the transfer.¹² Fourth, the treaties designate the manner and location of prisoner transfers and how the costs of transfer will be allocated.¹³ Fifth, the treaties provide that the sentencing state retains the exclusive jurisdiction to review the prisoner's conviction.¹⁴ These requirements are further supplemented by corre-

6. Abramovsky, *Endangered Species*, *supra* note 2, at 457.

7. Because the treaties and corresponding legislation use varied terminology, this paper will use the terms "prisoner" and "offender" interchangeably.

8. Inter-American Convention, *supra* note 3, art. III(4), S. Treaty Doc. No. 104-35, at 2 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, art. 3(1)(a), 35 U.S.T. at 2872, 22 I.L.M. at 531; Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mexico, art. II(2), 28 U.S.T. 7399, 7402 [hereinafter United States-Mexico Treaty].

9. Inter-American Convention, *supra* note 3, art. III(3), S. Treaty Doc. No. 104-35, at 2 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, art. 3(1)(e), 35 U.S.T. at 2872, 22 I.L.M. at 531; United States-Mexico Treaty, *supra* note 8, art. II(1), 28 U.S.T. at 7402. The requirement that the offense committed be a crime in both nations is referred to as "double criminality." See 18 U.S.C. § 4101(a) (1994). If the transferring or receiving nation has a federal form of government, double criminality can be satisfied if the act is an offense under the federal laws of the nation or the laws of a state or province within that nation. *Id.* For a discussion of double criminality and why it is an unnecessary restriction on the use of transfer treaties, see William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 Va. J. Int'l L. 813 (1989).

10. See United States-Mexico Treaty, *supra* note 8, art. II(4), 28 U.S.T. at 7403 (requiring that the offense not be a "political offense" or an "offense under the immigration or the purely military laws of a party"); see also Abramovsky, *Endangered Species*, *supra* note 2, at 459-60 (citing examples of excluded offenses in the transfer treaties between the United States and Mexico, Canada, Turkey, and Thailand).

11. Inter-American Convention, *supra* note 3, art. III(2), S. Treaty Doc. No. 104-35, at 2 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, art. 3(1)(d), 35 U.S.T. at 2872, 22 I.L.M. at 531; United States-Mexico Treaty, *supra* note 8, art. IV(2), 28 U.S.T. at 7403.

12. Compare Inter-American Convention, *supra* note 3, art. V(1), S. Treaty Doc. No. 104-35, at 3 (1996), Hein's No. KAV 4762 (stating that any party may initiate the transfer) with United States-Mexico Treaty, *supra* note 8, art. IV(1), 28 U.S.T. at 7403 (stating that transfer should be commenced by the transferring state).

13. Inter-American Convention, *supra* note 3, art. V(8-9), S. Treaty Doc. No. 104-35, at 3-4 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, arts. 16-17, 35 U.S.T. at 2878-80, 22 I.L.M. at 535; United States-Mexico Treaty, *supra* note 8, art. V(1, 4), 28 U.S.T. at 7405-06.

14. Inter-American Convention, *supra* note 3, art. VIII, S. Treaty Doc. No. 104-35, at 4 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, art. 13, 35 U.S.T. at 2878, 22 I.L.M. at 534; United States-Mexico Treaty, *supra* note 8, art. VI, 28 U.S.T. at 7406.

sponding provisions in the U.S. federal enabling legislation,¹⁵ which provides the statutory basis for participation in the transfer treaties.¹⁶

The transfer of penal sanctions treaties address two specific concerns of the United States: (1) the physical abuse, corruption, and sub-par living conditions encountered by many American citizens imprisoned abroad,¹⁷ and (2) the financial difficulties regarding the imprisonment of foreign nationals in American prisons.¹⁸ The United States also benefits from transfer treaties because the treaties seek to improve international relations between nations and increase cooperation in combating crime.¹⁹ Furthermore, transferring a prisoner to his home country is likely to improve the prisoner's social rehabilitation by enabling the prisoner to benefit from easier access to family, friends, and counsel, as well as better and faster employment opportunities upon release.²⁰

15. Enabling legislation is usually passed in concurrence with or subsequent to ratification of a treaty, and it empowers the government to act in accordance with the treaty. See Khaldoun A. Baghdadi, Comment, *Apples and Oranges—The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez*, 20 *Hastings Int'l & Comp. L. Rev.* 701, 710 (1997).

16. See 18 U.S.C. §§ 3244, 4100-4115 (1994).

17. See H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3146 (enumerating the complaints raised by the families of Americans imprisoned in Mexico); Abramovsky, *Endangered Species*, supra note 2, at 454-55 (citing, for example, the corruption, physical abuse, and generally poor conditions Americans imprisoned in Mexico must endure); Walsh & Zagaris, supra note 3, at 392-93 (stating that transfer treaties are motivated by a desire to protect Americans from unsafe and unsanitary prison conditions). In 1996, approximately 2,200 Americans were arrested abroad. Alfred Borcover, *Departing Thoughts*, Orange County Register, Dec. 29, 1996, at D7.

18. See Walsh & Zagaris, supra note 3, at 393-94, 429-31 (citing the cost of incarcerating prison inmates as an incentive to decrease prison populations by transferring prisoners out of the United States); see also Ken Chavez, *Wilson Challenge of INS Brings Inmate Full Circle*, Sacramento Bee, Jan. 31, 1996, at A1 (stating Governor Pete Wilson's claim that California spends \$400 million per year to house more than 20,000 undocumented immigrants in its prisons); Dave Leshner, *Wilson Jab at U.S. Takes 4-Hour Detour*, L.A. Times, Jan. 31, 1996, at A3 (stating Governor Pete Wilson's claim that the Clinton administration is not fulfilling its responsibilities regarding the burdens of illegal aliens in state prisons).

19. Inter-American Convention, supra note 3, pmbL, S. Treaty Doc. No. 104-35, at 1 (1996), Hein's No. KAV 4762 ("[Inspired by the desire] to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons"); Convention with Europe, supra note 3, pmbL, 35 U.S.T. at 2870, 22 I.L.M. at 530 ("[d]esirous of further developing international co-operation in the field of criminal law"); H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3149. Conversely, the transfer treaties can also cause disharmony in foreign relations. See Transfer of Alien Prisoners Act of 1997, S. 3, 105th Cong. § 107 (1997) (withholding foreign assistance and requiring the United States to vote against loans from international development banks for nations that are parties to transfer treaties with the United States and who do not accept for return a designated percentage of prisoners approved for transfer by the Attorney General).

20. Abramovsky, *Endangered Species*, supra note 2, at 456-57; see also Inter-American Convention, supra note 3, pmbL, S. Treaty Doc. No. 104-35, at 1 (1996), Hein's No. KAV 4762 (stating that the parties want "to ensure improved administra-

This Note addresses the legal issues surrounding the transfer of penal sanctions treaties which are raised when prisoners in an individual U.S. state's correctional system seek to utilize these treaties. A tension exists between the proper role of the individual states in executing transfers and the maintenance of a coherent and consistent foreign policy regarding the transfer treaties. Part I of this Note sets forth the constitutional, human rights, and other legal criticisms which have been raised in the past by scholars and commentators concerning the transfer treaties. Part II discusses the current operation of the transfer treaties on both the federal and state levels of government in the United States. Part II specifically examines transfer treaty enabling legislation in the states of New York, California, and Ohio. Part III analyzes the problems raised by the U.S. state enabling legislation, which provides for state participation in the international transfer of prisoners. Part III also critiques the transfer treaties based on their prospects for success in light of the current U.S. state enabling legislation. Part IV proposes that the discretion of the relevant state actors over the international transfer of prisoners should be limited and brought into line with the goals and purposes of the transfer treaties. In addition, part IV argues that U.S. state enabling legislation should be promulgated or amended in each state to include: procedures for the mandatory identification and notification of all prisoners eligible for transfer, more explicit guidelines governing the discretionary decision making of state actors regarding international transfers, and provisions for the conversion of indeterminate sentences to determinate sentences. This Note concludes that decisions regarding the international transfer of prisoners are a significant part of a larger foreign policy and that these decisions should not be viewed as isolated state issues. Consequently, states should adopt enabling legislation that results in the consistent use and operation of transfer treaties.

I. OBJECTIONS AND CRITICISMS REGARDING THE TRANSFER TREATIES

Since the first transfer treaty with Mexico was ratified in 1977,²¹ transfer treaties have come under attack for alleged constitutional violations.²² More recently, scholars and commentators have moved away from constitutional arguments and instead have criticized the treaties on two disparate grounds. Some have argued that the transfer

tion of justice through the social rehabilitation of the sentenced persons"); Convention with Europe, *supra* note 3, pmbl., 35 U.S.T. at 2870, 22 I.L.M. at 530 (stating that transfer treaties "further the ends of justice and the social rehabilitation of sentenced persons"); H.R. Rep. No. 95-720 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3146, 3149 (stating that rehabilitation is one of the primary objectives of U.S. penal policy).

21. United States-Mexico Treaty, *supra* note 8, 28 U.S.T. 7399.

22. See *infra* part I.A.

treaties fail to adequately recognize international human rights.²³ Others support the concept of international transfer treaties, but are dismayed by international and domestic political developments which hinder use of the treaties and prevent the treaties from realizing their full potential.²⁴

A. Constitutional Criticisms

Challenges to the constitutionality of the transfer treaties fall into two categories. Initially, transfer treaties were attacked on the grounds that the treaties deprived Americans, who were tried abroad and transferred to the United States, of the due process protections which would have been available at a trial in the United States.²⁵ Other objections focused on the operation of the transfer treaties regarding the prisoner's consent to transfer.²⁶ This part discusses both of these objections, which have dominated the professional commentary to date.

1. Trials Abroad Lack Due Process

Some critics argue that transfer treaties are unconstitutional because they deprive Americans tried abroad of procedural due process protections.²⁷ One commentator has targeted the lack of an exclu-

23. See *infra* part I.B.

24. See *infra* part I.C.

25. See *infra* part I.A.1.

26. See *infra* part I.A.2.

27. See Abraham Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 Wis. L. Rev. 25 [hereinafter Abramovsky, *American Policy*]; Abraham Abramovsky & Stephen J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 Iowa L. Rev. 275 (1979); Irwin P. Stotzky & Alan C. Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 Minn. L. Rev. 733 (1978); Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 Harv. L. Rev. 1500 (1977); Robert M. Emanuel, Note, *Intervention of Constitutional Powers: The Prisoner Transfer Treaties*, 2 Fla. Int'l L.J. 203, 208, 225 (1986) (arguing that an amendment to the Constitution is needed to solve the conflict between due process and prisoner exchange treaties); Gary Gray, Comment, *The Mexican-American Penal Sentences Treaty: A Run-On Sentence*, 6 Pepp. L. Rev. 149 (1978). But see Gregory Gelfand, *International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty*, 64 B.U. L. Rev. 563, 567 (1984) ("This evaluation reveals not only that penal transfer treaties are constitutionally sound, but also that many of the limitations in existing treaties . . . are . . . neither constitutionally required nor otherwise desirable."); Detlev F. Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty"*, 64 Iowa L. Rev. 325, 331-36 (1979) (defending the constitutionality of the transfer treaty with Mexico); Liana E. Olivarez, Comment, *The Mexican-American Prisoner Transfer Treaty: Current Problems and Solutions*, 30 Tex. Int'l L.J. 395, 400 (1995) (arguing that constitutional protections do not extend to convictions in foreign courts and changing the situs of incarceration does not alter that principle).

sionary rule²⁸ in foreign trials as a possible violation of due process.²⁹ This argument posits that transfer treaties allow American prosecutors and law enforcement to aid and encourage the prosecution of Americans abroad in trials not subject to the protections of procedural due process, thereby making it easier and less costly to get a conviction; the convicted American can then be transferred back to the United States under a transfer treaty.³⁰ There is also a less extreme version of this argument which avoids insinuating a broader conspiracy between American and foreign law enforcement. This version charges that even without the active participation of American law enforcement, by imprisoning Americans convicted abroad in trials lacking due process protections, the United States is affirming and enforcing unconstitutional convictions.³¹

The courts have not been willing to find constitutional flaws with the transfer treaties on the ground that Americans convicted abroad are entitled to trials with constitutional due process protections if they are to be transferred back to the United States.³² This applies to Americans convicted abroad even where American law enforcement is integrally involved in apprehending the American suspect.³³ The refusal to recognize due process violations is consistent with the congressional understanding of the transfer treaties.³⁴ The courts have relied on the principle, originating in *Neely v. Henkel*,³⁵ that an American citizen who commits a crime in a foreign country must submit to

28. The exclusionary rule prevents the introduction at trial of evidence which was obtained in contravention of a defendant's constitutional rights. See *Miranda v. Arizona*, 384 U.S. 436, 492 (1966); *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *Mapp v. Ohio*, 367 U.S. 643, 658-60 (1961).

