

# The International Prisoner Transfer Program

by Paula Wolff

## I. Introduction

Although the International Prisoner Transfer Program has been in existence since 1976, it remains a program about which most federal prosecutors have scant knowledge or understanding. This article will provide an overview of the program, discuss how a transfer request is processed, identify the criteria that are used when making a transfer determination, describe how the transferred sentence is administered in the receiving country, and discuss the role of federal prosecutors in the transfer program. *See also* <http://www.usdoj.gov/criminal/oeo/>.

## II. Background

The transfer program was formally established in November 1976, after the bilateral Treaty on the Execution of Penal Sentences between the United States and Mexico entered into force. Treaty on the Execution of Penal Sentences, Nov. 25, 1967, U.S.-Mex., 28 U.S.T. 7399. A major impetus for the United States to develop an international prisoner transfer program was the well-publicized reports of American nationals being incarcerated abroad, especially in Mexico, under abusive and inhumane conditions. In addition, "Midnight Express," first a popular book and then later a film about an American in custody in horrible conditions in a Turkish prison, fueled the drive for Congress to pass legislation authorizing the transfer program.

Since signing the Mexican Treaty, the United States has entered into other bilateral transfer treaties and has acceded to two multilateral transfer conventions, the Council of Europe Convention on the Transfer of Sentenced Persons (the COE Convention) in 1985, and the Inter-American Convention on Serving Criminal Sentences Abroad (the OAS Convention) in 2001. Together these international agreements give the United States prisoner transfer relationships with almost seventy countries. Although the United States prefers not to enter into any new bilateral transfer treaties because of the time and cost involved in their negotiation and passage, it is almost certain that, in the future, additional countries will accede to the COE and OAS Conventions, thereby increasing the number of countries with which the United States has a transfer treaty relationship.

These transfer treaties permit the United States and its treaty partners to return a foreign national, who is sentenced and imprisoned in their country, to the prisoner's home country to serve the time remaining on his sentence. The transfer program works in two directions. First, a country may receive one of its nationals from a foreign country which has convicted and sentenced the national for committing a criminal offense. That country accepts responsibility for enforcing or administering the transferred sentence. Second, a country may return foreign nationals who have been convicted and sentenced for a crime to their home country to serve their sentences. The country sending or transferring the foreign national is referred to as the "sending" or "sentencing" country, whereas the country receiving the prisoner and administering the transferred sentence is referred to as the "receiving" or "administering" country.

Most of the prisoners the United States has transferred to foreign countries have been convicted in federal courts. A majority of these transferred federal offenders have committed a drug offense. In addition to transferring federal offenders, state offenders are also eligible to apply for transfer. Currently, all states have legislation permitting them to participate in the transfer program. However, when a foreign national is in a state prison, he must first obtain the approval of the state before his application can be reviewed and approved by the Federal Government. Although the Department of Justice frequently approves state cases, if a compelling federal interest exists or if treaty requirements have not been satisfied, it will deny the transfer request. Because many states do not actively participate in the transfer program, the Department continues to engage in ongoing efforts to increase state participation.

In recent years, the United States has processed approximately 1,500 transfer applications each year. Of this total, the United States denies about sixty percent of these applications, with the denial rate being highest for Mexican applications, in part, because so many of these applicants are considered to be domiciliaries of the United States. In 2005, the United States transferred 281 foreign nationals back to their home countries and accepted the return of eightyfour Americans, most of whom were incarcerated in Mexican prisons. During the early years of the transfer program, the United States transferred many more American nationals back to the United States than foreign nationals to their home countries. With the advent of the Federal Sentencing Guidelines and the abolition of parole, the situation reversed itself in the early 1990s. Now the United States transfers about three times more foreign nationals out of the country than Americans back into the United States. Not surprisingly, because of our shared borders, a large percentage of these transfers are with Mexico, followed by Canada. This net outflow of prisoners results in a significant cost savings to the United States.

### **III. Benefits of the International Prisoner Transfer Program**

When some individuals first learn of the transfer program, they inquire about the motivation for the United States to participate in the program. Skeptics wonder what benefit the United States realizes from transferring a criminal, who has violated United States laws, to his home country and, conversely, what interest is served when the United States receives an American from a foreign government after that American has been convicted of committing a serious crime abroad.

