

Transferring Non-Consenting Prisoners

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Abstract: *Offenders' rehabilitation is the declared objective of the transfer of foreign prisoners to their country of nationality, origin or permanent residence. The rationale behind this is that allowing prisoners to serve their sentence close to home can be a significant instrument in improving their chances of social rehabilitation. In Framework Decision 2008/909/JHA, the previous right of veto held by sentenced persons in the 1983 Council of Europe Convention when they are transferred to their country of nationality or residence was abolished. This change has a major negative impact on the position of the sentenced person. It also raises questions as to the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective, given that social rehabilitation intrinsically requires the cooperation of the person involved. By discussing the compatibility, the reader is given a deeper and contextualised insight into the fact that not every policy measure actually serves the purpose for which it was intended. In fact, the abolition of the prisoner's right of veto makes the European instrument appear more concerned with the needs of the issuing states than with those of the affected individuals.*

Keywords: *Transfer of prisoners, social rehabilitation, Framework Decision 2008/909/JHA, offender's consent, mutual recognition.*

SUMMARY: 1. Introduction. – 2. The Grounds for Abolishing the Requirement of Consent. – 3. The Rehabilitation Perspective. – 4. Social Rehabilitation through Non-Consented Transfers? – 5. Concluding Remarks.

1. Introduction

The explanatory reports, preambles and contents of the instruments and agreements adopted in Europe since the 1960s that allowed foreign offenders to be transferred to their country of nationality, origin or permanent residence have consistently referred to their rehabilitation as an important objective of such transfers.¹ It is commonly accepted that, on the whole, enforc-

¹ See Preamble and Article 1 of the European Convention on the Supervision of Conditionally

ing a prison sentence in surroundings familiar to the prisoner is more likely to facilitate his or her social rehabilitation. Therefore, social ties, particularly employment and family relations, should be given sufficient attention during and after punishment.² It is also widely assumed that a transfer to the home country is in a foreign prisoner's interest as the problems offenders experience in prison are generally exacerbated when they are foreign, even though the principle of non-discrimination is a basic principle in penitentiary law. Difficulties in communication due to language barriers, lack of information about the legal system, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on foreign prisoners, making it likelier that they will relapse into crime.³ In many cases, they are not offered the range of penitentiary and post-release treatments and welfare-oriented services that may otherwise be an integral part of imprisonment.⁴ As a

Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964); Explanatory Report and Preamble to the European Convention on the International Validity of Criminal Judgments (The Hague, 28 May 1970, hereinafter the '1970 Validity Convention'); Explanatory Report and Preamble to the Convention on the Transfer of Sentenced Persons (Strasbourg, 21 March 1983, hereinafter the '1983 Council of Europe Convention'); Explanatory Report and text of the UN Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh Crime Congress (Milan, 16 August-6 September 1985) and endorsed by the General Assembly in resolution 40/32; Article 2 of the Agreement on the Application between the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons (25 May 1987), etc. In general, recommendations of the Council of Europe on the matter always mention the importance of the social rehabilitation of sentenced persons and to that end the transfer of such persons to the country of their own society. See Preamble of Recommendation R (92) 18, concerning the practical application of the Convention on the Transfer of Prisoners (adopted by the Committee of Ministers on 19 October 1992).

²F. McNeill, 'A desistance paradigm for offender management', *Criminology and Criminal Justice*, Vol. 6, No. 1, 2006, pp. 39-62.

³See A. Tarzi & J. Hedges, *A Prison Within a Prison*, Inner London Probation Service, London, 1990; P. Green, *Drug Couriers*, Howard League for Penal Reform, London, 1991; A. Tarzi. & J. Hedges, *A Prison Within a Prison - Two Years On: An Overview*, Inner London Probation Service, London, 1993; R. Ellis, *Asylum-Seekers and Immigration Act Prisoners - The Practice of Detention*, Prison Reform Trust, London, 1998; P. Green, *Drugs, Trafficking and Criminal Policy - the Scapegoat Policy*, Waterside Press, Winchester, 1998; C. Pourgourides, S.P. Sashidharan & P.J. Bracken, *A Second Exile: the Mental Health Implications of Detention of Asylum Seekers in the UK*, North Birmingham Mental Health Trust, Birmingham, 1996; H.S. Bhui, *Going the distance: Developing effective policy and practice with foreign national prisoners*, Prison Reform Trust, London, 2004; H.S. Bhui, 'Foreign National Prisoners: Issues and Debates', in H.S. Bhui (Ed), *Race and Criminal Justice*, Sage, London, 2009, pp. 154-169; M. Knapen, 'Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved?', in M. Groenhuijsen, T. Kooijmans & T. de Roos (Eds), *Fervet Opus. Liber Amicorum Anton van Kalmthout*, Maklu, Apeldoorn-Antwerp-Portland, 2010, pp. 118-120; T. Ugelvik, 'The Incarceration of Foreigners in European Prisons', in S. Pickering & J. Ham (Eds), *The Routledge Handbook on Crime and International Migration*, Routledge, London and New York, 2014, pp. 107-120.

⁴See T. Ugelvik, 'Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double

consequence, foreign prisoners are often not able to exercise their formally equal rights.⁵ It seems reasonable to conclude that a transfer to their home country would reduce the harm caused by their deprivation of liberty and promote social rehabilitation. This policy is also rooted in humanitarian considerations.⁶

The *ad hoc* legal instrument for the transfer of prisoners across the European Union is Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327, 5.12.2008, pp. 27-46, hereinafter, the 'Framework Decision'). Its declared purpose is also to facilitate the social rehabilitation of the sentenced person (Article 3(1)). Again, the driving rationale behind this declaration is that allowing foreign prisoners to serve their sentence close to home improves their chances of social rehabilitation, since its objective is to transfer them to the society to which they will return after punishment.

