

Americans Arrested Abroad

We are all familiar with nightmare stories of Americans rotting in foreign jails. Fortunately, it doesn't always have to be that way. The United States is a party to a number of prisoner transfer treaties that allow Americans to be transferred back to the United States to serve their sentences. Similarly, inmates in U.S. prisons who are citizens of countries that are parties to these treaties can be sent back to their native countries to serve their sentences. (18 U.S.C. §§ 4100 *et seq.*; see also 28 C.F.R. 2.62.); see also, *An Introduction to International Prisoner Transfers: Going Home*, available at <http://www.alanellis.com/CM/Publications/intro-international-transfers.asp>).

Some of these prisoner transfer treaties are bilateral; that is, they are between the United States and one other country. The first such treaty was a 1977 prisoner transfer treaty with Mexico. Since then, the United States has entered into bilateral prisoner transfer treaties with Bolivia, Canada, France, Hong Kong S.A.R., the Marshall Islands, Micronesia, Palau, Panama, Peru, Thailand, and Turkey. (France, Canada, Panama, and Turkey are also signatories to the Council of Europe Convention. France prefers proceeding under the bilateral treaty.)

The United States is now also party to two multilateral treaties (treaties between more than two countries): the Council of Europe Convention on the Transfer of Sentencing Persons (the COE Convention), and the Inter-American Convention on Serving Criminal Sentences Abroad (the OAS Convention). (See sidebar for list of signatory countries to both the COE and OAS Conventions.)

When an American is arrested abroad, the arresting country notifies the United States Embassy or Consulate, which then sends an American consular official to visit the prisoner. If the prisoner can substantiate his or her citizenship (usually through a passport or birth certificate), the

consular official should inform the prisoner of his or her rights under the International Prisoner Transfer Program, which the U.S. Department of Justice administers to ensure compliance by the United States with its obligations under the various prisoner transfer treaties.

The official often gives the American an unvetted list of local "attorneys" who have indicated their availability. Some of these "attorneys" are not lawyers at all, but, rather, con artists who take a fee from the unsuspecting American and are never heard from again.

Although each of the various treaties has its own eligibility requirements and application procedures, in general, an American prisoner is not eligible for transfer to the United States until after sentencing and the exhaustion of appellate rights in the foreign country. At that point, the application process can be initiated. Whether it makes sense to initiate the process depends on several things. First, is the inmate likely to have any time left to serve after the application is processed and approved? Normally this takes about six months, but can take up to a year. Second, does the inmate have any unpaid fines or restitution? Some foreign governments require a prisoner to pay any fines or restitution that are imposed as part of the sentence before transfer can occur and sometimes even before the approval decision is made. Finally, some treaties prohibit the transfer of inmates who have been convicted of certain types of offenses, such as immigration, military, and political offenses.

If the prisoner wishes to transfer, either the prisoner or the American Embassy (depending on the requirements of the applicable treaty) should apply to the foreign government for the transfer. After that, the foreign government or the American Embassy will assemble the necessary documents for the application package. This package will include the foreign sentencing documents, a summary and translation of the offense behavior and prisoner information, a copy of the travel document (proof of citizenship), and information regarding the prisoner classification and conduct. Once these documents are assembled, they will be forwarded to the International Prisoner Transfer Unit (IPTU) of the Criminal Division of the Department of Justice. The IPTU will review the application and decide whether to approve the request. If both the IPTU



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and the foreign government approve the request, the IPTU will make arrangements for a consent verification hearing before a U.S. magistrate judge. At that hearing, the prisoner is represented by a federal public defender. If the magistrate judge determines that the prisoner consents to the transfer, arrangements are made with the Federal Bureau of Prisons and the foreign government to transport him or her back to the United States to be incarcerated in a federal prison.

Treaty Signatories

As of March 1, 2006, the following countries have signed onto the COE Convention: Albania, Andorra, Armenia, Austria, Azerbaijan, Bahamas, Belgium, Bulgaria, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Republic of Korea (South Korea), Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia (Former Yugoslav Republic of), Malta, the Netherlands (including Netherlands Antilles and Aruba), Nicaragua, Norway (including Bouvet Island, Peter I's Island and Queen Maud Land), Panama, Poland, Portugal, Romania, Serbia and Montenegro, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tonga, Trinidad and Tobago, Turkey, Ukraine, the United Kingdom (including Anguilla, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Ducie and Oena Islands, Falkland Islands, Gibraltar, Henderson, Isle of Man, Montserrat, Pitcairn, St. Helena and Dependencies and the Sovereign Base Areas of Akrotiri and Dhekelia on the Island of Cyprus), and the United States.