29. Abramovsky, *Endangered Species*, *supra* note 2, at 478; Abramovsky & Eagle, *supra* note 27, at 302-03; see also Abramovsky, *American Policy*, *supra* note 27, at 40-41 (describing a hypothetical scenario in which American law enforcement circumvents the exclusionary rule by supplying foreign officials with illegally obtained evidence and having the foreign officials arrest and try the American abroad).

30. See Abramovsky, *Endangered Species*, *supra* note 2, at 477-78; Abramovsky & Eagle, *supra* note 27, at 321.

31. See Abramovsky, *American Policy*, *supra* note 27, at 35 ("By ratifying [a transfer] treaty, the United States enforces the sentences imposed by [certain foreign] courts, and in effect ratifies judgments secured in a criminal justice system plagued with inefficiency and corruption."); see also Abramovsky & Eagle, *supra* note 27, at 310 ("Ordinarily American courts will not enforce the penal laws of a foreign nation.").

32. *Kanasola v. Civiletti*, 630 F.2d 472 (6th Cir. 1980); *Mitchell v. United States*, 483 F. Supp. 291 (E.D. Wis. 1980).

33. Abramovsky, *Endangered Species*, *supra* note 2, at 478. *But see* H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3165 (explaining that an American convicted abroad with the aid of unconstitutional actions by American law enforcement could challenge the right of the United States to maintain custody over him, but not the conviction itself).

34. See H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3164-65.

35. 180 U.S. 109 (1901).

the modes of trial as the laws of that country prescribe.³⁶ This principle also recognizes the sovereignty of foreign nations.³⁷ Furthermore, the Supreme Court has stated that the Constitution "ha[s] no relation to crimes committed [outside] the jurisdiction of the United States against the laws of a foreign country."³⁸

2. Validity of a Prisoner's Consent to Transfer to the United States

Other critiques of the constitutionality of the transfer treaties are more focused on specific provisions of the transfer treaties. This category questions the validity of an American offender's consent to a transfer to the United States.³⁹ These arguments challenge the validity of the prisoner's consent, first, on grounds of duress⁴⁰ and second, based on the unconstitutionality of the prisoner's waiving his right to appeal his conviction.⁴¹ A prisoner transferring home to the United States waives the right to appeal when his consent is verified and made irrevocable.⁴² Neither version of this argument has met with any sustained success in American courts.

In post-transfer challenges, the courts have been unwilling to invalidate transfers based on "duress induced by the conditions of confinement in a foreign penitentiary."⁴³ Because one of the United States' purposes in entering into prisoner transfer treaties was to alleviate the inhumane prison conditions suffered by Americans in foreign coun-

36. *Id.* at 123; see Walsh & Zagaris, *supra* note 3, at 418 (quoting *Neely*, 180 U.S. at 122-23). In *Neely*, the Court upheld the constitutionality of an act of Congress which provided for the extradition of any person in the United States for trial in a foreign country under the laws of that country. *Neely*, 180 U.S. at 122-23.

37. See Walsh & Zagaris, *supra* note 3, at 418.

38. *Neely*, 180 U.S. at 122; see *Mitchell v. United States*, 483 F. Supp. 291, 294 (E.D. Wis. 1980) (quoting *Neely*, 180 U.S. at 122-23); Walsh & Zagaris, *supra* note 3, at 418.

39. See, e.g., Abramovsky, *American Policy*, *supra* note 27, at 43 (arguing that prisoners' agreeing to transfer is duress induced when the prisoner is under horrid and inhumane prison conditions); Abramovsky & Eagle, *supra* note 27, at 299 (questioning the voluntariness of an offender's consent to transfer when given in the face of horrid or torturous prison conditions); Emanuel, *supra* note 27, at 208 ("To activate the treaty, therefore, one must waive certain constitutional rights."); Olivarez, *supra* note 27, at 401-02 (setting out responses to the argument that an offender's waiving his right to petition for habeas corpus is invalid).

40. See Abramovsky, *American Policy*, *supra* note 27, at 43 (arguing that prisoners' agreeing to transfer is duress induced when the prisoner is under horrid and inhumane prison conditions); Abramovsky & Eagle, *supra* note 27, at 299 (questioning the voluntariness of an offender's consent to transfer when given in the face of horrid or torturous prison conditions).

41. See Abramovsky, *American Policy*, *supra* note 27, at 58-59; Abramovsky & Eagle, *supra* note 27, at 300-02 (questioning the constitutionality of a transfer treaty which forces the offender to waive the right to appeal his conviction). *But see* Olivarez, *supra* note 27, at 401-02 (setting out responses to the argument that an offender's waiver of his right to petition for habeas corpus is invalid).

42. 18 U.S.C. §§ 4107-4109 (1994); see *supra* note 14 and accompanying text.

43. Walsh & Zagaris, *supra* note 3, at 403; see *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir. 1980); *Boyden v. Bell*, 631 F.2d 120 (9th Cir. 1980); *Mitchell*, 483 F. Supp. 291.

tries,⁴⁴ it is clear that American officials know the nature and extent of these inhumane conditions.⁴⁵ Nevertheless, the courts have found that prisoners' decisions to consent to transfer were the product of rational decision making.⁴⁶ Because of the consent verification procedures in the federal enabling legislation, prisoners must formally consent to a transfer or ratify consent previously given.⁴⁷ Thus, this process further undermines any claim of duress by allowing the courts to justify their refusal to entertain duress claims.⁴⁸

A second objection, based explicitly on constitutional grounds, claims that both transfer treaties and the federal enabling legislation are unconstitutional because they require the waiver of the constitutional right to appeal a conviction or make a collateral attack upon the foreign conviction.⁴⁹ It is not disputed that the treaties and the legislation provide that a transferred prisoner cannot attack his conviction in the receiving state, even if that conviction occurred without constitutional due process protections.⁵⁰ Nevertheless, courts have found that

44. See *supra* note 17 and accompanying text.

45. See H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3146-47.

46. *Rosado*, 621 F.2d at 1191 (noting that "viewed in light of the alternatives legitimately available" the "decisions were voluntarily and intelligently made"); *Mitchell*, 483 F. Supp. at 294 (rejecting the petitioner's argument that his consent was not voluntary because he would have agreed to anything to secure his release from a Mexican prison). Although there is abundant evidence that Americans imprisoned abroad are often singled out for torture or, at best, generally less favorable treatment than other prisoners, some Americans might prefer to serve their sentences abroad. In foreign prisons, prisoners with money are often able to buy excellent accommodations, high quality meals, and personal servants. Abramovsky, *Endangered Species*, *supra* note 2, at 455 & n.21. Furthermore, prisoners in Mexico are eligible for conjugal visits. *Id.* at 455 n.21; *Olivarez*, *supra* note 27, at 402.

47. 18 U.S.C. §§ 4107-4109.

48. See, e.g., *Boyden*, 631 F.2d at 123 ("Allegations of duress caused by the conditions of his confinement . . . would not support a finding that this transfer was involuntary.").

49. See Abramovsky, *American Policy*, *supra* note 27, at 58-59; Abramovsky & Eagle, *supra* note 27, at 300-02; *Olivarez*, *supra* note 27, at 401 (pointing out the criticism of the fact that transferred prisoners are deemed to have waived their rights to seek a writ of habeas corpus); see, e.g., *Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 875 (9th Cir. 1980) (describing the plaintiff's argument that the transfer treaty with Mexico denies a transferred prisoner the right to challenge the constitutionality of his foreign conviction in a United States court).

50. See 18 U.S.C. § 3244(1) (1994) (stating that "the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country"); Inter-American Convention, *supra* note 3, art. VIII, S. Treaty Doc. No. 104-35, at 4 (1996), Hein's No. KAV 4762 ("The sentencing state shall retain full jurisdiction for the review of sentences issued by its courts."); Convention with Europe, *supra* note 3, art. 10, 35 U.S.T. 2867, 2876, 22 I.L.M. 530, 533-34 ("In the case of continued enforcement, the [receiving] State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.").

these provisions of the treaties and the enabling legislation do not violate the constitutional rights of the prisoners.⁵¹

The courts have held that the prisoner's consent, prior to his transfer, operates as "a waiver of, or at least an agreement not to assert, any constitutional rights the offender might have regarding his or her conviction."⁵² A waiver is valid if it is knowingly and voluntarily made, the waiving party has access to counsel, and the waiving party consents with full knowledge of the consequences.⁵³ Because the federal enabling legislation provides for all these opportunities,⁵⁴ any prisoner whose consent is verified in accordance with the enabling legislation will be deemed to have waived any right to challenge his foreign conviction.⁵⁵ Furthermore, waiver of the right to challenge the conviction was deemed an essential ingredient in negotiating transfer treaties, and Congress did not suggest any less intrusive means.⁵⁶ Although the prisoner cannot challenge the fact of his conviction, the prisoner can seek a writ of habeas corpus⁵⁷ based on the manner of execution of the sentence,⁵⁸ such as the conversion of his foreign sentence to a domestic sentence.⁵⁹

51. *Pfeifer*, 615 F.2d at 876 (holding that the lack of constitutionality in a conviction abroad does not render a transfer treaty unconstitutional or entitle a transferred prisoner to relief); *Kanasola v. Civiletti*, 630 F.2d 472, 474 (6th Cir. 1980) (holding that the transfer treaty with Canada does not violate the rights of a prisoner transferring home to the United States by denying American courts the jurisdiction to collaterally review the conviction); *Mitchell*, 483 F. Supp. at 294 (holding that U.S. courts do not have jurisdiction to hear any appeals of the transferred prisoner's conviction and, even if there were jurisdiction, the conviction and sentence by the transferring state are immune from attack). Only a few courts have granted relief on the basis of foreign officials' involvement in a joint venture with American law enforcement or where the foreign trial "lacked any semblance of due process." *Abramovsky, American Policy*, *supra* note 27, at 56-59; *see Abramovsky & Eagle, supra* note 27, at 303-05 (discussing how cooperation between American and Mexican law enforcement could constitute a joint venture and thereby prevent incarceration in the United States of an American convicted in Mexico).

52. *Pfeifer*, 615 F.2d at 876.

53. *See id.*

54. 18 U.S.C. §§ 4108-4109 (1994).

55. It is also possible that courts will not reach the question of the constitutionality of a waiver because a waiver requires relinquishment of a vested right, and Americans imprisoned abroad may "have no right to relief from United States courts." *Pfeifer*, 615 F.2d at 876.

56. *See* H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3164-65.

57. A writ of habeas corpus raises the issue of whether the petitioner is being lawfully retained, not the petitioner's guilt or innocence. *Black's Law Dictionary* 709 (6th ed. 1990).

58. *Walsh & Zagaris, supra* note 3, at 418.

59. These challenges involve credit for "good time," other probationary matters, and converting foreign sentences to domestic ones under the federal sentencing guidelines. *See Cannon v. United States Dep't of Justice*, 973 F.2d 1190 (5th Cir. 1992); *Hansen v. United States Parole Comm'n*, 904 F.2d 306 (5th Cir. 1990); *Thorpe v. United States Parole Comm'n*, 902 F.2d 291 (5th Cir. 1990); *Herrmann v. Meese*, 849 F.2d 101 (3d Cir. 1988); *Boyden v. Bell*, 631 F.2d 120 (9th Cir. 1980).

The discussion above addresses how the international transfer treaties have been criticized on various constitutional grounds. The courts, Congress, and the executive branch, however, have not objected to the treaties on constitutional grounds. Accordingly, constitutional criticism is no longer a constructive addition to the debate over transfer treaties.

B. *International Human Rights Perspective*

A second group of commentators have criticized the transfer treaties from an international human rights perspective.⁶⁰ This is an appropriate perspective for criticism: the treaties purport to seek justice and, therefore, must take into account the rights and needs of the prisoner.⁶¹ This Note, however, is primarily concerned with the proper operation of the treaties and the prospects for their success in light of domestic political norms and institutions.⁶² Nevertheless, the human rights perspective makes several persuasive points.

The human rights perspective argues that the primary purpose of transfer treaties is to benefit the individual prisoner, and only secondarily to benefit the states participating in the transfer.⁶³ This view of the purpose of transfer treaties is a major departure from more common perspectives on the purpose of the treaties, which view the treaties in the scope of international relations as well as the benefits the treaties may deliver to the individual.⁶⁴ The human rights perspective addresses how transfer treaties can be made more effective by removing the impediments to transfer which do not serve humanitarian goals.⁶⁵ For example, if the purpose of transfer treaties is to allow

60. See, e.g., Gelfand, *supra* note 27, at 566, 573 (rejecting constitutional objections to transfer treaties and criticizing provisions of the treaties which are counterproductive to their humanitarian purpose); Michael Plachta, *Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective*, 53 La. L. Rev. 1043 (1993) (discussing the role of humanitarian and human rights concerns in the international transfer of prisoners); Gregory D. Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771 (1994) (discussing how the treaty-based international rights of foreigners are being violated in the United States).

