

September 1991

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Recommended Citation

Ekkehart Muller-Rappard, *The Transfer of Sentenced Persons - Comments on the Relevant Council of Europe Legal Instruments*, 3 Pace Y.B. Int'l L. 155 (1991)

DOI: <https://doi.org/10.58948/2331-3536.1018>

Available at: <https://digitalcommons.pace.edu/pilr/vol3/iss1/6>

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THE TRANSFER OF SENTENCED PERSONS — COMMENTS ON THE RELEVANT COUNCIL OF EUROPE LEGAL INSTRUMENTS

Ekkehart Müller-Rappard†

I. INTRODUCTION

The transfer of sentenced persons is one of the legal devices developed by the Council of Europe over the last thirty years to address the enforcement of foreign criminal judgments.¹ Under this mechanism of European interstate co-operation, a person sentenced and detained in a foreign country may be transferred to a second country, usually the prisoner's state of origin, to serve his sentence. Under the lexicon used by the Council of Europe, the two involved countries are referred to as the "sentencing state" and the "administering state,"² respectively.

There are various arguments in favor of transfers. For instance, there is the assumption made by relatives and friends that imprisonment abroad entails particular hardships that are to be avoided as much as possible for purely humanitarian rea-

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¹ See generally 3 E. MÜLLER-RAPPARD & K. BASSIOUNI, *EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS* (1987) (presents a collection of the relevant recommendations and conventions). The transfer of sentenced persons is analyzed in E. Müller-Rappard, *La Convention européenne sur la valeur internationale des jugements reprisés*, in *LE JURISTE SUISSE FACE AU DROIT ET AUX JUGEMENTS ÉTRANGERS* 227-47 (1988) [hereinafter *LE JURISTE*].

² The administering state is defined as: "the State to which the sentenced person may be, or has been, transferred in order to serve his sentence." Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, art. 1(d), T.I.A.S. No. 10824. Further clarification is provided in Article 3: "A sentenced person may be transferred under this Convention only on the following conditions: (a) if that person is a national of the administering State." Concomitantly, the Convention's explanatory report implicitly defines the administering state as the sentenced person's "home" state. Council of Europe, *Explanatory Report on the Convention of the Transfer of Sentenced Persons*, ¶8 (1983). See *infra* text accompanying note 26.

sons. There also remains the belief, especially in quarters not much impressed by recidivism rates, that if an inmate is eventually to be returned or expelled to his state of origin or of permanent residence, the inmate should serve his sentence there. It is suggested that serving the sentence in the administering state from the outset may facilitate or even accelerate the preparation of the prisoner's release and social rehabilitation. Additionally, although this argument is not usually stated bluntly, it is a fact that imprisonment is quite costly and many prisons are currently overcrowded. Moreover, foreign prisoners are often difficult to handle by prison administrators.³ When a state's foreign prisoners outnumber the state's nationals imprisoned abroad, costs and disciplinary hardships weaken the wish to invariably punish the offender in the state where the crime was committed. In short, a busy prison administration will readily give up the difficult foreign crowd, provided the prisoner does not go free once abroad. However, crime policy and public order considerations may surface in particular cases where public outcry or protest by the victims is feared.

Notwithstanding arguments in favor of transfers, the sentencing state will certainly wish to be assured that the administering state will enforce the original sentence, at least in principle. In this light, transfers are more a matter of mutual trust than of comparative sentencing enforcement policy. Assuming this principle of mutual trust to be true, the importance of financial considerations, apparent at first blush, are weaker arguments for cooperation.

Under the international legal mechanisms of the Council of Europe, the transfer of a sentenced person depends on the following: i) whether the sentencing state is entitled to insist on the transfer, i.e. whether the administering state is bound to accept it under certain conditions; ii) who among the sentencing state, the sentenced person or the administering state should be entitled to initiate the procedure; and iii) whether consent to the transfer by the sentenced person is of any relevance. The weight given to these considerations in successive transfer conventions

³ See, e.g., *Explanatory Memorandum of the Committee of the Ministers to Member States Concerning Foreign Prisoners*, Recommendation No. R(84) at 12, 25-26 (1985).

has shifted over the years to reflect the changing goals of the Council of Europe.