Under the provisions of the Framework Decision, the consent of the sentenced person to the transfer will not be required when the transfer takes place to further the social rehabilitation of the person involved (Article 6). In particular, the consent of the sentenced person is not required when: (1) the person is a national of the executing state and also lives there; (2) the person is to be deported to the executing state on completing their sentence; and (3) the person has fled or otherwise returned there in response to the criminal proceedings. His or her opinion will be obtained when deciding the issue of forwarding the judgment together with the certificate, but it can be dismissed if the is-

Vision', in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, p. 183.

⁵ A.M. van Kalmthout, F. Hofstee-van der Meulen & F. Dünkel, *Foreigners in European prisons*, Wolf Legal Publishers, Nijmegen, 2007, p. 17.

⁶ M. Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, MPICC, Freiburg, 1993, pp. 150, 153, 158-159, 166-167 and 206, 'Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective', *Louisiana Law Review*, Vol. 53, No. 4, 1993, pp. 1043-1089, and 'Prisoner Transfer within the European Union: the European Enforcement Order and Beyond', in N. Keijzer & E. van Sliedregt (Eds), *The European Arrest Warrant in Practice*, T.M.C. Asser, The Hague, 2009, p. 360; A.M.M. Orie, 'Problems with the effective use of prisoner transfer treaties', in R. Atkins (Ed), *The alleged transnational offender*, Martinus Nijhoff Publishers, The Hague, 1993, pp. 59-67; D. van Zyl Smit, 'International imprisonment', *International and Comparative Law Quarterly*, Vol. 55, Issue 2, 2005, p. 364; E. De Wree, T. Vander Beken & G. Vermeulen, 'The transfer of sentenced persons in Europe', *Punishment and Society*, Vol. 11, No. 1, 2009, p. 117; Knapen 2010, pp. 118-121; D. van Zyl Smit & R. Spencer, 'The European dimension to the release of sentenced prisoners', in N. Padfield (Ed), *Release from prison*, Willan, Cullompton, 2010, p. 36; R. Mulgrew, 'The International Movement of Prisoners', *Criminal Law Forum*, Vol. 22, No. 1, 2011, pp. 111 and 139-140.

suings state has satisfied itself that such a transfer furthers the social rehabilitation of the prisoner involved. No position is taken on if and how the issuing state must assess this. More importantly, the Framework Decision does not provide the sentenced person whose consent is unnecessary with a remedy against the decision to forward the judgment.

Compared with the previous situation under the 1983 Council of Europe Convention, this is quite a novelty,⁷ even more relevant because the Framework Decision has a significant negative impact on the position of the sentenced person. The change merits a more detailed explanation than has been given so far, because it raises questions with respect to the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective,⁸ given that social rehabilitation intrinsically requires the cooperation of the person involved. Therefore, transferring a prisoner without his or her consent could be counter-productive in terms of rehabilitation. Does the decision-making process in the Framework Decision fit the purpose of increasing the prospects of the prisoner's rehabilitation? Is abolishing the requirement of consent consistent with the central position awarded to furthering social rehabilitation? Does it highlight a shift towards an instrumentalisation of the transfer of prisoners to deal with unwanted foreign prisoners who the issuing states want to remove from their territory? Answering these questions requires an analysis that combines three aspects, namely 1) the grounds for abolishing the requirement of consent; 2) the rehabilitation perspective; and 3) the compatibility between transferring non-consenting prisoners and the declared purpose of their transfer being that of social rehabilitation. The following sections will introduce these topics.

⁷ As such, it has been stressed in all related official documents. See the report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. COM (2014) 57 final of 5.2.2014, 12, p. 7, where reference is made to the member states' declarations. It has also been underlined in literature. See Knapen 2010, p. 113; W. de Bondt & A. Suominen, 'State Responsibility When Transferring Non-consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from Asylum Case Law', *European Criminal Law Review*, Vol. 5, No. 3, 2015, p. 347.

⁸ See Knapen 2010, pp. 118 and 123; G. Vermeulen *et al.*, *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU member states*, Maklu, Antwerp, 2011, p. 15; G. Conway, 'Prospects and Problems for European Legal Cooperation Concerning Prisoners', *European Journal of Probation*, Vol. 10, No. 2, 2018, p. 154; A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 43-61.

2. The Grounds for Abolishing the Requirement of Consent

None of the multilateral agreements on the enforcement of foreign penal judgments in the nineteenth century has ever mentioned the offender's consent, with only a minority sector in literature defending that transfer without consent by stating that it could be counterproductive to the declared purpose of rehabilitation.⁹ From the 1960s onwards, when the tendency towards transferring foreign prisoners to their home countries strengthened and widened, this position was still very common in international instruments.¹⁰ In the vast majority of multilateral conventions and uniform legislation adopted at that time, the consent of the sentenced person was not required in order to proceed with such a transfer. Nevertheless, the works in international congresses during the second half of the twentieth century reflected a slow but unstoppable change of opinion in the matter. While the Ninth International Congress on Penal Law (The Hague, 1964) only criticised the offender's restricted role in the context of extradition,¹¹ two decades later, the Thirteenth Congress (Cairo, 1984) emphasised that as long as the offender is imprisoned in the sentencing state, the transfer should only be authorised with his or her consent.¹² This consensus began to accelerate in the 1980s. For example, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders (Caracas, 1980) allowed the transfer to take place "either with the prisoner's consent or in his interest",¹³ whereas the Model Agreement on the Transfer of Foreign Prisoners adopted just five years later at the Seventh Congress already considered the prisoner's consent indispensable to any transfer (Milan, 1985). As a consequence of this change of mind, the Riyadh Arab Agreement on Judicial Cooperation (Riyadh, 6 April

⁹ See, for example, E. Brusa, 'Report', in AA.VV., *Actes du Congrès pénitentiaire international de Rome, novembre 1885. Publiés par les soins du Comité exécutif. Tome premier*, Mantellate, Rome, 1887, p. 467, and H. Lammasch, *Auslieferungspflicht und Asylrecht*, Duncker & Humblot, Leipzig, 1887, p. 823.