61. See Inter-American Convention, *supra* note 3, pmbl., S. Treaty Doc. No. 104-35, at 1 (1996), Hein's No. KAV 4762 ("[inspired by the desire] to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons"); Convention with Europe, *supra* note 3, pmbl., 35 U.S.T. 2867, 2870, 22 I.L.M. 530, 530 ("[c]onsidering that such co-operation [between nations] should further the ends of justice and the social rehabilitation of sentenced persons"); H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3149 ("The most fundamental justification for offender exchange treaties is human rights.").

62. Accordingly, it will not undertake an extensive discussion of the merits of arguments from an international human rights perspective.

63. See, e.g., Plachta, *supra* note 60, at 1043.

64. See *supra* notes 17-20 and accompanying text.

65. See Gelfand, *supra* note 27, at 566, 573; Plachta, *supra* note 60, at 1044 (examining how the conditions imposed on the transfer of prisoners relate to humanitarian and rehabilitative goals).

prisoners to be returned to the country with which they have genuine ties, then citizenship, country of origin, and current domicile should not be dispositive factors.⁶⁶

The human rights perspective, like the constitutional objections, also focuses on the prisoner's consent to his transfer under a treaty.⁶⁷ Under the human rights perspective, consent of the prisoner is essential to justify the use of transfer treaties.⁶⁸ Furthermore, this perspective argues that prisoners should be informed of the possibilities and legal consequences of transfer to ensure that there is informed consent,⁶⁹ and the receiving state should be able to verify that the prisoner's consent was properly and freely given.⁷⁰

It is probable that in the wake of *United States v. Alvarez-Machain*,⁷¹ the human rights perspective, which relies on general principles of international law, will not be successful in American courts. In that case, the Supreme Court disregarded, or at least downplayed, the importance of general principles and customary practices of international law.⁷² In *Alvarez-Machain*, the United States offered a reward for the defendant, who was charged with torturing and murdering an American DEA agent.⁷³ Two Mexican policemen kidnapped the defendant and delivered him to American authorities at the border.⁷⁴ Despite a willingness to admit that the U.S. government may have acted in violation of general principles of international law,⁷⁵ the Court would not limit the power of the government based

66. Plachta, *supra* note 60, at 1045-49. Under transfer treaties in their current form, the prisoner must be a citizen of the receiving state to qualify for transfer. See *supra* note 8 and accompanying text.

67. See Plachta, *supra* note 60, at 1049-72.

68. *Id.* at 1050-51. Consent by the prisoner is essential because, under the human rights perspective, "an important objective of transfer is to further the interests of the prisoner." *Id.* at 1050. Transfer differs from deportation and extradition because those are acts of a state carried out in the public interest. *Id.* Although all transfer treaties to which the United States is a party require the consent of the prisoner, there are treaties among other nations which do not require the prisoner's consent. See *id.* at 1056-59. *But cf. infra* note 207 (discussing the possibility that the consent of foreign prisoners in the United States might not be necessary at some time in the future).

69. Plachta, *supra* note 60, at 1059.

70. *Id.* at 1065-66.

71. 504 U.S. 655 (1992).

72. See *id.* at 666-69.

73. Erika E. Barnes, *The Practice of International Prisoner Transfer Treaties*, 10 Int'l Enforcement L. Rep. 238, 241 (1994).

74. *Alvarez-Machain*, 504 U.S. at 657; Barnes, *supra* note 73, at 241.

75. While the court's decision does not address what these general principles are, Justice Stevens does so in his dissent. See *Alvarez-Machain*, 504 U.S. at 680-81 (Stevens, J., dissenting). Some of these principles are: a state will not perform an act of sovereignty in the territory of another state, a state will not send its agents into another state to apprehend persons accused of a crime, and a state violates international law and shows gross disrespect for humankind when it abducts a person in a foreign country. *Id.* (Stevens, J., dissenting).

on such principles.⁷⁶ As a result, it is unlikely that American courts will utilize the human rights perspective as the basis for decisions in this area.

C. *International and Domestic Developments Which Undermine the Transfer Treaties*

In addition to the constitutional objections and human rights perspectives, a third type of critique exists regarding the transfer treaties. This critique recognizes the benefits and successes of the transfer treaties, but argues that international and domestic political developments pose the greatest threat to the effectiveness of the treaties.⁷⁷

One commentator, who originally challenged the use of transfer treaties on constitutional grounds,⁷⁸ has come to appreciate the potential benefits of transfer treaties.⁷⁹ This commentator has argued that, unfortunately, other aspects of foreign policy and international politics undermine transfer treaties.⁸⁰ For example, when agents of the United States forcibly abduct suspects abroad and bring them to the United States for trial, as was done in *Alvarez-Machain*, the United States both ignores and undermines transfer treaties, extradition treaties, and other maxims of international cooperation.⁸¹ The practice of abducting foreign suspects could lead to repercussions by other nations, including a refusal to accept or grant prisoner transfer requests.⁸²

In addition to unilateral abduction of suspects abroad, the United States' increased use of passive personality jurisdiction could also undermine transfer treaties and the cooperation necessary for their success.⁸³ Passive personality jurisdiction allows a state to assert

76. See *id.* at 669; see also Barnes, *supra* note 73, at 241 (stating that the "Clinton administration has basically taken the position of the Bush administration, which is not to endorse abduction, but not to exclude the practice formally"). Furthermore, the Supreme Court has never repudiated *Ker v. Illinois*, which held that forcible abduction of a defendant from another country for trial in the United States was not a violation of due process. See *Alvarez-Machain*, 504 U.S. at 660-61 (discussing *Ker v. Illinois*, 119 U.S. 436 (1886)).

77. See, e.g., Abramovsky, *Endangered Species*, *supra* note 2 (arguing that transfer treaties are effective and enforceable, but have been undermined by the United States' resorting to unilateral abductions).

78. Abramovsky, *American Policy*, *supra* note 27, at 40-45, 56-59; Abramovsky & Eagle, *supra* note 27, at 302-16.

79. See Abramovsky, *Endangered Species*, *supra* note 2, at 456-57, 486 (stating that the transfer treaties benefit the person imprisoned abroad and that the failure of the treaties would harm Americans imprisoned abroad).

80. *Id.*

81. See *id.* at 468-76; *supra* notes 73-76 and accompanying text.

82. Mexico formally protested Alvarez-Machain's abduction and requested the extradition from the United States of two individuals it suspected were involved in the abduction on charges of kidnaping. *United States v. Alvarez-Machain*, 504 U.S. 655, 669 & n.16 (1992).

83. See Abramovsky, *Endangered Species*, *supra* note 2, at 482-83.

jurisdiction over those defendants who commit criminal conduct against the state's citizens, even if that conduct occurs abroad.⁸⁴ Thus, passive personality jurisdiction focuses on the nationality of the crime's victim, thereby disregarding more universally accepted theories of jurisdiction.⁸⁵

Another view of the effect of international developments on transfer treaties focuses on the potential for expanding the treaties in the wake of increased international economic and political integration.⁸⁶ One proponent of this view suggests that the NAFTA agreement signifies the beginning of a larger economic integration and globalization; these economic forces can combine with political integration to bring about supranational approaches to cooperation in criminal law and, specifically, the transfer of prisoners.⁸⁷ Unfortunately, there is also the possibility that the rapidly changing status of international criminal law and reliance on out-dated political and criminal institutions will cause greater difficulties for nations seeking to cooperate in areas of criminal law and the international transfer of prisoners.⁸⁸

Scholars and commentators who take the perspective that international and domestic political developments affect the success and goals of transfer treaties have provided useful criticisms of transfer treaties. An analysis of transfer treaties from a practical perspective which accounts for international and domestic political realities is the most advantageous approach. The courts have made it clear that transfer treaties and the federal enabling legislation do not violate the constitutional rights of Americans who are transferred to the United States or the rights of foreign nationals who seek to transfer out of the United States.⁸⁹ The humanitarian and international human rights criticisms of transfer treaties fail to account for the realities of the international system; states act in an altruistic manner only when the incentives to do so outweigh the costs of other behavior.⁹⁰

Transfer treaties are successful due to the reciprocal nature of the treaties: states have equal power to veto a transfer under the treaties;

84. *Id.*

85. *Id.* For a discussion of the United States' use of passive personality jurisdiction against a terrorist who hijacked a Jordanian airliner with three Americans on board and the implications of that case, see Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 *Yale J. Int'l L.* 121 (1990).

86. See Walsh & Zagaris, *supra* note 3.

87. *Id.* at 438.

88. *Id.* at 445.

89. See *supra* part I.A.

90. This logic is demonstrated by the Transfer of Alien Prisoners Act, proposed in the Senate. See Transfer of Alien Prisoners Act of 1997, S. 3, 105th Cong. § 107 (1997). In this bill, Congress seeks to tie a country's refusal to accept prisoners approved for transfer to a reduction in foreign assistance or development loans. See *id.* Thus, if the bill becomes law, the economic incentive to accept transferred prisoners will outweigh the economic incentive to refuse them.

a transfer requires cooperation from two states; and states have no incentive to relinquish their ultimate decision making authority to the individual prisoner or any other international organization.⁹¹ Accordingly, the proper perspective for analyzing the current efficacy of transfer treaties focuses on the international norms and domestic institutions which govern the operation of the treaties. Domestic institutions, such as U.S. state enabling legislation, pose a threat to the success of international transfer treaties because state enabling legislation directly affects the operation of the transfer treaties.

The next part of this Note addresses the operation of transfer treaties on both the federal and state levels. Federal and state enabling legislation govern the practical application of the treaties. Because of poorly crafted and unenforced enabling legislation, the success of the transfer treaties relies on the willingness of federal and state actors to comply with the mandate and spirit of the treaties.

II. TRANSFER TREATIES AND ENABLING LEGISLATION IN THE UNITED STATES

Even if a prisoner satisfies the specific criteria required by the transfer treaty,⁹² a nation may still refuse to transfer a prisoner because the ultimate decision to execute a transfer is a discretionary one.⁹³ In the United States, the Attorney General must consent to the transfer of prisoners out of American prisons.⁹⁴ The federal enabling legislation for the transfer treaties states that the Attorney General "is authorized . . . to make regulations for the proper implementation of [transfer of penal sanctions] treaties."⁹⁵ The Attorney General has adopted regulations allowing the Director of the Bureau of Prisons to receive and transfer custody of prisoners under transfer treaties,⁹⁶ providing procedures for the transfer of prisoners,⁹⁷ and approving the receipt of prisoners from U.S. states for transfer abroad.⁹⁸

A. Discretion over Transfer Decisions on the Federal Level

Foreign nationals imprisoned in the United States and American citizens imprisoned abroad have sought relief in federal courts be-

91. See Barnes, *supra* note 73, at 239 & n.5.

92. See *supra* notes 8-14 and accompanying text.

93. See Inter-American Convention, *supra* note 3, arts. V(6), VI, S. Treaty Doc. No. 104-35, at 3-4 (1996), Hein's No. KAV 4762; Convention with Europe, *supra* note 3, art. 3(1)(f), 35 U.S.T. 2867, 2872, 22 I.L.M. 530, 531; see also Abramovsky, *Endangered Species*, *supra* note 2, at 463-64 (setting forth various factors transfer treaties suggest should be used by the sentencing state when deciding whether to transfer a prisoner and noting the wide latitude this gives to the sentencing state's decision).

94. 10 U.S.C. § 955(a) (1994); 18 U.S.C. § 4102(3) (1994).

95. 18 U.S.C. § 4102(4).

96. 28 C.F.R. § 527.40 (1995).

97. *Id.* § 527.44.

98. *Id.* § 527.45.

cause the Attorney General has never formally and officially composed or adopted regulations to provide a framework for deciding whether to grant a transfer request.⁹⁹ The Seventh and District of Columbia Circuits have rejected these claims.¹⁰⁰ Those courts have held that 18 U.S.C. § 4102(4) “does not require the Attorney General to issue substantive regulations.”¹⁰¹

In *Scalise v. Thornburgh*,¹⁰² the court endeavored to distill congressional intent to determine whether § 4102(4) imposed “a mandatory obligation to issue substantive regulations governing the Attorney General’s exercise of discretion.”¹⁰³ The Seventh Circuit considered “the language of the statute; the legislative history; and the interpretation given by the administrative agency charged with enforcing the statute” to determine congressional intent.¹⁰⁴ The *Scalise* court noted that because the statute “does not provide that the Attorney General ‘shall’ issue regulations,” the language of the statute does not impose a mandatory duty to issue regulations.¹⁰⁵ When the express language of a statute is clear, a court would not normally need to look further to interpret it.¹⁰⁶

While *Scalise* accepted that the statutory language did not impose a mandatory obligation to issue regulations, the court also stated that “the context in which this language [of § 4102(4)] is stated does not clearly imply that it is permissive.”¹⁰⁷ Accordingly, the court ex-

99. See, e.g., *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991); *Scalise v. Meese*, 687 F. Supp. 1239 (N.D. Ill. 1988), *rev'd sub. nom. Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989). The Justice Department has never published binding rules regarding the transfer of prisoners. Walsh & Zagaris, *supra* note 3, at 409. Such rules would decrease the department’s discretion. *Id.* at 409-10. Within the Justice Department, the Office of Enforcement Operations has written internal guidelines and considers the following factors when deciding a prisoner’s eligibility for transfer: whether the prisoner has paid fines or restitution if ordered to do so; whether return or transfer of a prisoner would outrage public sensibilities; whether the prisoner constitutes a threat to American security or law enforcement; whether the prisoner would engage in an activity that is part of a pattern of criminal activity; whether the prisoner is under investigation for other crimes; whether the prisoner can provide information regarding other crimes under investigation; the nature of the prisoner’s offense; and other factors appropriate to consider in a specific case. *Id.* at 410-12; see also 6 Michael Abbell & Bruno A. Ristau, International Judicial Assistance A-298.37 to A-298.42 (1995) (giving the full text of the guidelines adopted by the Office of Enforcement Operations).