II. DEVELOPMENTS REGARDING THE ENFORCEMENT OF FOREIGN SENTENCES

The European approach to the transfer of sentenced persons has changed over the years. At an earlier stage, inter-state co-operation in criminal matters was arranged solely between the states concerned. Under a co-operation agreement, for example, the sentenced person was merely an object of such co-operation and had no say regarding his transfer. The European Convention on the International Validity of Criminal Judgments (Validity Convention) of 28 May, 1970 reflects this view.⁴ It gives the sentencing state the exclusive right to request a transfer⁵ and obligates the requested administering state, under certain circumstances, to accept the request.⁶

⁴ European Convention on the International Validity of Criminal Judgments, May 28, 1970, 973 U.N.T.S. 57 [hereinafter the Validity Convention]. This convention entered into force on 26 July 1974 and at present binds seven states. The contracting states that are members of the Council of Europe, in order of ratification, are: Denmark, Sweden, Cyprus, Norway, Turkey, Austria and the Netherlands. There are no contracting non-member states.

⁵ The exclusive right of the sentencing state to request a transfer is subject to several conditions.

The sentencing State may request another Contracting State to enforce the sanction only if one or more of the following conditions are fulfilled:

- (a) if the person sentenced is ordinarily resident in the other State;
- (b) if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced;
- (c) if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State;
- (d) if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction;
- (e) if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.

Validity Convention, *supra* note 4, at art. 5.

⁶ There are several circumstances under which the requested administering state could refuse to enforce the sanction or sentence.

Enforcement requested in accordance with the foregoing provisions may not be refused, in whole or in part, save:

- (a) where enforcement would run counter to the fundamental principles of the legal system of the requested State;
- (b) where the requested State considers the offence for which the sentence

Article 44 of this Convention contains a characteristic compromise regarding the enforcement of sanctions pronounced in the sentencing state: while the administering state could not aggravate the sentence,⁷ it could, following a process of adaptation, as in an exequatur procedure, impose a milder sanction than that imposed in the sentencing state.⁸ For example, the administering state may substitute a fine for incarceration. According to the Convention's explanatory report, such a right "corresponds to developments in modern criminal law."⁹ Unless there is genu-

was passed to be of a political nature or a purely military one;

(c) where the requested State considers that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion;

(d) where enforcement would be contrary to the international undertakings of the requested State;

(e) where the act is already the subject of proceedings in the requested State or where the requested State decides to institute proceedings in respect of the act;

(f) where the competent authorities in the requested State have decided not to take proceedings or to drop proceedings already begun, in respect of the same act;

(g) where the act was committed outside the territory of the requesting State;

(h) where the requested State is unable to enforce the sanction;

(i) where the request is grounded on Article 5(e) and none of the other conditions mentioned in that article is fulfilled;

(j) where the requested State considers that the requesting State is itself able to enforce the sanction;

(k) where the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in the requested State;

(l) where under the law of the requested State the sanction imposed can no longer be enforced because of the lapse of time;

(m) where and to the extent that the sentence imposes a disqualification.

Id. at art. 6. In addition, Article 7 mandates: "A request for enforcement shall not be complied with if enforcement would run counter to the principles recognised in the provisions of Section 1 or Part III of this Convention." *Id.* at art. 7.

⁷ "In determining the sanction, the court shall not aggravate the penal situation of the person sentenced as it results from the decision delivered in the requesting State." *Id.* at art. 44.1.

⁸ If the request for enforcement is accepted, the court shall substitute for the sanction involving deprivation of liberty imposed in the requesting State a sanction prescribed by its own law for the same offence. This sanction may, subject to the limitations laid down in paragraph 2, be of a nature or duration other than that imposed in the requesting State. If this latter sanction is less than the minimum which may be pronounced under the law of the requested State, the court shall not be bound by that minimum and shall impose a sanction corresponding to the sanction imposed in the requesting State.

Id. at art. 44.1.