As of March 1, 2006, the following countries have signed onto the OAS Convention: Brazil, Canada, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, and Venezuela. Since it is possible that other countries will sign these treaties in the future, if a client is imprisoned in a country not listed above, it is important to check to see whether that country is now a signatory. (See, http://travel.state.gov/law/legal/treaty/treaty_1989.html and www.usdoj.gov/criminal/oeo/index.htm.)

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At the outset it is important to recognize that a transferred prisoner has no right to appeal, modify, set aside, or otherwise challenge his/her foreign conviction in a United States court or administrative agency after being transferred back to the United States. (18 U.S.C. § 3244(1).) Such authority remains with the courts in the sentencing country. In fact, the United States must execute the sentence imposed by the foreign country. To do so it must go through a careful analysis to determine how a comparable crime would be punished in the United States and then determine a release date for such an offense. (Council of Europe Convention on the Transfer of Sentenced Persons, opened for signature Mar. 21, 1983, 35 U.S.T. 2867, 1496 U.N.T.S. 92.)

The responsibility for determining the release date, as well as any period of supervised release and conditions that will apply, has been given to the United States Parole Commission, an administrative agency within the United States Department of Justice.

The process for determining the release date for the transferred prisoner begins shortly after the prisoner enters the United States. Following the prisoner's return to the United States, a U.S. probation officer who is located near the institution in which the prisoner is incarcerated reviews the documents submitted by the sentencing country that describe the offense committed by the prisoner. After reviewing these materials, the probation officer interviews the prisoner and prepares a postsentence report. The Parole Commission then schedules a special transferee hearing. Prior to this hearing, the transferred prisoner is provided with an opportunity to be represented by counsel.

At the hearing, the Parole Commission is presented with information and arguments regarding the appropriate period of imprisonment. Following the hearing, the Parole Commission deliberates and determines the date on which the prisoner will be released on supervised release. It also determines the length of the supervised release period and the conditions of supervised release.

In determining an appropriate release date and the length of the supervised release period, the commission considers many factors, including the nature of the offense, whether the prisoner has cooperated with law enforcement (a 5K1.1 motion is not required; merely letters from the agencies), and the sentence that would be applied for a comparable federal offense under the now advisory United States Sentencing Guidelines, the post-*Booker* fac-

tors set forth in 18 U.S.C. 3553(a). It is important to stress that, in determining a suitable release date from the foreign sentence, the Parole Commission cannot overturn the prisoner's conviction, reduce or modify the original sentence, or make findings of fact that are inconsistent with the findings of the foreign court. Although the release date determined by the Parole Commission may sometimes be less than the duration of the sentence imposed by the foreign country, it can never be greater than the foreign sentence. (18 U.S.C. § 4106(b)(1)(C).) A transferred prisoner who is dissatisfied with the decision of the Parole Commission may appeal the decision to the United States Court of Appeals.

The Federal Bureau of Prisons will then designate an appropriate federal institution for service of the sentence after considering a number of factors, including the nature of the offense, the sentence imposed, prior history of the prisoner, and the prisoner's home area.

The Federal Bureau of Prisons will then compute the sentence. The prisoner will receive credit

for all the time spent in custody from the day of arrest. Additionally, the release date set by the Parole Commission may be reduced by any foreign labor and good time credits earned prior to the transfer. The prisoner will also receive good time credits earned in the United States. (18 U.S.C. § 4105.) A transferred prisoner, like all regular federal prisoners, is expected to abide by prison rules and failing to do so risks losing good conduct time credits.

After a prisoner is released from the custody of the Bureau of Prisons, the probation officer, usually from the prisoner's home district, will be responsible for supervising the prisoner during any period of supervised release that has been imposed. During this period, the offender must report regularly to the probation officer and must abide by all of the conditions that have been imposed in connection with the term of supervised release. Failure to do so could result in a United States court revoking the supervised release and returning the offender to prison to serve the remainder of the sentence. ■