100. *Bagguley*, 953 F.2d 660; *Scalise*, 891 F.2d 640.

101. *Bagguley*, 953 F.2d at 662; accord *Scalise*, 891 F.2d at 647 (“[W]e conclude that Congress did not intend § 4102(4) to impose a mandatory obligation on the Attorney General to issue substantive regulations in the exercise of his discretion in prisoner transfer decisions.”).

102. 891 F.2d 640 (7th Cir. 1989).

103. *Id.* at 644.

104. *Id.* (quoting *United States v. Markgraf*, 736 F.2d 1179, 1182 (7th Cir. 1984)).

105. *Id.*; accord *Bagguley*, 953 F.2d at 662.

106. See *Scalise*, 891 F.2d at 644 n.5.

107. *Id.*

amined the legislative history of the statute.¹⁰⁸ Regarding § 4102(4), the House Judiciary Committee stated that “[it] expects the Attorney General to promptly establish regulations and to provide standards and guidelines which will govern the exercise of his discretion as to his consent to receive or transfer offenders.”¹⁰⁹ The *Scalise* court failed to note that the Committee also stated that “[i]n most cases, and possibly almost all cases, [the Attorney General] should agree to any receipt or transfer, if the offender requests or voluntarily consents to such transfer.”¹¹⁰ The *Scalise* court concluded that the Committee’s expression of an “expectation” did not establish congressional intent and that the language of the House Report was not dispositive.¹¹¹

Finally, *Scalise* examined the interpretation given to § 4102(4) by the Justice Department, the agency charged with enforcing it.¹¹² On behalf of the Justice Department, the Attorney General maintained that § 4102(4) imposed no mandatory obligation to issue substantive regulations governing his exercise of discretion in prisoner transfers.¹¹³ The court found that this interpretation by the Attorney General further supported its ruling.¹¹⁴ The court was giving substantial deference to the Attorney General.¹¹⁵

In addition to claiming that the Attorney General was required to furnish formal regulations addressing her discretion to transfer and receive prisoners under the transfer treaties, imprisoned offenders have also sought judicial relief on the grounds that their requests for transfer to or from the United States were wrongfully denied by the Attorney General.¹¹⁶ The courts have unanimously denied relief to claims brought on this ground.¹¹⁷

The courts have denied this relief by analyzing two aspects of the Attorney General’s decision, and giving both of those aspects a presumption in the Attorney General’s favor. First, the courts have ex-

108. *Id.* at 644-45.

109. *Id.* at 644-45 n.6 (emphasis added) (quoting Committee Report of the House Judiciary Committee, H.R. Rep. No. 95-720, reprinted in 1977 U.S.C.C.A.N. 3146, 3155).

110. H.R. Rep. No. 95-720 (1977), reprinted in 1977 U.S.C.C.A.N. 3146, 3155.

111. *Scalise*, 891 F.2d at 645.

112. *Id.* at 647.

113. *Id.*

114. *Id.*

115. *See id.*; see also *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991) (stating that “a court should defer to an agency’s interpretation of a statute that [the agency] is charged with implementing, so long as that interpretation is a permissible one”).

116. *See, e.g.,* *Marquez-Ramos v. Reno*, 69 F.3d 477, 479-80 (10th Cir. 1995) (stating plaintiff’s claim that the Attorney General’s duty to transfer him is nondiscretionary); *Bagguley*, 953 F.2d at 661 (challenging the denial of a request for transfer to England); *Scalise*, 891 F.2d at 643 (stating plaintiffs’ claim that the “failure of the Attorney General to provide them with a hearing prior to denial of [their transfer] request violated their fifth amendment rights”).

117. *See Marquez-Ramos*, 69 F.3d 477; *Bagguley*, 953 F.2d 660; *Scalise*, 891 F.2d 640.

amined the factors the Attorney General might use to consider the transfer request.¹¹⁸ As discussed above, courts have agreed that the Attorney General is not required to follow any specific guidelines in making her decision.¹¹⁹ Second, the courts have noted in cursory fashion that the Attorney General's decisions were based on facts underlying the prisoner's incarceration.¹²⁰ Thus, the courts have given substantial deference to the Attorney General's exercise of discretion in light of the facts presented. This judicial deference is based on the "unique nature" of transfer decisions.¹²¹ *Scalise* compared the decision whether to transfer a prisoner internationally to the decision whether to transfer a prisoner among intrastate institutions; the court decided that both decisions revolve around the same penological considerations.¹²² The *Scalise* court stated that interprison transfers between institutions in a single state "are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate."¹²³ Because the court regarded an international transfer as analogous to an intrastate transfer, the Attorney General received the benefit of wide discretion.¹²⁴ Not every court which has considered the merits of a transfer decision, however, has failed to note the international significance of such a decision.¹²⁵

By allowing the Attorney General to forgo establishing guidelines for considering a transfer and giving the Attorney General substantial deference regarding the ultimate transfer decision, courts have assured that almost any decision made by the Attorney General will be upheld.¹²⁶ Despite the Attorney General's unfettered discretion, this

118. *Marquez-Ramos*, 69 F.3d at 480; *Scalise*, 891 F.2d at 646.

119. See *supra* notes 99-115 and accompanying text.

120. See *Marquez-Ramos*, 69 F.3d at 481 ("As long as the Attorney General had the discretion, which she did, and exercised it within the framework of the Treaty, which she also did, Mr. Marquez-Ramos is not entitled to mandamus relief."); *Scalise*, 891 F.2d at 646 ("While these considerations may not appease those most intimately concerned, it is not our job to second guess the Attorney General's weighing of these considerations in his decision-making process.").

121. *Scalise*, 891 F.2d at 645; see *Marquez-Ramos*, 69 F.3d at 480 (stating that "the particular context in which transfer decisions are made cannot be ignored" and holding that transfer decisions are discretionary).

122. *Scalise*, 891 F.2d at 645-46.

123. *Id.* at 645 (citing *Shango v. Jurich*, 681 F.2d 1091, 1102 (7th Cir. 1982)) (quoting *Meachum v. Fano*, 427 U.S. 215, 226 (1976)).

124. See *id.*

125. *Marquez-Ramos*, 69 F.3d at 480 (stating that the Attorney General's wide discretion is further justified by the fact that transfer "determinations have international and political ramifications that cannot be relegated to mere ministerial actions").

126. There is also the possibility that the Attorney General's decision is beyond the jurisdiction of the court, thus making the decision immune from judicial review. As an alternative ground for its decision, *Scalise* held that under the Administrative Procedure Act, in the absence of standards upon which a court can review the Attorney General's discretionary authority and with a finding that there is no mandatory obligation to issue substantive regulations, the Attorney General's discretionary decision

Note does not argue that the Attorney General is unjustifiably rejecting prisoners' transfer requests. For example, in *Scalise*, the Attorney General denied the prisoner's transfer request because of the "relative seriousness of [the prisoner's] offense; his extensive criminal record; the manner of his return to the United Kingdom; his 'A' security classification in the United Kingdom, the highest security category; and, the likelihood that a transfer would not further his rehabilitation."¹²⁷ Thus, at this time, it does not appear that the Attorney General is abusing her wide discretion.

Notwithstanding the judicial interpretation of § 4102, not all of the transfer of penal sanctions treaties give the Attorney General such wide discretion. For example, the treaty between the United States and Mexico¹²⁸ requires that the Attorney General:

bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State.¹²⁹

Addressing the impact of this language, the Tenth Circuit held that where the Attorney General rejected a transfer request based upon "the seriousness of the offense and the prisoner's significant ties to the United States,"¹³⁰ the Attorney General had exercised her discretion within the framework of the treaty.¹³¹ The Tenth Circuit granted even wider deference under 18 U.S.C. § 4102 to the Attorney General than had other courts.¹³² The court did not undertake any analysis of the Attorney General's decision making process as it related to the mandate of the treaty.¹³³

is not reviewable. *Scalise*, 891 F.2d at 648-49; see also *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991) (holding that both the Convention with Europe and 18 U.S.C. § 4102(4) give the Attorney General "unfettered discretion with respect to transfer decisions" and thus are not reviewable under the Administrative Procedure Act).

127. *Scalise*, 891 F.2d at 646.

128. United States-Mexico Treaty, *supra* note 8, 28 U.S.T. 7399.

129. *Id.* art. IV(4), 28 U.S.T. at 7404; see also Inter-American Convention, *supra* note 3, art. V(6), S. Treaty Doc. No. 104-35, at 3 (1996), Hein's No. KAV 4762 (listing factors the transferring state "may consider").

130. *Marquez-Ramos*, 69 F.3d at 478.

131. See *id.* at 481.

132. See *supra* notes 99-115, 119-121, and accompanying text.

133. See *Marquez-Ramos*, 69 F.3d at 478 (noting that the Attorney General has the discretion to make the transfer decision and the record indicates that the Attorney General has assessed the merits of the transfer, but failing to discuss the Attorney General's decision).

B. *Discretion over International Transfers on the State Level*

The individual states of the United States are not parties to international treaties.¹³⁴ Accordingly, the U.S. states may not be directly bound by specific provisions of transfer treaties.¹³⁵ The multilateral transfer agreement with Europe simply does not address the role of sovereign states or provinces within a signatory nation.¹³⁶ In contrast, the bilateral treaty between the United States and Mexico on the transfer of sentenced persons addresses the role of sovereign states within each nation. Article Four of that treaty states that “[i]f the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required.”¹³⁷

Notwithstanding the inclusion of specific language contemplating the participation of individual states or provinces in some international transfer treaties and omission of the language from other treaties, individual states may take part in any of the international transfer treaties.¹³⁸ To participate, states, like the federal government, must have enabling legislation which allows them to transfer foreign prisoners from the state correctional system to the federal government; the federal government is then able to transfer the sentenced person to his home country under the relevant treaty.¹³⁹ Forty states have enacted legislation of this sort.¹⁴⁰

134. Technically, only the United States is a party to international treaties. See Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1082 (1992). Thus, only prisoners incarcerated for federal crimes automatically qualify for the possibility of transfer under transfer treaties. Furthermore, individuals do not possess rights under treaties, but attain them only derivatively through a nation party to a treaty. See *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); Vázquez, *supra*, at 1082 (stating that “treaties . . . establish legal obligations and correlative legal rights only of the nations that are parties to them, not of individuals”).

135. See *Hogan v. Koenig*, 920 F.2d 6, 8 (9th Cir. 1990) (holding that the State of California is not a party to the transfer treaty between the United States and Canada and thus is not bound by the terms of the treaty); *Walton v. Department of Corrections*, 538 N.W.2d 66, 68 (Mich. Ct. App. 1995) (holding that the transfer treaty between the United States and Canada does not restrict the discretion of the State of Michigan in consenting to the transfer of a state prisoner to Canada because Michigan is not a party to the treaty).

136. See *Convention with Europe*, *supra* note 3, 35 U.S.T. 2867, 22 I.L.M. 530.

137. *United States-Mexico Treaty*, *supra* note 8, art. IV(5), 28 U.S.T. at 7404; see also *Inter-American Treaty*, *supra* note 3, art. V(3), S. Treaty Doc. No. 104-35, at 3 (1996), Hein’s No. KAV 4762 (“If the sentence was handed down by a state or province with criminal jurisdiction independent from that of the federal government, the approval of the authorities of that state or province shall be required for the application of this transfer procedure.”).

138. See *Walsh & Zagaris*, *supra* note 3, at 412-13, 424.

139. See *Barnes*, *supra* note 73, at 241 (“Not all states have legislation enabling them to deliver foreign prisoners to federal authorities for transfer.”).