The United States first considered entering into prisoner transfer treaties in the early 1970s in response to reports that some Americans imprisoned abroad had been convicted in unfair judicial proceedings or had been subjected to torture and inhumane conditions while confined in foreign prisons. The United States, like most other countries, is protective of its citizens and is concerned about poor or unfair treatment accorded its nationals in other countries, even when these nationals may have acted unlawfully. As the United States began to explore the prisoner transfer option, it recognized that other benefits, besides protecting the health, well-being, and rights of its nationals, could be obtained by prisoner transfer. Foremost among these benefits was that genuine

rehabilitation, and eventual reintegration of a prisoner into his home society, were much more likely to occur when the prisoner served his sentence in his own country, where he would be near his family, friends, and a familiar culture. In addition, the United States realized that the imprisonment of foreign nationals created a significant administrative burden on its prison staff by requiring the prisons to adapt their practices and procedures to prisoners having differing languages, customs, cultural backgrounds, and dietary requirements. The United States believed that prisoner transfer could reduce this burden. Moreover, the United States recognized that confining the nationals of another country created diplomatic tension with the foreign country and that returning the foreign national to his home country would reduce this tension.

As the United States began to participate in the prisoner transfer process, it also recognized that there were two other significant benefits to the program. The first was a law enforcement benefit while the second was an economic one. Normally, after a foreign national completes the service of a sentence in the United States, he is referred to the Bureau of Immigration and Customs Enforcement (ICE) for deportation or removal proceedings. Frequently, after the removal order has been issued, such prisoners are returned to their home country, without notification to the home country of their arrival, and without providing the home country with any pertinent information about the individual, such as the specifics of the criminal conduct in which the individual engaged or any continuing risks that the individual might pose. As a result, the home country often knows nothing about the person released into its midst. Consequently, it is unable to take precautionary steps to ensure the safety of its populace, help the former prisoner to receive necessary medical or rehabilitative assistance, or reintegration into its society.

In many instances prisoner transfer is preferable to traditional removal. When a prisoner is transferred, the United States provides the receiving country with detailed information about the prisoner, including official accounts of the criminal conduct committed. Unlike the removal of a former prisoner, a transferred prisoner is placed directly in the custody of law enforcement officials from the receiving country. This transfer procedure permits the receiving country to monitor the prisoner's activities, address any treatment or rehabilitative needs of the prisoner, assist in the eventual reintegration of the prisoner into society, and take appropriate steps to protect society from the prisoner. This last benefit is particularly significant for certain types of repeat or predatory offenders, such as sexual offenders. Many countries, such as Canada, have systems to monitor these offenders, and to provide notice to communities when such an offender is living in their neighborhood.

Although not a factor motivating the negotiation of the transfer treaties, the United States recognizes that these agreements also create an economic benefit to both the Federal Government and the state governments participating in the transfer program, by reducing the number of prisoners confined within their prisons. Approximately twenty-seven percent of all federal prisoners are foreign nationals and states also have significant foreign populations. For every prisoner transferred, the federal or state government recognizes a savings equal to the cost of imprisoning that person for the period remaining on the sentence.

#### **IV. Administering the Transfer Program and making the transfer decision**

Fourteen separate international agreements, as well as federal implementing legislation, 18 U.S.C. §§ 4100-4115, provide the legal authority for the International Prisoner Transfer Program. Congress authorized the Attorney General to act as the central authority for the program, and the Attorney General delegated his authority to the Office of Enforcement Operations (OEO) within the Criminal Division. See 18 U.S.C. § 4102; 28 C.F.R. §§ 0.64-1, 0.64-2. The International Prisoner Transfer Unit (IPTU), a unit within OEO, oversees the daily operation of the program. It receives considerable assistance from the Federal Bureau of Prisons (BOP) in various stages of the transfer process.

Prisoner transfer cannot occur unless the sentencing country, the receiving country, and perhaps most critical, the prisoner, consent to the transfer. The decision whether or not to approve transfer is a discretionary one that must be made by both the sentencing country and the receiving country. Under the International Prisoner Transfer Program, a prisoner does not have a "right" to transfer to his home country, nor can the sentencing country force the prisoner to transfer.

Although the United States approves virtually all transfer applications submitted by Americans imprisoned abroad, it is more selective when reviewing the transfer applications of foreign nationals, approving approximately forty percent of these transfer applications. The overall approval rate is lowered significantly by the large number of Mexican nationals who apply for and are denied transfer. The lower approval rate for Mexican nationals is attributed to two main factors. First, the transfer treaty with Mexico prohibits the transfer of domiciliaries and many Mexicans satisfy the treaty domiciliary test by having lived in the United States for over five years. Second, the United States knows that Mexico applies a number of restrictive criteria—most notably that the remaining sentence cannot exceed five years—and will deny applicants who do not satisfy these criteria. The United States continues to express its concern over the restrictive criteria used by Mexico but has been unsuccessful in having Mexico modify its criteria.