¹⁰ See, for example, the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden (Helsinki, 23 March 1962), the Law on Cooperation with Finland, Iceland, Norway and Sweden Relating to Enforcement of Penal Sentences (3 May 1963), the Treaty between Belgium, the Netherlands and Luxembourg on the Enforcement of Judgments in Criminal Matters (26 September 1968, which never came into force), the 1970 Validity Convention or the Convention on the Transfer of Persons Sentenced to Imprisonment to Their Home Countries to Serve Their Sentence (19 May 1978).

¹¹ Resolution III.B of Section 4 adopted at the IX AIDP Congress, retrieved on 15 September 2019 from <http://www.penal.org/en/resolutions-aidp-iapl-congresses>, p. 301.

¹² Resolution 11 of Section 4 adopted at the XIII AIDP Congress, retrieved on 15 September 2019 from <http://www.penal.org/en/resolutions-aidp-iapl-congresses>, p. 349.

¹³ Retrieved on 20 September 2019 from <https://www.unodc.org/congress/en/previous/previous-06.html>, resolution 13(1).

1983), the Commonwealth Scheme for the Transfer of Convicted Offenders of 1986 and the 1983 Council of Europe Convention introduced the requirement of the offender's consent.

In the 1983 Council of Europe Convention, the consent requirement was explicitly rooted in the understanding that transferring a prisoner without his or her consent would be counter-productive in terms of rehabilitation, which it declared to be its primary purpose (according to para. 23 of the Explanatory Report, although just in passing). Even so, it was still difficult to speak of a wide acknowledgement of the offender's consent as an integral part of the transfer of prisoners in international multilateral instruments of transfer.¹⁴ In fact, many possible exceptions to the rule of consent were considered reasonable:¹⁵ That the offender's veto might be detrimental to the public interest involved in this international instrument, for example, in cases where it would inevitably lead to impunity;¹⁶ and that consent might be considered unnecessary where the offender is only a visitor who has been in the country for a very short time, with no ties to it, or where a deportation order has been made against the prisoner, so that he or she will be compulsorily returned to the executing country at the end of the sentence. In fact, the most influencing entry point of a new state of opinion was the increase in migration flows from the mid-1980s, with a large percentage of migrants coming from former Eastern bloc states and underdeveloped African, American and Asian countries. In such an international and European context in which it was increasingly common for many foreign prisoners to have no links with the country in which they were sentenced, being compulsorily removed at the end of their sentence, it was only natural that prisoner transfer agreements moved away from the idea that prisoners should consent to the transfer and therefore have the power to exercise an effective veto over the procedure.

¹⁴ The requirement of consent was severely criticised from the perspective that it was not only a strange body in the legal system governing international legal assistance, but also undesirable from a practical viewpoint and detrimental to the whole prisoner transfer scheme. This reasoning was widespread in German literature. See T. Vogler, 'Zur Rechtshilfe durch Vollstreckung ausländischer Strafurteile', in T. Vogler (Ed), *Festschrift für H.-H. Jescheck zum 70. Geburtstag. Band II*, Duncker & Humblot, Berlin, 1985, p. 1383; F.-Ch. Schroeder, 'Übertragung der Strafvollstreckung', *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 98, No. 2, 1986, p. 460; E. Müller-Rappard, 'The Transfer of Sentenced Persons – Comments on the Relevant Council of Europe Legal Instrument', *Pace International Law Review*, Vol. 3, No. 1, 1991, pp. 160-161.

¹⁵ Plachta 1993, pp. 358-362.

¹⁶ For example, the 1990 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, established that the transfer of enforcement of a penalty involving deprivation of liberty would not require the consent of the sentenced person whenever this person has avoided the enforcement by escaping to his or her own country (Article 69).

Consequently, the requirement of consent in the 1983 Council of Europe Convention was significantly diluted by the Additional Protocol to the Convention on the Transfer of Sentenced Persons (18 December 1997), which signalled a turning point. It allowed for non-consented transfers in particular circumstances. In order to prevent convicted persons who have fled to their state of nationality evading justice due to the prohibition on the extradition of nationals in some domestic legal systems, the Additional Protocol allows these persons to be tried in the administering state without their consent (Article 2). Moreover, acknowledging that the Convention operated on the basis of a three-fold consent – *i.e.* the sentencing state, the administering state and the sentenced person –, the Committee considered that the Convention could operate on the basis of a twofold consent – namely, the consent of both the sentencing state and the administering state – where the person concerned as a consequence of the sentence passed is subject to deportation or expulsion from the sentencing state (Article 3(1)). The need for the offender’s consent was substituted by the offender’s right to be heard by the administering state before the decision on transfer was taken and the requirement of an agreement between both states involved to dispense with the consent of the sentenced person (Article 3(2)). This exception was considered reasonable in terms of rehabilitation as it related to circumstances in which the offender could not start a new life in the sentencing state after punishment.¹⁷ However, the Additional Protocol recognised that there was a significant difference between transferring a sentence to the state to which a prisoner has fled for enforcement purposes, and the involuntary transfer of a prisoner to another state to serve his or her sentence. It therefore enabled the contracting states to opt out of the latter mechanism (Article 3(6)). Non-consented transfers under the Additional Protocol would have to comply with the requirements of Protocol No. 7 to the European Convention on Human Rights (according to para. 30 of the Explanatory Report to the Additional Protocol), which means that prisoners must be given an opportunity to submit reasons against their transfer and to have their cases reviewed with the benefit of representation.