⁹ Council of Europe, *Explanatory Report on the European Convention on the In-*

ine mutual trust, however, a sentencing state will refrain from requesting enforcement by the administering state for fear that the sanction substituted by the latter might no longer correspond to the reprehensive character of the offence as recognized in the original judgment.¹⁰

More recently, it has been argued that the sentenced person's view about his transfer should be taken into account because his transfer aims principally at giving him a better chance of resocialization in the administering state. Thus, on 14 June 1979 the Council of Europe responded. Its Committee of Ministers recommended that the governments of the contracting parties "take . . . all appropriate steps to ensure that in the case of a sanction involving deprivation of liberty the person sentenced is granted the opportunity to express his view before a final decision . . . is taken."¹¹

III. THE TRANSFER CONVENTION OF 1983

The Convention on the Transfer of Sentenced Persons (Transfer Convention),¹² which was opened for signature on 21 March 1983, further advanced the notion of prisoner consent. The Transfer Convention entered into force on 1 July 1985 and binds fourteen member states of the Council of Europe,¹³ as well as two non-member states.¹⁴ It makes a sentenced person's consent one of the basic elements of the transfer mechanism and converts the transfer into a tripartite agreement.¹⁵ Prisoner con-

ternational Validity of Criminal Judgments, ¶ 68 (1970) [hereinafter *Explanatory Report to the Validity Convention*].

¹⁰ See, *LE JURISTE*, *supra* note 1, at 238. It might be noted that, according to the Convention's explanatory report, article 5 (Validity Convention, *supra* note 4) precludes a request for transfer based solely on the sentencing state's desire to avoid enforcing a judgment passed by its own authorities. *Explanatory Report to the Validity Convention*, *supra* note 9, at 30.

¹¹ *European Convention on the International Validity of Foreign Judgments*, Recommendation No. R(79) 13, I, 2b (1979).

¹² Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, T.I.A.S. No. 10824 [hereinafter *Transfer Convention*].

¹³ The member states to the Transfer Convention are Austria, Cyprus, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

¹⁴ The non-member states to the Transfer Convention are Canada and the United States of America.

¹⁵ "A sentenced person may be transferred under this Convention only . . . if the

sent is critical to the Transfer Convention because one of the primary purposes of the Convention is to facilitate the rehabilitation of offenders¹⁶ and because the drafters presume that "transferring a prisoner without his consent would be counter-productive in terms of rehabilitation."¹⁷ Yet this kind of sweeping presumption may surely be questioned on its underlying logic. Why should a person whose views were not sought as to whether and when he is to go to prison be entitled to give or refuse his consent as to where he is to be imprisoned? Assuming that a foreign prisoner can be rehabilitated at all¹⁸ and that rehabilitation will be achieved best in his state of origin or permanent residence,¹⁹ why should he be allowed to refuse his transfer

transfer is consented to by the sentenced person or . . . by the sentenced person's legal representative. . . ." Transfer Convention, *supra* note 12, art. 3.1.d.

¹⁶ The purposes of the Transfer Convention are set forth in its preamble as follows:

The member States of the Council of Europe and the other States, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

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

Considering that this aim can best be achieved by having them transferred to their own countries,

Have agreed as follows. . . .

Transfer Convention, *supra* note 12, preamble.

¹⁷ Council of Europe, *Explanatory Report on the Convention on the Transfer of Sentenced Persons*, ¶ 23 (1983) [hereinafter *Explanatory Report to the Transfer Convention*].

¹⁸ Doubts as to whether resocialization in a prison environment is at all possible were expressed, *inter alia*, in the *Gronigen Report* of the Dutch Ministry of Justice, The Hague, 1987, at 46:

[i]t is extremely difficult to create guarantees that persons placed in a situation of a fundamental lack of liberty will change so essentially as to behave quite better when they eventually return to their own surrounding. In any event, greater maturity (or only age) still seems to be the best form of resocialization.

Id.

¹⁹ The assumption that rehabilitation will best be achieved in the prisoner's state of origin is indeed the official basis of both the Validity Convention (*see* Validity Convention, *supra* note 4, preamble) and the Transfer Convention (*see* cited provision *supra* note 16). (*See also Explanatory Report to the Transfer Convention*, *supra* note 17, ¶ 9). This makes it all the more surprising that these Conventions reflect almost opposite con-

to a prison in that state? Finally, why should one assume that his rehabilitation in that state will be at stake if he were transferred without his consent?