Each transfer application submitted to the Department presents a unique set of facts that must be evaluated on its individual merits. However, for the Department to approve a transfer application submitted by a foreign national incarcerated in a United States prison, it must first collect pertinent information from the responsible United States Attorney's office (USAO) and law enforcement agency, and then determine if the case satisfies the requirements of the applicable treaty and federal implementing legislation. See 18 U.S.C. §§ 4100-4115. The basic requirements that must be satisfied by all successful applicants are as follows.

- The prisoner must be convicted and sentenced.
- The prisoner, sentencing country, and receiving country, must consent to the transfer.
- The prisoner must be a national of the receiving country.

- A minimum period of time must remain on the sentence, typically at least six months.
- The judgment and conviction must be final, with no pending appeals or collateral attacks.
- No charges or detainers may be pending against the prisoner in the sentencing country.
- Dual criminality must exist (the crime of conviction must also be a crime in the receiving country).

Depending on the applicable treaty, there may also be additional requirements.

In addition to the treaty and statutory requirements, the IPTU has developed a set of guidelines that assists it in evaluating each transfer request. These guidelines focus on four broad areas, with the first being the likelihood of social rehabilitation. One of the major goals of the transfer program is to return the prisoner to his home environment where, hopefully, there is familial and peer support, for in this type of environment, the prisoner has the best chance of successful rehabilitation and reintegration into society. In addition, since most foreign national prisoners are deported when they are released from custody, it may not make sense to allow them to remain in a foreign prison where they must adjust to a society different from the one to which they will ultimately be deported. To assess the likelihood of social rehabilitation of the prisoner, the IPTU examines various facts that include the following.

- The strength of the prisoner's family and other social ties to the sentencing and receiving countries.
- Whether the prisoner accepted responsibility for his criminal conduct.
- Cooperation with law enforcement.
- The criminal history of the prisoner.
- The seriousness of the offense.
- The role of the prisoner in the offense.
- The presence of aggravating and mitigating circumstances.
- The prisoner's remaining criminal ties to the sentencing and receiving countries.

Thus, a first time offender who had a minor role in a criminal offense and has strong family and social ties in the receiving country is a much more likely transfer candidate than a career offender who has family in the United States and has lived here for many years.

The second focus of the guidelines, and one of particular interest to the USAOs, is on law enforcement concerns. These include the following.

- The seriousness of the offense, including if public sensibilities would be offended by the transfer.
- Any public policy issues that would be implicated by the transfer.

- The possibility that the transfer would facilitate the prisoner's renewed association with his criminal associates in his home country.
- Possible sentencing disparity in the home country (of greatest concern for the most serious offenses).
- Whether law enforcement or the prosecutor need the prisoner for pending or future trials, investigations, or debriefings.
- The existence of unpaid fines, assessments, and restitution.

The third major concern that is examined is the likelihood that the prisoner will return to the United States. Allowing a foreign national to serve his remaining sentence in his home country makes sense only if the prisoner will remain in his own country after release. A fundamental reason for the transfer is the belief that rehabilitation is most likely to occur in the prisoner's home environment, an objective that would not be realized if the prisoner returns to the sentencing country. A number of factors are considered in making this determination, including the following.

- The strength of the prisoner's ties to the United States.
- The strength of the prisoner's ties to his home country.
- The location of the prisoner's family.
- Previous deportations and illegal entries.
- Previous prisoner transfers.

With respect to this last factor, it is the policy of the Department to deny all transfer requests if the prisoner participated in a previous prisoner transfer.

The final concern, which arises infrequently, is whether the transfer presents any serious humanitarian concerns. Such concerns typically involve the terminal illness of the prisoner or a close family member. Although humanitarian concerns are never viewed in isolation, it is possible that when compelling humanitarian concerns are present, a transfer will be approved unless outweighed by other negative variables.

After considering all legal requirements and using these guidelines to evaluate the unique facts in each case, the United States will decide whether to approve the transfer request. In those cases where the United States denies the request, it will inform all pertinent parties and notify the prisoner that, provided that there will be at least six months remaining on the sentence, he can reapply for transfer in two years. Occasionally the denial may be based on one factor, such as a pending appeal, which will probably cease to be an impediment to transfer in less than two years. In those situations, the IPTU will entertain an earlier reapplication and frequently will reconsider the case without a specific request.