The Framework Decision follows the path of the Additional Protocol and takes the exclusion of the requirement of consent further, while at the same time imposing a duty on the executing state to take charge of sentenced persons.¹⁸ In addition, in much the same way as in the Additional Protocol, the

¹⁷ See De Wree, Vander Beken & Vermeulen 2009, p. 119. Expressing some doubts, Conway 2018, p. 145. For critical considerations on this aspect, see V. Mitsilegas, ‘The third wave of third pillar law: which direction for EU criminal justice?’, *European Law Review*, Vol. 34, No. 4, 2009, p. 541 *et seq.*

¹⁸ This compulsory system was also included in the proposed 2017 Second Additional Protocol to the 1983 Council of Europe Convention (Article 2.1), not currently in force.

consent of sentenced persons is not required when they flee or stand to be deported or expelled, but it is also not required when they are to be returned to a state party of which they are nationals and in which they live. The change is not limited to Europe in terms of its influence or effect. The Framework Decision states that existing and future bilateral and multilateral agreements entered into by EU member states may only be relied upon insofar as they allow the objectives of the EU Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for enforcing sentences (Article 26). Although it is unclear how this provision will be interpreted in practice, it is implied that it requires the EU member states to pursue ‘no consent’ transfer mechanisms in their agreements with non-EU States.¹⁹ At national level, some countries are increasingly seeking to negotiate bilateral agreements that enable transfers without the offender’s consent.²⁰ The explicit purpose of this policy is to reduce significantly the foreign prisoner population and thus the burden on the national prison system.²¹ Is it possible to pursue this purpose while at the same time furthering the rehabilitation of the transferred foreign offenders? To answer this question, we must first explain how social rehabilitation is to be seen in the context of the Framework Decision.

3. *The Rehabilitation Perspective*

‘Social rehabilitation’ is the term historically used in international transfer conventions and now in the Framework Decision. This concept is perceived in various ways in different European countries. Furthermore, it is not defined at European level, with only its contours having gradually been defined in the case law of the European Court of Human Rights.²² It is clear that a uniformly interpreted, European-wide notion of social rehabilitation could only contribute to a more widespread achievement of the EU objective to become an area

¹⁹ Cf. Mulgrew 2011, p. 114.

²⁰ See, for example, the UK and Rwandan Agreement on the Transfer of Sentenced Persons (Kigali, 11 February 2010), para. 9. This agreement also introduces a new condition for transfer, not contained in the UK’s previous bilateral prison transfer agreements, namely the sentenced person must be subject to an order for deportation or removal from the sentencing state.

²¹ For the UK, see Hansard Debates HC col 410W, 1 March 2011, parliamentary answer of the Secretary of State for Justice.

²² S. Meijer, ‘Rehabilitation as a Positive Obligation’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 25, No. 2, 2017, p. 146. For a definition of rehabilitation according to the sources of international and EU law, see S. Montaldo, ‘Offenders’ Rehabilitation: Towards a New Paradigm for EU Criminal Law?’, *European Criminal Law Review*, Vol. 8, No. 2, 2018, pp. 223-243.

of freedom, security and justice. As we will see, providing such an interpretation may prove challenging, given the great diversity of legal and penological traditions.²³

In EU law, the meaning of social rehabilitation corresponds today more closely to ‘reintegration’, seen as the offender’s re-entry into society following imprisonment, than to the classical understanding of ‘rehabilitation’ as a process of internal change.²⁴ Recital 9 of the Preamble to the Framework Decision offers some guidance on which aspects need to be considered, even though it does not explicate the concept:

the competent authority of the issuing State should take into account such elements as, for example, the person’s attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

This understanding is coherent with both Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules²⁵ and the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter, the ‘Mandela Rules’),²⁶ according to which prisoners should be allocated “to the extent possible, to prisons close to their homes or their places of social rehabilitation” (Rule 17(1) of the European Prison Rules and Rule 59 of the Mandela Rules), and allowed “to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons” (Rule 24(1) both of the European Prison Rules and of the Mandela Rules). Case law of the European Court of Human Rights repeatedly stresses that states’ authorities should assist prisoners in maintaining effective contact with close family members as an im-

²³ See Knapen 2010, p. 123, and A. Martufi, ‘The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?’, *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2018, p. 673.

²⁴ De Wree, Vander Beken & Vermeulen 2009, p. 112; Meijer 2017, pp. 160-161. In the European instruments, ‘rehabilitation’ is an all-encompassing term, often used interchangeably with ‘reintegration’. We will do the same, although we are aware that there are differences between the two.