140. The states which have enacted this enabling legislation are: Alabama, see Ala. Code § 15-9-100 (1995), Alaska, see Alaska Stat. § 33.30.291 (Michie 1996), Arizona, see Ariz. Rev. Stat. Ann. § 41-105 (West 1992), Arkansas, see Ark. Code Ann. § 12-27-121 (Michie 1995), California, see Cal. Gov’t Code § 12012.1 (West 1992), Colo-

The vast majority of states with statutes enabling participation in a transfer treaty have authorized the state governor to consent to the transfer of foreign prisoners to a foreign nation pursuant to a treaty. Six states have authorized the governor or the governor's designee to consent to the transfer.¹⁴¹ Four states—Alaska, Connecticut, New York, and Utah—have empowered the commissioner of the department of corrections to consent to the transfer of prisoners under a treaty.¹⁴² Furthermore, twenty-six of the forty states with enabling legislation have authorized the governor or the commissioner of the department of corrections to “take any other action necessary to initiate the participation” of the state in a transfer treaty.¹⁴³

A survey of the U.S. state enabling legislation reveals that most states have utilized concise, boilerplate language in the enabling stat-

rado, *see* Colo. Rev. Stat. Ann. § 24-60-2301 (Bradford 1988), Connecticut, *see* Conn. Gen. Stat. Ann. § 18-91a (West Supp. 1997), Florida, *see* Fla. Stat. Ann. § 944.596 (West 1985), Hawaii, *see* Haw. Rev. Stat. § 353-16.5 (1993), Idaho, *see* Idaho Code § 20-104 (1997), Illinois, *see* 730 Ill. Comp. Stat. Ann. 5/3-2-3.1 (West 1992), Indiana, *see* Ind. Code Ann. § 11-8-4.5-2 (Michie Supp. 1996), Iowa, *see* Iowa Code Ann. § 7.22 (West 1995), Kansas, *see* Kan. Stat. Ann. § 22-3723 (1995), Kentucky, *see* Ky. Rev. Stat. Ann. § 196.073 (Michie 1995), Louisiana, *see* La. Code Crim. Proc. Ann. art. 892.3 (West 1997), Maine, *see* Me. Rev. Stat. Ann. tit. 34-A, § 3072 (West 1988), Maryland, *see* Md. Ann. Code art. 27, § 690B (Michie 1996), Massachusetts, *see* Mass. Ann. Laws ch. 127, § 97B (Law. Co-op. 1989), Michigan, *see* Mich. Comp. Laws Ann. § 791.265 (West 1982 & Supp. 1997), Minnesota, *see* Minn. Stat. Ann. § 243.515 (West 1992), Missouri, *see* Mo. Ann. Stat. § 217.137 (West 1996), Montana, *see* Mont. Code Ann. § 53-1-106 (1995), Nebraska, *see* Neb. Rev. Stat. § 83-956 (1994), Nevada, *see* Nev. Rev. Stat. Ann. § 209.291 (Michie 1996), New Hampshire, *see* N.H. Rev. Stat. Ann. § 622-C:1 (Supp. 1996), New Jersey, *see* N.J. Stat. Ann. § 30:7D-1 (West 1997), New Mexico, *see* N.M. Stat. Ann. § 31-4-31 (Michie 1996), New York, *see* N.Y. Correct. Law § 71 (McKinney Supp. 1997), North Dakota, *see* N.D. Cent. Code § 54-23.3-04 (Supp. 1995), Ohio, *see* Ohio Rev. Code Ann. § 5120.53 (Anderson 1996), Oklahoma, *see* Okla. Stat. Ann. tit. 57, § 96 (West 1991), Oregon, *see* Or. Rev. Stat. Ann. § 421.229 (Michie 1995), Rhode Island, *see* R.I. Gen. Laws § 42-56-40 (Supp. 1996), South Carolina, *see* S.C. Code Ann. § 24-1-145 (Law. Co-op. 1989 & Supp. 1996), South Dakota, *see* S.D. Codified Laws § 1-15-32 (Michie Supp. 1996), Texas, *see* Tex. Crim. P. Code Ann. § 42.17 (West 1979), Utah, *see* Utah Code Ann. § 77-28b-2 (1995), Virginia, *see* Va. Code Ann. § 53.1-220 (Michie 1994), and Washington, *see* Wash. Rev. Code Ann. § 43.06.350 (West Supp. 1997). The American Correctional Association and the International Affairs Committee have been helping states without enabling legislation to develop enabling legislation. *See* Barnes, *supra* note 73, at 241 n.10.

141. The six states are Alabama, California, Florida, Iowa, Michigan, and Washington. *See* Ala. Code § 15-9-100; Cal. Gov't Code § 12012.1; Fla. Stat. Ann. § 944.596; Iowa Code Ann. § 7.22; Mich. Comp. Laws Ann. § 791.265; Wash. Rev. Code Ann. § 43.06.350.

142. *See, e.g.*, Conn. Gen. Stat. Ann. § 18-91a (stating that “the Commissioner of Correction may, on behalf of the state and subject to the terms of the treaty, consent to the transfer”). Furthermore, New York allows the commissioner to designate this power to someone else. *See* N.Y. Correct. Law § 71(1-b) (“The commissioner, or his designee, shall retain sole and absolute authority to approve or disapprove an inmate’s application for transfer.”).

143. *See, e.g.*, Ala. Code § 15-9-100 (“The Governor may take any other action necessary to initiate the participation of this state in the treaty.”).

utes. Alabama's enabling legislation is representative of approximately three-quarters of the U.S. state enabling legislation statutes:

When a treaty is in effect between the United States and a foreign country that provides for the transfer of convicted offenders who are citizens or nationals of the foreign country, the Governor of Alabama or the Commissioner of the Department of Corrections, if designated by the Governor, may consent to the transfer of the convicted offenders who are under the jurisdiction of the Department of Corrections to the place or jurisdiction specified in the treaty. The Governor may take any other action necessary to initiate the participation of this state in the treaty.¹⁴⁴

A few states—New York, California, and Ohio,—have chosen more extensive language for their enabling legislation.¹⁴⁵ These more extensive statutes provide greater insight into the aims of the respective state legislatures and the relationship of the state enabling legislation to the transfer treaties. Accordingly, this Note analyzes the more detailed enabling legislation of New York, California, and Ohio to examine aspects of international prisoner transfers at the U.S. state level.

1. Enabling Legislation in New York

The State of New York recently amended section 71 of its correctional law¹⁴⁶ regarding the transfer of prisoners under a treaty.¹⁴⁷ The first section of the law addresses the prisoner's access to information regarding international prisoner transfer treaties and the prisoner's rights and options under the treaties.¹⁴⁸ Section 71(1-a) requires that prison law libraries have information "on international offender transfers sufficient to inform those persons who are citizens of a treaty nation of the existence of such treaties and of the means by which such persons may initiate a request for return to the person's country of citizenship."¹⁴⁹ The law also requires that prison law libraries contain annual Amnesty International Reports describing the conditions of prisons in each treaty nation, and to the extent practicable, other reports on prison conditions published by international organizations such as the United Nations.¹⁵⁰ Furthermore, the law suggests that prison law libraries list foreign countries' provisions for the reduction of terms of confinement or a list of officials at the United States Justice Department or the embassies of foreign countries to whom the

144. *Id.*

145. See Cal. Penal Code § 2912 (West Supp. 1997); *id.* § 5028; Cal. Gov't Code § 12012.1; N.Y. Correct. Law § 71; Ohio Rev. Code Ann. § 5120.53.

146. N.Y. Correct. Law § 71(1-a).

147. See Act of Aug. 2, 1995, ch. 547, 1995 N.Y. Laws 1514-15.

148. See N.Y. Correct. Law § 71(1-a).

149. *Id.*

150. *Id.*

inmate can write for information on these provisions.¹⁵¹ Finally, the law states that to the extent practicable, "newly received inmates who are identified as foreign nationals of treaty nations shall . . . be advised of the existence of such treaties and the possibility of the initiation of a transfer request."¹⁵²

The second section of the amended law addresses the method by which a transfer from New York would proceed under a treaty.¹⁵³ Section 71(1-b) affirmatively states that "[t]he commissioner [of the department of correctional services] shall promulgate rules and regulations setting forth the procedures by which an inmate may apply to be considered for transfer to a foreign nation."¹⁵⁴ Despite the clear mandate of the language,¹⁵⁵ the commissioner has not formally established these rules and regulations.¹⁵⁶ Nevertheless, by mandating that rules and regulations be promulgated, New York has shown its willingness to establish clear guidelines for the process of transferring prisoners under an international treaty.

New York's "rules and regulations" would presumably set forth information regarding the transfer of state prisoners under the transfer treaties and the prisoners' rights and options under the New York enabling statute.¹⁵⁷ The substantive character of these potential rules and regulations makes them particularly significant. If promulgated, such rules and regulations would entitle prisoners to the substantive and procedural rights created by the legislation.¹⁵⁸ This explains why prisoners in the federal system sought to force the Attorney General to promulgate guidelines for considering the international transfer of prisoners in the federal correctional system.¹⁵⁹ The prisoners in the federal system were unsuccessful because the enabling statute did not

151. *See id.*

152. *Id.* Information regarding international transfers does not necessarily have to come from the sentencing state. For example, Canada has prepared a booklet explaining the possibility of transfer for Canadians convicted in the United States. Abbell & Ristau, *supra* note 99, at 129. "The Council of Europe has also prepared a short, standard information form for prisoners eligible for transfer under the Convention on the Transfer of Sentenced Persons." *Id.*

153. *See* N.Y. Correct. Law § 71(1-b).

154. *Id.* (emphasis added).

155. *Id.* There is no doubt that the statute requires the commissioner to promulgate these rules and regulations. *Cf.* *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991) (holding that "being 'authorized'" does not require the Attorney General to promulgate rules); *Scalise v. Thornburgh*, 891 F.2d 640, 647 (7th Cir. 1989) (same). For a discussion of this issue on the federal level, see *supra* part II.A.

156. Telephone Interview with Abraham Abramovsky, Professor, Fordham University School of Law (Mar. 1997).

157. *See supra* notes 146-56 and accompanying text.

158. For example, if the department's rules required a hearing to decide upon a transfer request, a prisoner whose request was denied without a hearing would be entitled to judicial relief.

159. *See supra* note 99 and accompanying text.

require that such guidelines be issued.¹⁶⁰ Because of the clear language of the New York statute, however, a New York state prisoner would not have to address the issue of whether the commissioner of the department of correctional services has the discretion not to promulgate rules and regulations for considering a transfer request. New York could have chosen not to mandate that formal rules and regulations be promulgated, but it did not so choose.¹⁶¹

Even if New York's intent to establish clear guidelines for the transfer of prisoners under a treaty did confer certain substantive and procedural rights on the prisoner, the prisoner would still not possess the right to a transfer. The same statute which mandates that guidelines be adopted also states that "[n]othing herein shall be construed to confer upon an inmate a right to be a [sic] transferred to a foreign nation."¹⁶² In addition to the clarity of the language regarding a prisoner's right to transfer, New York further ensured that it was not limiting the appropriate authority's decision making power. The statute continues:

[t]he commissioner, or his designee, shall retain sole and absolute authority to approve or disapprove an inmate's application for transfer. . . . If a request for transfer is approved by the commissioner or his designee, facility staff shall assist in the preparation and submission of all materials and forms necessary to effectuate the person's request for transfer to the United States Department of Justice for purposes of finalization of the transfer process¹⁶³

Thus, the commissioner has unchecked authority to decide upon requests for the international transfer of prisoners, although he would be subject to any rules and regulations which were formally adopted.

Despite New York's willingness to vest the commissioner of the department of correctional services with vast discretionary power, New York's statute includes several procedural safeguards. For example, the statute explicitly mandates that the state provide information regarding the existence of the treaties in prison law libraries and requires the consent of the prisoner before his transfer.¹⁶⁴ The enabling

160. See *Bagguley*, 953 F.2d at 662 (holding that "being 'authorized'" does not require the Attorney General to promulgate rules); *Scalise*, 891 F.2d at 647 (same); see also *supra* notes 99-115 and accompanying text (discussing judicial interpretation of the federal enabling legislation regarding the discretion of the U.S. Attorney General).

161. There are many options other than the mandatory language of the New York statute or the federal enabling legislation which authorizes but does not require the Attorney General to establish guidelines. See, e.g., Wash. Rev. Code Ann. § 72.68.010(a) (West 1983 & Supp. 1997) ("If directed by the governor, the secretary shall, in carrying out this section . . . adopt rules . . . to effect the transfer of prisoners requesting transfer to foreign countries.").

162. N.Y. Correct. Law § 71(1-b) (McKinney Supp. 1997) (footnote omitted).

163. *Id.* (emphasis added).