When the United States, after confirming that all statutory and treaty requirements have been satisfied, decides to approve the case, the next step is to inform the prisoner's home country and to request their decision on the transfer request. If the receiving country

approves the transfer, the next step is for the IPTU to make arrangements for a consent verification hearing to be held. This hearing, mandated by 18 U.S.C. § 4107 and conducted by a federal magistrate, is held to confirm that the prisoner consents to the transfer and understands the full consequences of the transfer. If the prisoner gives his consent to the transfer, the BOP makes arrangements with the foreign country to send escorts to the United States to accompany the prisoner on his return and then moves the prisoner to a prison facility near the departure point.

With respect to Americans who are transferring back to the United States, BOP will send escorts to return the prisoner to the United States, where the prisoner will remain in BOP custody pending a review of the transferred sentence by the United States Parole Commission. The Parole Commission is responsible for reviewing the sentence and applying the sentencing guidelines to the transferred sentence to determine a release date for the prisoner. 18 U.S.C. § 4106A. If the projected release date has already passed, BOP will release the prisoner; otherwise BOP will retain custody of the prisoner until his sentence has been successfully served.

## **V. Administration of the sentence in the foreign country**

When a prisoner is transferred, the responsibility for administering the sentence belongs exclusively to the receiving country. The sentencing country, however, retains the power to modify or vacate the sentence, including the power to grant a pardon. Under most of the treaties, the receiving country will continue the enforcement of the transferred sentence. Such continued enforcement will be executed under the laws and regulations of the receiving country, including any provisions for the reduction of the term of confinement by parole, conditional release, good-time release, or otherwise. Under the French and Turkish bilateral treaties and the COE Convention, the receiving country has the additional option of converting the sentence, through either a judicial or administrative procedure, into its own sentence. When a sentence is converted, the receiving country substitutes the penalty under its own laws for a similar offense. The receiving country, however, is bound by the findings of facts insofar as they appear in the judgment, and it cannot convert a prison term into a fine or lengthen a prison term. Only a few countries have elected to convert transferred sentences. The United States has adopted the continued enforcement method of administering the transferred sentence.

Some assume that when a sentence is transferred, the prisoner will always serve the same period of time in prison in his home country that he would have served if he had remained in the United States. As a practical matter, however, this is not usually the case. Sometimes the actual time that the transferred prisoner spends in prison in the receiving country may be less than the time he would have served in the sentencing country. This disparity appears most often in transfers to Canada and many European countries, especially in drug cases where there is an opportunity for parole. Other times, because of differences in the availability of prison credits, the prisoner may spend more time in prison in his home country. Of particular interest to federal prosecutors is the information provided to the Department that indicates that most transferred Mexican nationals serve sentences which closely approximate the sentences they would have served had they

remained in the United States. Furthermore, due to changes in Mexican law, Mexican prisoners who have committed drug offenses frequently discover that because of the difference in prison credits awarded, they will spend a longer period of time in custody in a Mexican prison than if they had remained in the United States.

Although it is possible that some transferred prisoners may serve less time in prison, such a result is neither unexpected nor inconsistent with the goals of the transfer program. The United States and its treaty partners recognized at the time they entered into these international agreements that the administration of the sentence by the receiving country, which involved applying criminal laws unique to that country, could result in the prisoner serving less prison time than if he had remained in the sentencing country. These same countries, however, were willing to accept this result in return for the ability to have their foreign nationals transferred. It is important to realize that it is not unusual for a returning American to serve less time in an American prison than he would have served if he had remained incarcerated in the sentencing country. Thus, it would place the United States in an awkward diplomatic position to accept this benefit for its citizens, yet object to a transfer of a foreign national because he might experience a similarly beneficial sentencing outcome.

## **VI. Role of the United States Attorneys' offices in the Transfer Program**

An USAO may be faced with issues surrounding the prisoner transfer program at two distinct phases of the criminal process. First, the issue of a possible prisoner transfer may arise during plea negotiations. It is not uncommon, during plea negotiations, for a foreign national to ask the USAO to guarantee that he will be transferred in return for a guilty plea. Because the discretion to grant or deny transfer requests is vested in the Attorney General, the USAO is without the power to make this promise. The USAO, however, can represent that it will support the application, or that it will not oppose the transfer. It should be clear in the agreement that any representation is being made by the particular USAO, and not by the Department as a whole. See USAM § 9-35.100.