²⁵ Adopted by the Committee of Ministers of the Council of Europe on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies. The emphasis placed on managing detention “so as to facilitate the reintegration into free society of persons who have been deprived of their liberty” (Rule 6) has strongly influenced the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁶ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, and revised by the United Nations General Assembly on 17 December 2015 after a five-year process.

portant means to facilitate re-entry after release.²⁷ According to this understanding, pursuing social rehabilitation with regard to the transfer of foreign prisoners means that such transfers should help to establish or restore offenders' societal and family bonds in their home country, which improve the likelihood of successful re-entry.²⁸

However, social rehabilitation also refers to assisting with the moral, vocational and educational development of the imprisoned individual via working practices and educational, cultural and recreational activities. It includes addressing the special needs of offenders with programmes covering a range of problems, such as substance addiction, mental or psychological conditions, anger and aggression, amongst others, which may lead to re-offending behaviour. In this sense, the Mandela Rules mention that prisoners should be offered education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health and sports-based nature (Rule 4(2)). The European Prison Rules also pay attention to social work, medical and psychological care and education of sentenced prisoners (Rules 103 to 106). Similarly, Recommendation Rec(2000)22 of the Committee of Ministers of the Council of Europe to member states on improving the implementation of the European rules on community sanctions and measures highlights that special attention should be given to basic skills (e.g. basic literacy and numeracy, general problem solving, dealing with personal and family relationships, pro-social behaviour), educational or employment situation, possible addiction to drugs, alcohol, medication and community-oriented adjustment when designing programmes and interventions in the context of community sanctions and measures. The idea that providing prisoners with a real opportunity for rehabilitation requires them to be allowed to engage in work or education is also present in the case law of the European Court of Human Rights, which consistently demands that contacts with the outside world be supported by a comprehensive set of pro-

²⁷ Cases *Messina v. Italy* (no. 2), Judgment of the Court (Second Section) of 28 September 2000, para. 61-62; *Lavents v. Latvia*, Judgment of the Court (First Section) of 28 November 2002, para. 139.

²⁸ D. MacKenzie, 'The impact of formal and informal social controls on the criminal activities of probationers', *Journal of Research in Crime and Delinquency*, Vol. 39, No. 3, 2002, pp. 243-376; S. De Li & D. Layton MacKenzie, 'The gendered effects of adult social bonds on the criminal activities of probationers', *Criminal Justice Review*, Vol. 28, No. 2, 2003, pp. 278-298; J. Hepburn & M. Griffin, 'The effect of social bonds on successful adjustment to probation: An event history analysis', *Criminal Justice Review*, Vol. 29, No. 1, 2004, pp. 46-75; van Zyl Smit 2005; M. Maguire & P. Raynor, 'How the resettlement of prisoners promotes desistance from crime: Or does it?', *Criminology and Criminal Justice*, Vol. 6, No. 1, 2006, pp. 19-38; De Wree, Vander Beken & Vermeulen 2009, p. 122. Explaining that family background and social capital in the home state may better serve relapse into crime than rehabilitation, which calls for a case-by-case analysis instead of generalisation, see I. Wieczorek, 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation', *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2018, p. 659.

grammes aimed positively at rehabilitating the offender.²⁹ It appears, however, that this criterion has not been considered in the Framework Decision, even though literature consistently underlines its importance,³⁰ maintaining that the transfer should improve foreign prisoners' access to treatment and assistance,³¹ particularly if there are language barriers³² or major cultural differences.³³ The Framework Decision simply assumes that possibilities of training, education and work are usually greater in the prisoner's own country.

A similar situation occurs with post-release services and supervision. Following their release, offenders face a range of social, economic and personal challenges that may become obstacles to a crime-free lifestyle, such as securing suitable accommodation with very limited means, surviving financially with little or no savings until they begin to earn wages and access services and support for their specific needs. Research on the variables that influence successful reintegration has revealed the interdependence of employment, housing, addiction treatment and social network support.³⁴ In the absence of material, psychological and social support during this transitional period, many offenders are likely to become trapped in a vicious cycle of release and re-arrest. The Mandela Rules contain a strong reminder that "the duty of society does not end with a prisoner's release" (Rule 90) and emphasise the need for efficient aftercare to be delivered by both governmental and non-governmental entities (Rule 108). The European Prison Rules also recommend close cooperation between prison authorities, services, and agencies that supervise and assist released prisoners to enable them to re-establish themselves in the com-

²⁹ Cases *James, Wells and Lee v. United Kingdom*, Judgment of the Court (Four Section) of 8 September 2012, para. 218; *Khoroshenko v. Russia*, Judgment of the Grand Chamber of 30 June 2015, para. 122 and 144; and *Harakchiev and Tolumov v. Bulgaria*, Judgment of the Court (Four Chamber) of 8 July 2014, para. 265.

³⁰ E. Rotman, 'Beyond punishment', in A. Duff & D. Garland (Eds), *A Reader on Punishment*, Oxford, Oxford University Press, 1994, pp. 281-305; G. Robinson, 'Late-modern rehabilitation: The evolution of a penal strategy', *Punishment and Society*, Vol. 10, No. 4, 2008, pp. 429-445; R. Canton, *Why punish? An Introduction to the Philosophy of Punishment*, Palgrave MacMillan, London, 2018.

³¹ See van Kalmthout, Hofstee-van der Meulen & Dünkel 2007; De Wree, Vander Beken & Vermeulen 2009, pp. 121-122.

³² See Bhui 2004, p. 10; Ugelvik 2014, pp. 114-115.

³³ De Wree, Vander Beken & Vermeulen 2009, p. 122.

³⁴ See D. Banks & D.C. Gottfredson, 'The Effects of Drug Treatment and Supervision on Time to Rearrest among Drug Treatment Court Participants', *Journal of Drug Issues*, Vol. 33, No. 2, 2003, pp. 385-412; C.A. Visher, L. Winterfield & M.B. Coggeshall, 'Ex-offender Employment Programs and Recidivism: A Meta-analysis', *Journal of Experimental Criminology*, Vol. 1, No. 3, 2005, pp. 295-315; S.J. Bahr *et al.*, 'Successful reentry: what differentiates successful and unsuccessful parolees?', *International Journal of Offender Therapy and Comparative Criminology*, Vol. 54, No. 5, 2010, pp. 667-692.

munity (Rule 107(4)). In this sense, the issuing state might have better structures and resources to finance post-release services. However, again, this criterion has not been considered in the Framework Decision, which does not even mention post-sentencing alternatives for assisting offenders in their reintegration into society.