164. *Id.* § 71(1-a to 1-b). These provisions are also covered in part by the federal enabling legislation and the international transfer treaties. See *Inter-American Con-*

legislation in three other states also seeks to guard the rights of the prisoner.¹⁶⁵ Consequently, the state cannot abridge a prisoner's rights under the treaty by positing that it can operate outside the scope of the treaty because it is not a party to the treaty.¹⁶⁶

In the same amendment to section 71 of the correction law, New York also amended section 5 of the correction law.¹⁶⁷ Section 5 creates the department of correctional services and the position of commissioner as the head of that department.¹⁶⁸ The amended section 5 now states that

[t]he commissioner [of the department of correctional services] is hereby authorized and empowered to convert the sentence of a person serving an indeterminate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, to a determinate sentence of imprisonment equal to two-thirds of the maximum or aggregate maximum term imposed where such conversion is necessary to make such person eligible for transfer either to federal custody or to foreign countries under treaties . . . [for] the execution of penal sentences.¹⁶⁹

The sponsor of the amendment was specifically addressing the problem of transferring to Canada the increasing number of Canadian citizens sentenced to indeterminate sentences in New York State prisons.¹⁷⁰ The conversion of indeterminate sentences to determinate sentences is not necessary to request or execute transfers under the

vention, *supra* note 3, arts. III, V, S. Treaty Doc. No. 104-35, at 2, 3 (1996), Hein's No. KAV 4762 (stating that "[t]he sentenced person must consent to the transfer, having been previously informed of the legal consequences thereof" and that "the sentencing state shall permit the receiving state to verify, if it wishes, through an official designated by the latter, that the sentenced person has given consent to the transfer in full knowledge of the legal consequences thereof"); Convention with Europe, *supra* note 3, art. 3(1), 35 U.S.T. 2867, 2872, 22 I.L.M. 530, 531 ("A sentenced person may be transferred under this Convention only on the following conditions: . . . if the transfer is consented to by the sentenced person . . ."); United States-Mexico Treaty, *supra* note 8, art. IV(2), 28 U.S.T. at 7403 (requiring the prisoner's consent before transfer); 18 U.S.C. § 4100(b) (1994) (stating that "[a]n offender may be transferred to or from the United States only with the offender's consent" and providing for verification of consent by a "verifying officer"); *see also id.* §§ 4107-4109 (discussing the procedure for verifying consent and who qualifies as a "verifying officer").

165. *See* Conn. Gen. Stat. Ann. § 18-91a (West 1992) (requiring the prisoner's consent before a transfer); Haw. Rev. Stat. § 353-16.5(b) (1993) (requiring the prisoner's consent if the receiving country is not, according to a list published by Amnesty International, an approved country regarding the treatment of prisoners); Or. Rev. Stat. Ann. § 421.229 (Michie 1995) (requiring that the prisoner approve his transfer in writing).

166. *See supra* notes 134-35 and accompanying text.

167. *See* Act of Aug. 2, 1995, ch. 547, 1995 N.Y. Laws 1514.

168. *See* N.Y. Correct. Law § 5 (McKinney 1987) (amended 1995).

169. *Id.* § 5(4) (McKinney Supp. 1997).

170. New York State, 1995 Legislative Annual 408-09 (1996) (Memorandum of Assemblyman Daniel L. Feldman); New York State Assembly, Memorandum in Support, 1995 N.Y. Laws 2244.

federal legislation¹⁷¹ or under each of the transfer treaties.¹⁷² Some treaties, however, require determinate sentences.¹⁷³ Thus, by enacting this amendment, New York appears to have expanded the base of foreign prisoners that might be eligible for transfer under international treaties.¹⁷⁴ At the same time, however, New York has elected to remove certain prisoners, those serving sentences with a maximum term of life imprisonment, from eligibility for transfer.¹⁷⁵ As a result, the process for executing a transfer may have been made less cumbersome as the law intended,¹⁷⁶ but the absolute number of transfers may not increase.

Before the amended version of sections 5 and 71 took effect on August 2, 1995,¹⁷⁷ the previous provisions of section 5 governed the transfer of prisoners under international treaties.¹⁷⁸ That law recognized that it was "in the public interest" to utilize the transfer treaties and that prisoners with indeterminate sentences of imprisonment in New York were not eligible under some treaties unless their sentences were made determinate.¹⁷⁹ Thus, it seems that the previous New York statute encouraged the department of correctional services to work with the governor to carry out the purpose of the transfer treaties.

This previous New York statute provided that the department of correctional services was "authorized and empowered to take such steps as are necessary at the state level to implement the terms of

171. See 18 U.S.C. § 4102(2-3) (1994) (authorizing the Attorney General to transfer or receive offenders sentenced to imprisonment, parole, or probation).

172. See, e.g., Inter-American Convention, *supra* note 3, arts. I, III, S. Treaty Doc. No. 104-35, at 1, 2 (1996), Hein's No. KAV 4762 (requiring only that the sentence be final: a "judicial decision imposing . . . imprisonment or a term of parole, probation, or other form of supervision without imprisonment" and with no legal appeal pending); Convention with Europe, *supra* note 3, art. 3, 35 U.S.T. 2867, 2872, 22 I.L.M. 530, 531 (stating that "at the time of receipt of the request for transfer, the sentenced person [must] ha[ve] at least six months of the sentence to serve or . . . the sentence [must be] indeterminate").

173. See, e.g., United States-Mexico Treaty, *supra* note 8, art. IV(6), 28 U.S.T. 7399, 7404 ("No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.").

174. *But see infra* notes 176-83 and accompanying text. Connecticut, Ohio, and Washington have also empowered state officials to fix determinate sentences to make a prisoner eligible for transfer under a treaty. See Conn. Gen. Stat. Ann. § 18-91a(b) (West Supp. 1997) ("[If] a foreign national . . . is barred from transferring . . . due to the indeterminate nature of his sentence, the board of pardons may . . . set a determined date."); Ohio Rev. Code Ann. § 5120.53(C) (Anderson 1996); Wash. Rev. Code Ann. § 43.06.350 (West Supp. 1997).

175. N.Y. Correct. Law § 5(4) (McKinney Supp. 1997).

176. New York State Assembly, Memorandum in Support, 1995 N.Y. Laws 2244.

177. Act of Aug. 2, 1995, ch. 547, 1995 N.Y. Laws 1514.

178. Before the amendments to sections 5 and 71 became effective on August 2, 1995, section 71 of New York's Corrections Law did not address the transfer of prisoners under international treaties. See notes accompanying N.Y. Correct. Law § 71 (McKinney Supp. 1997).

179. Act of Aug. 3, 1984, ch. 743, 1984 N.Y. Laws 2123 (amended 1995).

[transfer] treaties between the United States of America and foreign countries."¹⁸⁰ To further the implementation of transfer treaties, the statute also provided that "the authority of the department of correctional services shall include the power to recommend to the governor the commutation of the sentence of a person serving an indeterminate sentence of imprisonment to a determinate sentence."¹⁸¹ The governor of the state was given the power to grant the recommendation and commute the sentence "where such commutation is necessary to make such person eligible for transfer under the terms of such treaties."¹⁸² Thus, by preventing the governor from fixing the sentences of prisoners sentenced to life imprisonment,¹⁸³ New York's amended section 5 has actually decreased the number of New York state prisoners who might be eligible for transfer under a treaty.

2. Enabling Legislation in California

California is the only state other than New York which has enabling legislation that formally addresses the prisoner's ability to obtain information regarding his options and the possibility of transfer under an international treaty.¹⁸⁴ The California enabling statute requires that the appropriate agency "devise a method of notifying each undocumented felon in a prison or reception center . . . that he or she may be eligible to serve his or her term of imprisonment in his or her country of origin" under federal treaties.¹⁸⁵ California does not address the notification of those felons who are not "undocumented," however, and therefore does not provide this notification procedure to all prisoners who may be eligible for transfer.¹⁸⁶ Furthermore, the California statute uses the language "country of origin" to refer to the receiving state under an international treaty,¹⁸⁷ but a prisoner's country of origin is not necessarily relevant to whether the prisoner is eligible to transfer to a state under a transfer treaty.¹⁸⁸ Rather, it is the prisoner's current citizenship which is determinative.¹⁸⁹

While California did not adopt or require the adoption of specific guidelines regarding transfer decisions, California has shown some interest in promoting transfers.¹⁹⁰ Specifically, California seeks to promote the transfer of undocumented felons by: requiring that this class

180. *Id.*

181. *Id.*

182. *Id.*

183. See *supra* notes 167-76 and accompanying text.

184. See Cal. Penal Code § 2912 (West Supp. 1997).

185. *Id.*

186. See *id.* Presumably, "undocumented" prisoners are those who have entered or remained in the country illegally.

187. *Id.*

188. See *supra* notes 8-16 and accompanying text.

189. See *supra* note 8. For a discussion of why the citizenship requirement is misguided, see Plachta, *supra* note 60, at 1045-49.

190. See Cal. Penal Code § 2912(b)(1); *id.* § 5028(c).

of prisoners be notified of the possibility of transfer under a treaty,¹⁹¹ encouraging eligible prisoners to apply for transfer,¹⁹² and authorizing a payment of not more than \$2,000 per year to be made to a receiving state which accepts and imprisons a transferred prisoner.¹⁹³ California also requires that the Board of Prison Terms "provide quarterly reports outlining its efforts" to encourage the transfer of prisoners.¹⁹⁴

3. Enabling Legislation in Ohio

In addition to New York, Ohio is the only other state which has enacted enabling legislation to specifically address the discretion of state officials to execute a transfer under a treaty.¹⁹⁵ Most state enabling legislation, as well as the federal enabling legislation, does not mention the factors that should be considered when making a transfer decision.¹⁹⁶ Presumably, this gives the decision maker, in most cases the state governor,¹⁹⁷ wide discretion over whether to grant or deny the transfer request.

The State of Ohio, like New York, requires that rules be adopted governing the decision to transfer a prisoner under a transfer treaty.¹⁹⁸ Ohio goes further, however, by mandating that the rules adopted must include the requirement that when considering a transfer, the director of rehabilitation and correction or his designee consider: (1) the nature of the prisoner's offense; (2) the likelihood that the prisoner would serve a shorter sentence in the receiving state than he would in Ohio; (3) the likelihood that the prisoner would return or attempt to return to Ohio after being released from imprisonment in the receiving state; (4) the degree of shock to the conscience of society that would be experienced in Ohio if the prisoner is transferred; and (5) all other factors that are deemed relevant to the determination.¹⁹⁹ Some of these considerations overlap with the informal guidelines on the federal level adopted by the Office of Enforcement Operations in the Justice Department.²⁰⁰ No Ohio court has had occasion to review the decision making process regarding transfer of a prisoner set out in the statute. Even if the Ohio department of corrections failed to adopt specific decision making guidelines, a prisoner in Ohio could at least cite the statute as setting forth the minimum number of factors which

191. *See id.* § 2912(a).

192. *See id.* § 2912(b)(1).

193. *See id.* § 5028(c).

194. *Id.* § 2912(b)(1).

195. Ohio Rev. Code Ann. § 5120.53(D) (Anderson 1996).

196. *See supra* notes 144-45 and accompanying text; *supra* part II.A.

197. *See supra* notes 140-43 and accompanying text.

198. *See* N.Y. Correct. Law § 71(1-b) (McKinney Supp. 1997); Ohio Rev. Code Ann. § 5120.53(D).

199. Ohio Rev. Code Ann. § 5120.53(D)(1-5).

200. *See supra* note 99.

must be considered in deciding upon the transfer. The Ohio enabling legislation also excludes certain prisoners, based on the type of crime committed, from any eligibility for transfer under a treaty,²⁰¹ but does provide for conversion of indeterminate sentences to determinate sentences to execute a transfer.²⁰²

III. OPERATION OF TRANSFER TREATIES UNDER U.S. STATES' ENABLING LEGISLATION

This Note has analyzed the individual U.S. states' enabling legislation, which allows foreign nationals to transfer out of the United States.²⁰³ This Note now turns to a critique of that enabling legislation in light of the goals of the transfer treaties.²⁰⁴ The basis for this critique is not altruism towards foreigners imprisoned in the United States or anxiety over the international human rights of those prisoners, although raising those issues will be beneficial as well.²⁰⁵ Rather, this critique is based on the principle that following the rules of the transfer treaties and allowing foreign nationals to transfer out of American prisons when appropriate are keys to the success of transfer treaties.²⁰⁶ This is because abiding by the rules of the treaties provides the basis for reciprocal behavior by other nations.²⁰⁷ Thus, the actions of the sovereign U.S. states regarding the implementation of transfer treaties have a significant effect upon the success of transfer treaties for the entire nation.

201. See Ohio Rev. Code Ann. § 5120.53(B)(1).

202. *Id.* § 5120.53(C).

203. See *supra* part II.B.

204. See *supra* notes 17-20 and accompanying text.

205. For a discussion of how to ensure the proper administration of justice for those charged or convicted of crimes in a foreign land, see Gisvold, *supra* note 60.

206. See Abramovsky, *Endangered Species*, *supra* note 2, at 453 (arguing that resorting to unilateral abductions will undermine cooperation between nations and the viability of transfer treaties); see, e.g., Walsh & Zagaris, *supra* note 3, at 428-29 (stating that several American prisoners were transferred to the United States from Mexico while a large number of Mexican prisoners were transferred to Mexico in a one-time mass transfer).