Whatever its justification in terms of penological philosophy or human rights policy, the subordination of the transfer to the sentenced person's consent is the most striking characteristic of the 1983 Transfer Convention and has important consequences. A sentenced person may request a transfer either of the sentencing state or the administering state.²⁰ Moreover, with a view to enabling a sentenced person to express his interest, he or she must be informed of the Convention's substance by the sentencing state.²¹ Further, once the sentenced person has expressed an interest to either the sentencing or the administering state, he or she must be informed in writing of any action or decision taken by either state on the request for transfer.²² Lastly, the sentencing state must ensure that the sentenced person consents "voluntarily and with full knowledge of the legal consequences thereof"²³ and that the administering state is allowed to verify that this condition has been met.²⁴

clusions regarding the weight to be afforded the sentenced person's consent to, or refusal of, his transfer.

²⁰ "To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention." Transfer Convention, *supra* note 12, art. 2.2.

²¹ "If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final." *Id.* at art. 4.2. "If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to that State the information referred to in paragraph 3 above." *Id.* at art. 4.4. The arrangements for informing foreign prisoners of the text of the Convention in a language they understand are provided in the *Convention on the Transfer of Sentenced Persons*, Recommendation No. R(84) 11 (1984) [hereinafter Recommendation R(84)].

²² "The sentenced person shall be informed, in writing, of any action taken by the sentencing State or the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer." Transfer Convention, *supra* note 12, art. 4.5.

²³ The pertinent provision of the Transfer Convention states, in part:
The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3.1.d does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.
Id. at art. 7.1.

²⁴ "The sentencing State shall afford an opportunity to the administering State to

The condition that both the sentencing state and the administering state agree to the transfer²⁵ constitutes a second characteristic of the 1983 Transfer Convention. Because "[t]he purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious,"²⁶ the Transfer Convention confines itself to providing the procedural framework for transfers.²⁷ In fact, it imposes only one rather general obligation on the party states: "the Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons"²⁸ Either state may request the transfer, but neither is under any obligation to comply with such a request²⁹—even if the sentenced person has given his consent and all the other conditions for transfer are fulfilled.³⁰ As there

verify, through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above." *Id.* at art. 7.2.

²⁵ "A sentenced person may be transferred under this Convention only . . . if the sentencing and administering States agree to the transfer." *Id.* at art. 3.1.f.

²⁶ *Explanatory Report to the Transfer Convention*, *supra* note 17, ¶ 8.

²⁷ The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested state to give reasons for its refusal to agree to a requested transfer.

Id. at ¶ 10.

²⁸ Transfer Convention, *supra* note 12, art. 2.1.

²⁹ For this reason it is surprising that Article 4.2 of the Transfer Convention provides that when a sentenced person expresses an interest in being transferred, the sentencing state "shall so inform the administering State as soon as practicable" (Transfer Convention, *supra* note 12). Such an obligation may seem unnecessary since the sentencing state may reject the administering state's request for transfer at a later stage, and without giving any reasons. "The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer." *Id.* at art. 5.4. Moreover, the latter is under no obligation to make a request in the case of repatriation of one of its own nationals.

³⁰ The remaining conditions for transfer are:

- a. if that person is a national of the administering State;
- b. if the judgment is final;
- c. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;
- d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;
- e. if the acts or omissions on account of which the sentence has been imposed

is no obligation to comply with a request, the Transfer Convention does not include a list of grounds for refusal, nor does it require the requested state to give reasons for refusing to agree to a requested transfer.³¹ Although confining the Transfer Convention to a procedural mechanism that merely requires consensus may have been the prevailing goal of the drafters, practice has shown that it would be useful if refusals to comply with a request for transfer were accompanied by an explanation, if only to avoid repeating similar requests in the future.³²

A third legal novum in the Transfer Convention of 1983, as compared with the Convention of 1970,³³ is the option³⁴ offered to the administering state of either "continued enforcement"³⁵

constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory.

Id. at art. 3.1.

³¹ See provisions cited *supra* note 27.

³² Concerning the practical application of the Transfer Convention, Recommendation No. R(88) 13, which the Committee of Ministers adopted on 22 September 1988, proposes solutions to a whole range of other difficulties which have arisen in practice. The organizational and practical measures suggested in this Recommendation include: setting up procedures for the effective handling of transfer requests; circulating a list of officials responsible for the practical application of the Transfer Convention; introducing target dates for the processing of cases; using the widest possible modern means of telecommunication to inform the sentenced person of all relevant details of the expected effects of his transfer; broadly defining the term "national" (Transfer Convention, *supra* note 12, art. 3.4); and searching for other solutions if the choice of the enforcement procedure (*Id.* at art. 3.3) hampers the functioning of the transfer mechanism between the parties concerned. *Convention on the Transfer of Sentenced Persons*, Recommendation No. R(88) 13 (1988).