In summary, it is commonly accepted that using a rehabilitation perspective implies that the prisoners' societal and family bonds must be established, maintained or restored in order to increase their chances of reintegration, but also that prison-based treatment and assistance and post-release services provided to former prisoners are considered important to diminish the risk of recidivism. "The chosen interventions when focusing on rehabilitation are, therefore, treatment, assistance and the stimulation of societal bonds".³⁵ However, the Framework Decision only focuses on facilitating the social circumstances required for the full re-entry of sentenced persons into the community to which they belong. It fails to guarantee offenders' access to prison-based rehabilitation programmes and re-entry assistance. It also fails to consider that reintegration not only concerns societal and family ties, but also employment, education, mental healthcare, drug abuse treatment, and so on.

Last but not least, the Framework Decision does not take into account that the offenders' active and meaningful engagement with the requirements of an order and its prescribed purposes is the more direct link between effective enforcement, long-term compliance and reduced recidivism.³⁶ Given that social rehabilitation intrinsically requires the cooperation of the person involved, whenever a transfer is decided upon without the offender's consent, even to the country of origin, nationality or residence, there are reasons to doubt that the chances of rehabilitation can really be enhanced.³⁷ After all, although the

³⁵De Wree, Vander Beken & Vermeulen 2009, p. 115. See another conceptualisation of rehabilitation, from the perspective that a sentence served in the community against which the offence was committed is more rehabilitative, in Conway 2018, p. 154.

³⁶T.R. Tyler, 'Procedural justice, legitimacy, and the effective rule of law', in M. Tonry (Ed), *Crime and justice. A review of research. Volume 30*, University of Chicago Press, Chicago, pp. 431-505; F. McNeill & G. Robinson, 'Liquid legitimacy and community sanctions', in A. Crawford & A. Huckleby (Eds), *Legitimacy and Compliance in Criminal Justice*, Routledge, London, 2013, pp. 116-137; T. McCulloch, 'Beyond compliance: Participation, co-production and change in justice sanctions', *European Journal of Probation*, Vol. 7, No. 1, 2015, pp. 40-57.

³⁷De Wree, Vander Beken & Vermeulen 2009, pp. 118 and 124; Mitsilegas 2009, p. 541; Knapen 2010, p. 123; G. Vermeulen *et al.*, *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, Maklu, Antwerp-Apeldoorn-Portland, 2011, p. 15; G. Vermeulen, 'Material Detention Conditions and Cross-border Execution of Custodial Sentences in the EU', in European Commission, *Framework Decisions on the Transfer of Prisoners and on Probation, Abstracts*, European Commission, 2012, pp. 111-112; L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', *Cambridge Yearbook of European Legal Studies*, Vol. 18, 2016, pp. 231-232; Martufi 2018a, p. 43.

expression of consent should not be overvalued, it is usually “taken to be an indication of a willingness to comply and indeed to cooperate actively”.³⁸ A lack of consent may create frustration and disappointment within offenders, which may in turn negatively reflect in their behaviour. This is particularly true in the context of supervisory measures applied to community sanctions, probation, parole, conditional release and suspended sentences, as some degree of co-operation on the part of the offender is essential to their meaningfulness and effectiveness. Is it possible to further social rehabilitation whilst imposing a transfer upon a non-consenting offender? Or are there other aims at stake?

4. Social Rehabilitation through Non-Consented Transfers?

As seen in the previous section, the Framework Decision uses a very limited notion of rehabilitation as the goal of transferring foreign prisoners, strictly related to the maintenance of societal and family bonds to facilitate re-entry into the society to which they belong. Even within this strict concept, “the evidence for this is not clear”.³⁹ In fact, the Framework Decision gives the impression that the focus has shifted from the perspective of offenders’ rehabilitation to that of the issuing states wanting to remove foreigners from their prisons.⁴⁰ They needed an instrument that was not rigid, slow and bureaucratic in its practical application, unlike the previous 1983 Council of Europe Convention.⁴¹ Therefore, the Framework Decision “provides for a faster and more streamlined procedure than the Council of Europe instruments”.⁴² The Framework Decision is based on the principle of mutual trust, founded on the presumption that member states respect fundamental rights throughout the Union.⁴³ Such a presumption calls for a high degree of automaticity, which, in

³⁸ Canton 2018, p. 220.

³⁹ Conway 2018, p. 154.

⁴⁰ See G. Vermeulen, ‘Mutual instrumentalization of criminal and migration law from an EU perspective’, *European Journal of Migration and Law*, Vol. 9, No. 3, 2007, p. 353; De Wree, Vander Beken & Vermeulen 2009, p. 117; Mitsilegas 2009, p. 541 *et seq.*; Knapen 2010, p. 122; V. Mitsilegas, *EU after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart, Oxford and Portland, Oregon, 2016, p. 222; S. Neveu, *Le transfert de l’exécution des peines privatives et restrictives de liberté en droit européen. À la recherche d’un équilibre entre intérêts individuels et collectifs*, Anthemis, Limal, 2016, p. 440.

⁴¹ J.C. Froment, ‘Les avatars de la Convention sur le transfèrement des détenus en Europe’, in J. Céré (Ed), *Panorama européen de la prison*, L’Harmattan, Paris, 2002, pp. 131-132.

⁴² European Agency for Fundamental Rights, *Criminal detention and alternatives: fundamental rights in EU cross-border transfers*, Publications Office of the European Union, Luxembourg, 2016, p. 28.