207. See Walsh & Zagaris, *supra* note 3, at 425-26 (explaining that the European nations party to the Convention with Europe contend that an individual nation should not apply guidelines other than those in the Convention to the decision making process). Alternatively, the United States could choose to reduce foreign assistance or development loans for those countries which are unwilling to accept a designated percentage of prisoners approved for transfer by the Attorney General. See Transfer of Alien Prisoners Act of 1997, S. 3, 105th Cong. § 107 (1997). This bill reflects a radical departure from current use of transfer treaties. The bill also requires the Secretary of State to renegotiate transfer treaties to make the consent of foreign prisoners in the United States unnecessary to execute a transfer. See *id.* § 103. This would make transfer under a treaty more analogous to a deportation.

A. *Compliance by Individual U.S. States with the Terms of the Treaties*

The enabling legislation in the individual U.S. states does not effectively further compliance with the transfer treaties. Although it is clear that the states are not parties to the treaties,²⁰⁸ they should not ignore provisions of the treaties, the federal enabling legislation, and congressional intent. While many state statutes do not directly contravene either the treaties or the enabling legislation, the statutes do not clearly comply with the treaties or the federal enabling legislation.²⁰⁹ At the same time, U.S. states have encouraged the federal government to increase the transfer of foreign prisoners.²¹⁰

It is well established that treaties are the supreme law of the land.²¹¹ Federal legislation written to execute treaties is deemed "necessary and proper" to the execution of those treaties.²¹² Furthermore, treaties and federal statutes preempt any inconsistent or conflicting state law.²¹³ It has also been said that "[s]tates must abide by federal foreign policy measures, even when they encroach on areas in which the state would otherwise have concurrent authority to legislate."²¹⁴ Thus, to the extent a state statute thwarts transfer treaties' goals and the treaties' implementation by federal legislation, that state law may be unconstitutional. This principle also applies to states with statutes which do not expressly contradict the treaties, but do so as applied.

Simply put, many of the U.S. states' enabling legislation does not encourage or actively facilitate the transfer of prisoners under the transfer treaties. State enabling legislation fails to provide for identification and notification of eligible prisoners, to limit the discretionary

208. See *supra* notes 134-35 and accompanying text.

209. This is problematic because of the possible effects on foreign relations. One commentator asserts that "the Framers were concerned about treaty violations [by states] because they could provoke wars, deter other nations from entering into beneficial agreements with us, and adversely affect the nation's reputation." Vázquez, *supra* note 134, at 1110.

210. See Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration: A Post-NAFTA Transition Period Analysis with Special Attention to Investing in Mexico*, 3 Sw. J. L. & Trade 1, 21 (1996) (stating that "political pressure exerted by the states on the federal government to take action to return foreign prisoners more expeditiously because of the economic and other burdens on state prison systems" contributed to an accelerated prisoner transfer program with Mexico).

211. U.S. Const. art. VI; *Ware v. Hylton*, 3 U.S. 199 (1796); see also Vázquez, *supra* note 134, at 1104-08 (1992) (explaining that there was consensus at the Constitutional Convention that measures were needed to ensure compliance by the states with treaties, with the Supremacy Clause as the ultimate solution).

212. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

213. See *Pacific Gas & Elec. Co. v. State Energy Resources*, 461 U.S. 190, 203-04 (1983); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 778 (N.J. 1977) (citing *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961)) ("A state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty.").

214. *Gisvold*, *supra* note 60, at 786.

authority of the state official who must consent to the transfer, and to allow a prisoner's sentence to be made determinate and thereby to allow that prisoner to become eligible for transfer under some treaties.²¹⁵

Only two states, New York and California, have provisions in their enabling legislation that address a prisoner's access to information regarding a transfer treaty.²¹⁶ The New York statute guarantees the availability of certain information regarding the treaties and seeks to identify and notify those prisoners who would be eligible for transfer under a treaty.²¹⁷ The California statute seeks to notify only "undocumented felons" about the possibility of transfer under a treaty.²¹⁸ "Undocumented felons" represent only a subset of those prisoners who might be eligible for transfer, however.²¹⁹ Because only two states have statutes which address the identification and notification of prisoners eligible for international transfer, it is safe to assume the overwhelming majority of prisoners eligible for transfer are unaware of the transfer option, or are aware of the option but do not know how to initiate the transfer.

The failure to notify eligible prisoners of the possibility of transfer contravenes the transfer treaties. The Convention with Europe provides that "[a]ny sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention."²²⁰ Again, while an individual American state may not be bound by the language of the treaty,²²¹ it is clear that the treaty's goal is to ensure that eligible prisoners are aware of their transfer options. Similarly, the treaty with Mexico contemplates that an individual prisoner can initiate a transfer request.²²² It is not realistic to think that a prisoner can do this without some access to information or notification of the possibility of transfer.²²³ Furthermore, the legis-

215. See *supra* part II.B.

216. See *supra* notes 148-52, 184-89, and accompanying text.

217. See *supra* notes 148-52 and accompanying text.

218. See *supra* notes 184-89 and accompanying text.

219. See *supra* notes 185-89 and accompanying text.

220. Convention with Europe, *supra* note 3, art. 4(1), 35 U.S.T. 2867, 2872, 22 I.L.M. 530, 531; see also Inter-American Convention, *supra* note 3, art. IV(1), S. Treaty Doc. No. 104-35, at 2 (1996), Hein's No. KAV 4762 ("Each state party shall inform any sentenced person covered by the provisions of this convention as to its content.").

221. See *supra* notes 134-35 and accompanying text.

222. United States-Mexico Treaty, *supra* note 8, art. IV(1), 28 U.S.T. 7399, 7403 ("Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.").

223. Walsh & Zagaris, *supra* note 3, at 413-14 (stating that the lack of requests for transfer from Mexican offenders in California state prisons "is blamed primarily on the lack of information available and provided to offenders on their potential right to transfer").

lative history of the federal enabling legislation reveals Congress' intention that the transfers be freely granted.²²⁴

The degree of discretion which state enabling legislation gives to state officials in considering a transfer request is especially troubling. Almost all state enabling legislation offers no guidance to the decision maker who is, in most cases, the governor.²²⁵ Because no guidance is provided, the governor could conceivably consult a number of sources to inform his decision. For instance, he might attempt to comport his decision with the purpose and mandate of the treaties. In the alternative, the governor could look to the Justice Department's informal guidelines for considering a transfer request.²²⁶ Unfortunately, the lack of guidance in the state enabling legislation also allows the governor to use his own criteria for assessing a transfer request. Only Ohio has written specific guidelines for considering a transfer request into its enabling legislation.²²⁷ New York has required that rules and regulations regarding a transfer request be promulgated, but none have been promulgated accordingly.²²⁸

The failure of state enabling legislation to address the discretion of the decision maker considering a transfer request violates the spirit, if not the letter, of the transfer treaties. It is well established that the transfer treaties confer wide discretion on both the receiving and transferring states.²²⁹ Nevertheless, the U.S. Attorney General is bound by the language of the treaties in a way that the states are not.²³⁰ The treaty with Mexico, for example, requires that certain factors enter the Attorney General's calculus.²³¹ State decision makers should use these same factors in considering a transfer request.

The state legislatures have conferred even greater discretion on state decision makers by allowing parties other than the governor to make the final transfer decisions. Only twenty four of the forty states with enabling legislation require that the governor himself consider and decide upon the transfer request.²³² Six states allow the governor or the governor's designee to make the decision, and three states empower solely the commissioner of the department of corrections to make the decision.²³³ One state, New York, empowers the commissioner of the department of correctional services or his designee to consider and consent to the transfer.²³⁴

224. See *supra* notes 108-10 and accompanying text.

225. See *supra* notes 140-43 and accompanying text.

226. See *supra* note 99.

227. See *supra* notes 199-200 and accompanying text.

228. See *supra* notes 154-56 and accompanying text.

229. See *supra* note 93 and accompanying text.

230. See *supra* notes 92-135 and accompanying text.

231. See *supra* notes 128-33 and accompanying text.

232. See *supra* notes 140-42 and accompanying text.

233. See *supra* notes 140-42 and accompanying text.

234. See *supra* notes 140-42 and accompanying text.

The danger posed by this aspect of the U.S. state enabling legislation is that decisions directly affecting foreign policy have been removed from the most accountable public official on the state level of government. Not only does the American federal form of government remove the consideration of transfer requests from the executive branch of the federal government, but the state enabling legislation also further distances the decision by relegating it to unelected and possibly ill-informed officials.²³⁵ The commissioner of a state department of corrections is not likely to be concerned with developing a coherent foreign policy regarding the transfer of foreign prisoners. Even if an individual state's commissioner is aware of the bigger picture, there is little one state decision maker can do to ensure a coherent transfer policy.²³⁶ The United States' inability to ensure compliance by the U.S. states with the terms of the transfer treaties weakens the prospects for reciprocity and cooperation with other nations.²³⁷ Disruptions in this area of foreign policy could, in turn, adversely affect other aspects of foreign affairs.²³⁸

Finally, only four states—Connecticut, New York, Ohio, and Washington—have empowered state officials to fix determinate sentences for foreign offenders with indeterminate sentences and thereby make them eligible under the treaties which require determinate sentences.²³⁹ Even in these four states, not all prisoners with indeterminate sentences are eligible to have their sentences fixed.²⁴⁰ Failure of the states to provide for fixing determinate sentences does not contravene the transfer treaties; the treaties do not even require a party to the treaties, such as, the United States, to do this. This decision by U.S. states not to provide for the fixing of sentences, however, repre-

235. See *supra* notes 140-42 and accompanying text.

236. It is clear that transfer treaties are inherently part of the United States' larger foreign policy. See, e.g., Transfer of Alien Prisoners Act of 1997, S. 3, 105th Cong. § 107 (1997) (linking foreign assistance and development loans to cooperation under transfer treaties); Kevin Cullen, *IRA Technician to Complete US Prison Term in Ireland*, Boston Globe, Jan. 20, 1997, at A6 (linking the transfer of IRA members home to Ireland to a larger role for the United States in resolving the conflict in Northern Ireland).

237. The United States already creates the possibility that it will impede a transfer on the federal level by allowing the Attorney General to use decision making guidelines not found in the transfer treaties, a practice not followed in the European countries. See Walsh & Zagaris, *supra* note 3, at 425-26. A provision in the Inter-American Convention might bypass this problem by allowing an individual state to transfer a prisoner internationally without federal approval, although it is unclear whether the provision would, in fact, have this effect. See Inter-American Convention, *supra* note 3, art. V(3), S. Treaty Doc. No. 104-35, at 3 (1996), Hein's No. KAV 4762; Walsh & Zagaris, *supra* note 3, at 427. In any event, the United States has objected to this provision. Walsh & Zagaris, *supra* note 3, at 427.

238. See *supra* part I.C; see also Transfer of Alien Prisoners Act of 1997, S. 3, 105th Cong. § 107 (1997) (seeking to punish foreign countries for their failure to cooperate and accept prisoners approved for transfer by the Attorney General).

239. See *supra* notes 169-76 and accompanying text.

240. See *supra* notes 169-76 and accompanying text.

sents another example of the states' failure to facilitate transfers, which is the goal of the transfer treaties.²⁴¹

B. *Judicial Deference*

Despite the limited number of decisions in federal courts, it is clear that transfer decisions made by the Attorney General will carry at least the presumption that they are proper, and might even be deemed beyond review.²⁴² Because no state court has had occasion to interpret its state's enabling legislation, it is not clear how closely state courts will scrutinize transfer decisions or how much deference will be given to the decision maker.

Federal courts' justifications for deferring to the Attorney General's decision making may not be applicable in challenges to state enabling legislation or the decisions of state actors. Because of marked differences between state and federal enabling legislation,²⁴³ transfer decisions at the state level will not always be analogous to those at the federal level. Accordingly, it may be necessary for state courts to scrutinize enabling legislation and transfer decisions more closely than the federal courts.

While the federal enabling legislation does not require the Attorney General to promulgate guidelines for deciding transfers,²⁴⁴ some state enabling legislation mandates that such guidelines be established.²⁴⁵ Other state enabling legislation makes it explicitly clear that transfers are to be encouraged and participation under transfer treaties maximized.²⁴⁶ These significant differences between state and federal enabling legislation require that the state and federal enabling legislation not be applied in the same way.²⁴⁷ Thus, state courts may be expected to follow the plain meaning of the statutes and rule accordingly.