The second occasion when the USAO may be involved in the transfer program is during the postsentencing phase of the case when the transfer application is being processed. To ensure a thorough, fair, and principled review of each application, the IPTU collects and evaluates pertinent information from various sources, including input from law enforcement agencies. Among the most important information that the IPTU collects for each case are comments from the prosecuting USAO. Soon after receiving the case, an IPTU analyst will fax an inquiry sheet to the USAO seeking its views on the requested transfer, and asking if there are any pending appeals or collateral attacks. The form also provides space for comments and the USAO is always free to submit additional documentation to support its views. As noted by former Assistant Attorney General Michael Chertoff, now head of the Department of Homeland Security, it is critical that the USAO provide timely responses to these inquiries. See Memorandum to all USAOs, dated August 7, 2002, from Michael Chertoff, Assistant Attorney General. The IPTU, recognizing the strong interest that the USAOs have in the cases they have prosecuted, carefully reviews all comments that the USAOs submit, and considers these comments to



be critical information in rendering its transfer decision.

Over the years, many USAOs have provided thoughtful and informative responses to IPTU inquiries. The IPTU considers legitimate law enforcement concerns raised by USAOs very seriously, and in most situations, these concerns will cause denial of the transfer request. Problems arise, however, when the USAO fails to provide case-specific reasons for opposing the transfer, and instead registers only generic complaints about the transfer program. Such complaints typically express a general dislike of the program, a belief that the prisoner should serve his sentence in the United States, an unsupported belief that the prisoner will return to the United States and commit a new offense, a concern that the prisoner will serve a shorter term in the foreign country, or a distrust of the integrity of the foreign prison system.

As discussed above, standing alone, the fact that the prisoner may serve less time in a foreign prison does not usually justify denying a transfer request. Nor are concerns about the integrity of the prison system of our treaty partners a basis to deny a transfer request. Since the majority of the transfer requests come from Mexican inmates, some USAOs have voiced concerns about the integrity of the Mexican prison system. Although problems have existed in the Mexican criminal justice system, the current government has taken substantial steps to combat and reduce corruption. From the information available to the Department, there appears to be little or no support to substantiate the view that transferred prisoners are able to buy or negotiate a lesser sentence in Mexico. To reduce the potential for corruption, Mexico generally limits its transfer approvals to low security, first-time offenders who are from low-to-middle socioeconomic class, and who have no connection to a drug cartel or organized crime. Mexico has instituted this policy because it believes that such inmates, due to their lack of resources and connections, are less likely to be in the position to take advantage of any corruption existing in the system.

The Department has little information that would substantiate the belief that a transferred prisoner will return to the United States and commit new crimes. It has been our experience that offenders who are transferred to distant locales, especially to countries in Europe or Asia, are unlikely to reappear in the United States following their release from confinement abroad. Although there is no guarantee against recidivism for any category of offender, the possibility that a foreign national will return to the United States following completed service of his sentence at a prison in his home country can be greatly minimized by ensuring that inmates obtain removal orders prior to transfer, and by limiting approvals to those candidates who have strong family ties to their home countries and who have minimal or no prior criminal records. The IPTU, in conjunction with the Department of Homeland Security, ensures that all Mexican nationals have a removal order before they are transferred to Mexico.

Finally, a blanket policy of objecting to transfer without a substantial basis to do so would be inconsistent with the treaty obligations of the United States. The treaties and conventions governing the transfer of prisoners express a foreign policy determination of the United States that prisoner transfer should be available to foreign nationals

incarcerated here, just as it should be available to American nationals incarcerated abroad. Furthermore, since the prisoner transfer treaties are part of United States law, the United States has an obligation to give a good faith consideration to each case.

## **VII. Conclusion**

For thirty years, the United States has participated in the International Prisoner Transfer Program. As a result, thousands of qualified foreign nationals have been returned to their home countries to serve their criminal sentences. It is expected that these numbers will increase as more countries accede to the two existing prisoner transfer conventions and as the states become more active participants in the program. Although transfer is not appropriate for all inmates, the prisoner transfer program does offer significant rehabilitative, law enforcement, and diplomatic benefits in many cases. ~

## **About The Author**

Paula Wolff has been Chief of the International Prisoner Transfer Unit in the Office of Enforcement Operations of the Criminal Division of the United States Department of Justice since September 2000. She was a Trial Attorney in the Terrorism and Violent Crime Section from 1996 to 2000, and in the General Litigation and Legal Advice Section from 1986 to 1996, where she was Acting Deputy Chief from 1994-1996.