⁴³ This presumption has been highly contested over recent years. See V. Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State

turn, grants discretion to the issuing state when deciding on the transfer and the dispensation of the offender's consent in some cases, as well as narrows the grounds upon which the executing state may decline to enforce a sentence.

Of course, one could say that dispensing with the offender's consent may merely be related to the fact that the greater the similarity between the criminal systems, traditions and policies of the concerned states, the less reason there may be to afford the sentenced person an enforceable right to challenge a decision to transfer him or her.⁴⁴ The offender's veto might be considered detrimental to the interests of the EU and, perhaps more importantly, those of the issuing states. The EU's interests can be encapsulated in the need to enhance the effectiveness of the activity of law enforcement agencies and judicial authorities across Europe to compensate the absence of a genuine European area of criminal law, as both substantive and procedural criminal law largely remains national, and to reduce the risk of impunity that may result as a consequence of the increased mobility of EU citizens across borders.⁴⁵ The interests of the issuing states are centred around reducing prison costs and protecting victims and the general public.⁴⁶ The problem is that these interests are not seen as something that can be achieved *through* rehabilitation – which reduces prison costs and protects victims and the public by reducing reoffending – but as distinct objectives that may be contradictory with the social rehabilitation of offenders.⁴⁷

From the viewpoint of social rehabilitation, the prisoner's consent before a transfer can take place is a positive requirement. We should not forget that the underlying but central thrust of the transfer of prisoners is a humanitarian attempt to assist them in readapting to society. Individuals are the primary beneficiaries – not states. The fact that the repatriation of sentenced persons may

Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law*, Vol. 31, Issue 1, 2012, pp. 319-372; T.P. Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions', *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2019; and the case law of the Court of Justice of the European Union, especially on the European Arrest Warrant Framework Decision (*see* Montaldo's chapter in this book).

⁴⁴ The increased automaticity of the transfer procedure is "premised on the presumption that fundamental rights are respected fully across the European Union", according to Mitsilegas 2016, p. 126. It is also associated with international comity to non-inquiry, since legality and legitimacy are presupposed to exist *ipso iure* and are thereby removed from judicial testing.

⁴⁵ *See* van Zyl Smit & Spencer 2010, pp. 36-37; Martufi 2018a, p. 48.

⁴⁶ The Framework Decision does not mention the purpose of protecting the victims and the general public, but other mutual recognition instruments contain explicit reference to it. *See* Recital 24 of Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337, 16.12.2008, pp. 102-122).

⁴⁷ *See* Vermeulen 2007, p. 353.

be in the best interests not only of them but also of the states concerned should not lead to a different prioritisation of interests. Whenever these interests collide, offenders' rehabilitation should come first. This does not happen in the Framework Decision. The procedure has been designed to serve the interests of the issuing state rather than those of the individuals affected by the transfer,⁴⁸ or even those of the executing state. It is up to the issuing state to decide whether the transfer is in the best interest of the sentenced person. In addition, the executing state has to recognise and enforce the judgment if the sentencing state forwards it – except when there are formal grounds for refusal (Article 9), and the consent of the home country can be dispensed with in cases of enforcement of a sentence imposed on a national residing in the state of nationality or awaiting expulsion or deportation towards it. The fact that the transfer may take place, *inter alia*, when the executing state is that in which the sentenced person lives (Article 6(2)) is based upon the presumption that social rehabilitation will be more successful in the executing state. Within the EU, however, which is based on the principle of free movement of persons, it is perfectly conceivable that an offender will want to return to a foreign society because he or she wants to settle there with a view to work, a relationship, etc.,⁴⁹ as the offender has lived there for most of his or her life, or simply because his or her family is entitled to remain there. For this reason, it is reasonable to listen to the sentenced person. A transfer without the offender's consent may violate Article 8 of the European Convention on Human Rights (hereinafter, the 'European Convention'), which protects the right to private and family life. Certainly, such interference with family life may be justified if the decision is made in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others (Article 8(2) of the European Convention). Nevertheless, states should consider a large number of factors already outlined by the European Court: the nature and seriousness of the offence committed by the prisoner; the length of time the prisoner has spent in the country; the prisoner's conduct in prison; the nationalities and situation of the prisoner's family; the length of any marriage and whether it has produced children, and if so, their ages; whether the couple lead a real and genuine family life; and the difficulties a spouse

⁴⁸This can be seen not only in the regulation of consent. For example, the system's cost-effectiveness is an important factor. The transfer of a prisoner is costly, and the considerable expenses incurred by the states concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned only has a short sentence to serve, even if this could further his or her social rehabilitation.

⁴⁹Knapen 2010, p. 117.

would face in the prisoner's country of origin.⁵⁰ The Framework Decision does not guarantee that all these aspects will be considered by the issuing and the executing state when making their decision.

Furthermore, prison conditions may pose a challenge to the possibilities of social rehabilitation.⁵¹ The lack of rehabilitative prospects due to deficiencies in detention conditions should constitute grounds for non-transfer under the Framework Decision,⁵² which includes general respect of the fundamental rights clause (Article 3(4)). It does not. The problem here is that the issuing state may not be interested in undertaking such a 'specific and precise' analysis as required by the Court of Justice of the European Union in the context of the European Arrest Warrant,⁵³ particularly if it has problems with prison overcrowding or is concerned with financial costs linked to maintaining foreign citizens in prison. The Framework Decision does not impose this check, clearly relying on the assessment made by the issuing state. Perhaps considering that the executing state would not want to address the inadequate conditions of its prison system, the intervention of the executing state in this assessment is not required, as there is no need for an exchange of information between judicial authorities, even though the possibility of pre-transfer consultations provides some room for an informal exchange of views on this aspect. Nevertheless, the prominent role given to the issuing state can not only constitute a threat to mutual trust,⁵⁴ but also nurtures the fear that the transfer can be easily used as a political instrument to expel undesired aliens from the country, already clearly perceptible in the literature.⁵⁵

Finally, where consent is not a requirement, the protection of the human rights of persons who may be transferred against their will becomes particularly important. The Framework Decision does not consider that the chances of

⁵⁰ See *Boultif v. Switzerland* App. No. 54273/00 (2 August 2001), para. 48, and *Amrollahi v. Denmark* App. No. 56811/00 (11 July 2002), para. 35.