³³ Validity Convention, *supra* note 4.

³⁴ The competent authorities of the administering State shall:

a. continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in article 10, or

b. convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

Transfer Convention, *supra* note 12, art. 9.1.

³⁵ 1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be en-

or "conversion"³⁶ of the original sentence. In this respect, the administering state must, if requested, inform the sentencing state as to which of these procedures it will follow before it transfers the sentenced person.³⁷ The administering state may also indicate, at the time of signature or when depositing its instrument of ratification, that it intends to omit either of these procedures.³⁸

IV. SOME DIFFICULT QUESTIONS AND PROSPECTS OF SOLUTIONS

In order to provide the transfer mechanism with needed flexibility, provisions allow for a choice between continued enforcement and conversion of sentence. However, this flexibility presents the possibility that each state will opt for a different enforcement procedure, thus rendering the Convention ineffective by paralyzing the transfer mechanism. Indeed, if a sentencing state has excluded the conversion of sentence and if an ad-

forced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Id. at art. 10.

³⁶ In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

- a. shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;
- b. may not convert a sanction involving deprivation of liberty to a pecuniary sanction;
- c. shall deduct the full period of deprivation of liberty served by the sentenced person; and
- d. shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

Id. at art. 11.1.

³⁷ "The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow." *Id.* at art. 9.2.

³⁸ Article 3.3 gives the administering state express permission to forego one of the procedures. It provides as follows:

Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9.1.a and b in its relations with other Parties.

Id. See provisions cited *supra* note 34.

ministering state has excluded continued enforcement, there can be no transfer under the terms of this Convention between these two countries. They will be forced to enter into supplemental, bilateral agreements or make *ad hoc* arrangements if there is to be any transfer at all!

Are other unforeseen legal complications posed? Is the lack of speedy replies to requests for transfers, which is often complained of in practice, a genuine reason to doubt the success of this Convention? What is the actual impact of the provision requiring that a sentenced person be transferred only "if that person is a national of the administering State,"³⁹ when millions of Europeans reside in countries whose passport they do not hold? In other words, is it true that most contracting states have availed themselves of the opportunity under Article 3.4 to define the term "national" in a broad sense, so as to include any close ties the sentenced person may have with the administering state? What about the improvement brought by this Convention in providing that, in the case of conversion of sentence, the administering state "may not convert a sanction involving deprivation of liberty to a pecuniary sanction"?⁴⁰ How could the sentenced person, prior to consenting to transfer, be better informed of the likelihood of sentence in the administering state, which is a matter of real concern to most foreign prisoners? What is the effect of the administering state's obligation to provide certain information to the sentencing state concerning the enforcement of the sentence?⁴¹

Any attempt at a definitive reply to these and many more questions⁴² would seem rather hazardous at present. The fact re-

³⁹ *Id.* at art. 3.1.a.

⁴⁰ *Id.* at art. 11.1.b.

⁴¹ The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

- a. when it considers enforcement of the sentence to have been completed;
- b. if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- c. if the sentencing State requests a special report.

Id. at art. 15.

⁴² See, LE JURISTE, *supra* note 1, at 246-47. For a comprehensive examination of all provisions and innovations of this Convention, see H. Bartsch, *Strafvollstreckung im Heimatstaat*, NEUE JURISTISCHE WOCHENSCHRIFT (Deutscher Anwaltverein) 513-17 (1984) and Bolle, *Présentation de la Convention sur le transfèrement des personnes condamnées du 21 mars 1983*, INFORMATIONS PÉNITENTIAIRES SUISSES 207-14 April, 1983.

mains, however, that the system seems to work and those who are called upon to apply this system seem very eager to improve it.⁴³ Effective enforcement of the Transfer Convention ultimately depends on the readiness of government officials to trust the penal system of other countries and on the willingness of governments to co-operate as quickly and effectively as possible.

⁴³ As evidenced by the preparation and adoption of the Recommendation on the practical application of the Transfer Convention. *See, e.g.*, Recommendation No. R (84), *supra* note 21.