Similarly, federal courts' deferential reliance on the Attorney General's decisions regarding transfers²⁴⁸ may not translate into state courts' reliance on state decision makers. Because many states' enabling legislation does not vest the authority to decide upon transfers

241. See *supra* note 5 and accompanying text.

242. See *supra* part II.A.

243. See, e.g., *supra* notes 105, 154, and accompanying text.

244. See *supra* notes 99-115 and accompanying text.

245. See *supra* notes 154-56, 198-99, and accompanying text.

246. See *supra* notes 190-94 and accompanying text; see also Senate Institutions, Health and Welfare Committee Statement to N.J. Stat. Ann. § 30:7D-1 (West 1997) ("[W]hile a state relinquishes authority over the prisoners transferred, the state will not have to accept new prisoners in return. The practice of prisoner transfers should contribute to the easing of overcrowded conditions in the State prisons"); New York State Assembly, Memorandum in Support, 1995 N.Y. Laws 2244 (stating that two amendments to the laws of New York governing participation in international transfer treaties "will result in a savings to the state due to the decreased demand for bedspace").

247. See *supra* notes 99-115, 154-56, 198-99, and accompanying text.

248. See *supra* notes 118-27 and accompanying text.

in a specific office,²⁴⁹ the deference afforded to the Attorney General would be inappropriate. Furthermore, state courts may realize that international transfers of prisoners are not based on the same penological considerations as intrastate transfers.²⁵⁰ International transfer of a prisoner does not require placement of the prisoner in another state institution, and removal of the prisoner from the state and country would not negatively impact public safety in most cases.²⁵¹ In addition, the prisoner's request for transfer suggests *prima facie* that the transfer is in the prisoner's best interest. Whereas intrastate transfers may have local and institutional implications which are difficult to discern, international transfers would rarely present such issues.

C. *The Traditional Justifications for Punishment and U.S. State Participation in International Transfer Treaties*

The shortcomings of state enabling legislation are obvious not only from a legal perspective, but also from a policy perspective. The traditional justifications for the state's role in punishing those convicted of a crime support more widespread use of the transfer treaties. The justifications for punishment can be furthered by increasing the use of international transfer treaties in two ways: (1) U.S. states' recognizing the value of international transfers and granting almost all transfer requests, and (2) expanding the number of prisoners eligible for transfer.

The traditional justifications for the state punishment of prisoners are based on the concepts of deterrence, retribution, and restraint.²⁵² The deterrence of crime occurs when it is widely believed by individuals that punishment, in any of its forms, is undesirable.²⁵³ For deterrence to be effective, the probability and undesirability of receiving state-sponsored punishment must outweigh the expected benefits of committing a given crime. The concept of retribution is based on the need for the community to exact some punishment from the prisoner.²⁵⁴ Restraint, or utility, addresses the costs and benefits of removing a prisoner from the ranks of the community: there are costs involved with imprisoning an offender, but benefits gained from ensuring the offender will not commit future crimes.²⁵⁵

As a traditional justification for punishment, deterrence is neutral in relation to the transfer of prisoners under international transfer treaties. The transfer treaties do not allow prisoners to escape from

249. See *supra* notes 140-42 and accompanying text.

250. See *supra* notes 121-25 and accompanying text.

251. An exception would exist, for example, where the prisoner was the leader of a terrorist group and could more easily operate from a prison in his home country.

252. See Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 1.5(a), at 23-26 (2d ed. 1986).

253. See *id.*

254. See *id.*

255. See *id.*

imprisonment if they are transferred out of the sentencing state.²⁵⁶ Although a receiving state must convert a prisoner's foreign sentence to a sentence under the domestic laws of the receiving state, the requirement of double criminality ensures that some compatibility exists between the penal laws of the receiving and sentencing states.²⁵⁷ While a prisoner might benefit by being closer to friends and family if his transfer request is granted, the prisoner might also suffer under less sanitary or other unfavorable prison conditions in foreign countries. Thus, on the whole, the transfer of foreign prisoners neither furthers nor hinders the operation of deterrence in fighting criminal behavior.

Furthering the retributive aspects of punishment presents the strongest argument against the use of transfer treaties. The policy of retribution includes the idea that the state is punishing a prisoner on behalf of the people. Transferring the prisoner elsewhere would remove the role of the sentencing state in administering the punishment, and thus the sentencing state would find transfer unacceptable. This argument makes good sense for denying the transfer of the occasional prisoner who is convicted of heinous crimes against the people of a state. Those kinds of prisoners, however, are few and far between.²⁵⁸ Furthermore, even the slightest discretion given to a state decision maker would allow the decision maker to deny that particular prisoner's request for transfer. In many cases, however, foreign prisoners are convicted of crimes which do not call for the need of the sentencing state itself to administer punishment.

From a utilitarian perspective, the transfer of foreign prisoners presents an ideal situation for the U.S. states. The transfer treaties are a one way street out of U.S. state prisons: U.S. states can transfer prisoners out of their correctional systems but do not receive prisoners who are transferred back to the United States. Thus, U.S. states benefit from removing a prisoner from circulating in the community and, if the prisoner is transferred abroad, the states do not have to pay the cost of incarcerating the prisoner. Clearly, the utilitarian justification for punishment would suggest that U.S. states use transfer treaties to their fullest extent.

IV. PROPOSALS FOR U.S. STATE ENABLING LEGISLATION

The international transfer treaties seek to maximize the potential rehabilitative aspects of punishment and, at the same time, shift the burden of imprisoning offenders to the prisoner's homeland and fam-

256. See *supra* notes 2-5 and accompanying text.

257. See *supra* note 9 and accompanying text.

258. See Plachta, *supra* note 60, at 1050 ("Although there are significant arguments based on public interest in favour of prisoners serving sentences in their own countries, the public interest is not seriously damaged if an individual prisoner of overseas origin serves his sentence in that country.").

ily. This Note is highly critical of the shortcomings of current U.S. state enabling legislation and the failure of U.S. state enabling legislation to take full advantage of the benefits of transfer treaties. This part argues that there are several actions that states can take to improve the operation of transfer treaties. Specifically, this part proposes that U.S. state enabling legislation should: include provisions for the mandatory identification and notification of prisoners eligible for transfer, enact explicit guidelines regarding the discretion over transfer decisions, vest decision making authority with high ranking state officials, and allow for the conversion of indeterminate sentences to determinate sentences. This part also argues that state courts should scrutinize transfer decisions more carefully than the federal courts.

This Note makes these proposals to achieve two objectives. The first objective is to encourage those U.S. states without enabling legislation to take notice of the legal and policy issues favoring the use of the transfer treaties and to design enabling legislation accordingly. The second objective is to encourage those U.S. states with enabling legislation to consider the importance of amending their legislation to include provisions more favorable for executing transfers.

Legislative provisions for the mandatory identification and notification of prisoners who might be eligible for transfer should be included in state enabling legislation. This would encourage wider use of the transfer treaties. Furthermore, procedures for identification and notification, such as those found in the New York legislation,²⁵⁹ can be instituted easily and inexpensively. All that is necessary is that prison officials check a prisoner's citizenship against a list of countries with whom there is a transfer treaty. The officials could then distribute a pamphlet, similar to the information form used in Europe or the booklet compiled by Canada,²⁶⁰ to the potentially eligible prisoners. From both legal and policy standpoints, there is nothing to be gained from allowing or ensuring a prisoner's ignorance of the transfer treaties.²⁶¹

Most importantly, U.S. states should adopt explicit guidelines, similar to those in the Ohio statute, regarding the discretion of state decision makers.²⁶² As noted earlier, the enabling legislation of Ohio requires that the decision maker consider: (1) the nature of the prisoner's offense; (2) the likelihood that the prisoner would serve a shorter sentence in the receiving state than he would in Ohio; (3) the likelihood that the prisoner would return or attempt to return to Ohio after being released from imprisonment in the receiving state; (4) the degree of shock to the conscience of society that would be exper-

259. See *supra* notes 149-52 and accompanying text.

260. See *supra* note 152.

261. See *supra* part III.C.

262. See *supra* note 199 and accompanying text.

ienced in Ohio if the prisoner is transferred; and (5) all other factors that are deemed relevant to the determination.²⁶³ Guidelines do not guarantee that transfer treaties will be utilized to their full potential, but explicit guidelines have the advantage of providing a concrete framework for the decision making process. Prisoners and their counsel could rely on the guidelines and frame transfer requests accordingly. Formally adopting guidelines would cause states to decide what specific factors should be considered and prevent every transfer request from being decided on an ad hoc basis. Thus, rather than denoting specific guidelines which should be used, this Note recommends that any explicit guidelines which further the goals of the treaties would be beneficial because such guidelines would bring stability and clarity to an otherwise murky area of law. For example, Ohio's open-ended guidelines reflect the understanding that international transfers of prisoners are part of a broader foreign policy; the guidelines give state actors sizeable discretion, but they also focus the attention of the decision maker on specific factors. Furthermore, explicit guidelines, enacted or specified in a statute, would give courts the ability to properly review transfer decisions.

Individual states should not thwart the intent of the transfer treaties or Congress' understanding of how decisions regarding transfers would be made under the treaties.²⁶⁴ Thus, it is necessary for U.S. states to vest decision making power regarding international transfers with higher, rather than lower, state authorities. Currently, many states designate a decision maker and then allow that decision maker to designate someone else.²⁶⁵ This practice does not ensure that the proper factors will be consistently weighed when deciding upon an international transfer. These decisions, which affect our nation's foreign policy and ability to comply with international legal obligations, should be left to the state's governor or attorney general.

Courts on the state level should undertake a higher level of scrutiny of transfer decisions than the scrutiny used by the federal judiciary.²⁶⁶ At the least, state courts should ensure that state officials are following the requirements of the state enabling legislation. If states recognize the importance of overall compliance with the transfer treaties and pass legislation accordingly, the courts must be willing to ensure that the state executive branches comply with the legislatures' intent.

Finally, state enabling legislation should also include provisions which allow the governor or other state actor to convert a prisoner's indeterminate sentence to a determinate sentence. Such a provision would only make more prisoners eligible for transfer under certain treaties. The provision would have no effect on the ultimate decision

263. Ohio Rev. Code Ann. § 5120.53(D)(1-5) (Anderson 1996).

264. See *supra* notes 109-10 and accompanying text.

265. See *supra* notes 140-42 and accompanying text.

266. See *supra* notes 120-33 and accompanying text.

of whether to grant the transfer. Because in most cases a transferred prisoner must serve out his remaining sentence in his home country, the duration of a sentence governs the degree of punishment. Indeterminate sentences do not ensure prisoners will serve longer jail time. If longer sentences are the objective, indeterminate sentences can simply be converted to long determinate sentences.

International transfer treaties have the potential to play a more significant role in improving the prospects for rehabilitation of offenders and decreasing the cost of doing so. Individual U.S. states should examine their respective enabling legislation and improve the operation of international transfer treaties over prisoners on the state level. States can accomplish this by notifying eligible prisoners, enlarging the pool of prisoners who may be eligible, and ensuring that state actors apply consistent standards in deciding upon transfer requests.

CONCLUSION

Transfer of penal sanctions treaties present a unique opportunity for the United States to address the problem of Americans imprisoned abroad as well as the cost of imprisoning foreigners at home. The transfer treaties also signify the United States' willingness to cooperate in furthering criminal justice in the international arena. Furthermore, transfer treaties recognize the individual rights of prisoners and the factors which enhance their rehabilitation.

On the federal level, the U.S. Attorney General has been given wide discretion to consider transfer requests, pursuant to the transfer treaties and enabling legislation. The legality, and certainly the wisdom, of the courts' conferring this wide discretion to the Attorney General is questionable. The transfer treaty with Mexico suggests that the Attorney General must consider certain enumerated factors; the House Report to the federal enabling legislation suggests a presumption that a transfer request will be granted unless there are extraordinary circumstances. Furthermore, *Scalise v. Thornburgh*,²⁶⁷ the principal case on this issue, analogized international prisoner transfers to intrastate prisoner transfers. This Note has shown, however, that the international transfer of prisoners is part of a larger U.S. foreign policy, which has more far-reaching concerns than the capacity, maintenance, or security of correctional facilities.

Despite judicially-granted wide discretion, the Attorney General has utilized informal guidelines for considering requests and is bound by all provisions regarding transfer decisions set forth in individual treaties. Conversely, U.S. states have maintained an independence from the provisions of transfer treaties. This allows for unlimited discretion in various state actors' deciding upon transfer requests. Furthermore, U.S. states have not endeavored to inform foreign prisoners

267. 891 F.2d 640 (7th Cir. 1989).

who might be eligible for transfer or to fix determinate sentences for prisoners who could be made eligible for transfer.

The U.S. states' current enabling legislation reflects an unwillingness to account for the broader aims and needs of U.S. foreign policy. The U.S. state legislation presents obstacles to the success of transfer treaties by decreasing the prospects for reciprocity and cooperation in the international arena. Furthermore, the legislation cannot be justified under traditional justifications for the punishment of offenders. Accordingly, U.S. states should adopt enabling legislation or amend existing enabling legislation to further the specific goals of the transfer treaties and the broader needs of American foreign policy.

Notes & Observations