⁵¹ See Vermeulen *et al.* 2011, p. 15; Martufi 2018a, p. 43; M. Pleić, 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective', in D. Duić & T. Petrašević (Eds), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement*, University Josip Juraj Strossmayer, Osijek, 2018, p. 381; Marguery 2019, pp. 714-715.

⁵² De Wree, Vander Beken & Vermeulen 2009, p. 119. At least, whenever detention conditions are so appalling that they result in inhuman and degrading treatment, prohibited by Article 4 of the European Convention.

⁵³ Judgment of 5 April 2016 in *Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru*, [2018] ECLI:EU:C:2016:198.

⁵⁴ As underlined by S. Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov', *European Papers*, Vol. 2, Issue 2, 2017, p. 718.

⁵⁵ See Vermeulen 2007, p. 353; De Wree, Vander Beken & Vermeulen 2009, p. 117; Knapen, 2010, pp. 122-123; Mulgrew 2011, p. 141; Mitsilegas 2016, p. 222; Neveu 2016, p. 440; Pleić 2018, pp. 380-381; Marguery 2019, p. 716.

social rehabilitation in the state to which the prisoner is transferred may not be as good as those in the issuing state. Certainly, the judicial cooperation mechanism should not be initiated if the offender's prospects of social rehabilitation are better in the issuing state. A transfer should be promoted only if the issuing state is satisfied that enforcing the sentence in the executing state will enhance the offender's chances of social rehabilitation.⁵⁶ However, prisoners whose consent is not necessary do not have the opportunity to file a complaint in this regard, given that the Framework Decision does not envisage a right to appeal the forwarding decision in the issuing state, which not all member states grant.⁵⁷ Even if they had such a right, prisoners may not challenge a decision to transfer them to a member state with poorer detention conditions if they perceive that the transfer could contribute to the reduction of the time spent behind bars.⁵⁸ Moreover, the case law of the European Court of Human Rights has ruled out that offenders should enjoy a right to be transferred for rehabilitation purposes, or even a right not to be transferred.⁵⁹

5. Concluding Remarks

By abolishing the offender's right to veto, the EU expects to maximise the offenders' chances of social rehabilitation while ensuring the cross-border enforcement of custodial sentences and measures involving deprivation of liberty. However, as De Wree *et al.* have correctly pointed out,⁶⁰

[t]he fact that consent is considered to be an obstacle may indicate that offenders do not feel that transfer is of benefit to their reintegration, or that it is in any way a favour.

⁵⁶ See Montaldo 2017, p. 716.

⁵⁷ European Agency for Fundamental Rights 2016, p. 96.

⁵⁸ See I. Durnescu, E. Montero Pérez de Tudela & L. Ravagnani, 'Prisoner transfer and the importance of the "release effect"', *Criminology & Criminal Justice*, Vol. 17, No. 4, 2017, pp. 462 ff.

⁵⁹ J.D. Mujuzi, 'Legal Pluralism and the convention on the transfer of sentenced person in practice: Highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe', *The Journal of Legal Pluralism and Unofficial Law*, Vol. 47, No. 2, 2015, p. 324; Martufi 2018a, p. 43. For critical considerations regarding the compatibility of this opinion with the priority attributed in some national constitutions, such as that of Spain, to the aim of offenders' social rehabilitation, see, for instance, M. Baras González, 'La necesaria autorización judicial para el traslado de personas físicas condenadas a penas de prisión entre estados miembros de la Unión Europea', *Revista de derecho UNED*, Vol. 9, 2011, pp. 40-41.

⁶⁰ De Wree, Vander Beken & Vermeulen 2009, p. 124.

Further research should be conducted to find out why foreign offenders object to transfers. This was not the aim of our analysis. Our intention was instead to evaluate critically the intended main goal of the Framework Decision and its compatibility with the abolition of consent. It becomes clear from this analysis that the abolition of consent is not completely in line with improving offenders' rehabilitation prospects, nor with the primarily humanitarian – not administrative – aim that should be pursued by the European instrument. Moreover, there is potential for other traditional criminal justice concerns (apart from the social rehabilitation of offenders) to be displaced. In fact, the possibility of transferring non-consenting prisoners is just one of the many loopholes that exist,⁶¹ making it obvious that the EU transfer system is no longer viewed primarily as a legal tool for returning to their home country citizens imprisoned abroad in order to improve their possibilities of rehabilitation, but as an efficient means for removing undesired foreign prisoners from expensive and sometimes overcrowded national prisons.

⁶¹ There are others. For example, Article 4(1) of the Framework Decision allows the transfer between member states other than the home member state in particular circumstances, which seem to bear no relation to rehabilitation. *See* Conway 2018, p. 154. Article 9(1) k) includes a new optional ground for refusal in cases where the sentence imposes a measure of psychiatric or health care or another involving deprivation of liberty which cannot be executed by the executing state under its legal or healthcare system, which demonstrates that concerns by member states with regard to the potential burdens that mutual recognition in the field would entail for their criminal justice systems prevail over rehabilitation. *Cf.* Mitsilegas 2009, p. 543.