NOTE: The final version of this paper was published as R. Mulgrew "The International Movement of Prisoners" (2011) 22(1) *Criminal Law Forum* 103-143 (DOI 10.1007/s10609-011-9139-z) – The final publication is available at http://link.springer.com/article/10.1007%2Fs10609-011-9139-z

RÓISÍN MULGREW*

THE INTERNATIONAL MOVEMENT OF PRISONERS

I. INTRODUCTION

The movement of prisoners sentenced in one State across territorial boundaries to serve their sentences in another State raises a variety of inter-related legal, penological, political, financial and human rights issues. In order to explore the operation and evolution of two contemporary systems for the transfer of prisoners, the inter-state prisoner transfer system (hereafter the inter-state system) and the international criminal justice enforcement system (hereafter the ICJ system), the United Kingdom has been selected as a case-study.

To gain a deeper understanding of the two systems and how they operate in the UK, doctrinal, socio-legal and qualitative empirical research was undertaken. The latter element involved semi-structured interviews with officials from the British Government, international criminal courts and their enforcing States.

The article begins by describing the systems in place in the UK for the international movement of prisoners and outlining the basic conditions for contemporary transfers. Recent legislative developments in the inter-state system have resulted in changes to the requirement to obtain consent from both the proposed transferee, the prisoner, and the enforcing State. The potential consequences of these developments for the operation of both systems are discussed in the following sections. The paper concludes with an analysis of the evolution of the rationales and procedures governing the operation of the two systems.

II. UK SYSTEMS FOR THE TRANSFER OF PRISONERS

The first modern inter-state prisoner transfer agreement was entered into between Syria and Lebanon in 1951. Since then a vast range of national, regional and international instruments

* Róisín Mulgrew is a Lecturer in Law at the University of Nottingham. The author wishes to thank Professor Van Zyl Smit, Graham Wilkinson and Bob Daw for their comments on this article. Any mistakes are the author's own.

have been adopted in this field.[1] The British Government, however, only introduced domestic legislation to facilitate the inter-state transfer of convicted prisoners in the mid 1980s: the Repatriation of Prisoners Act, 1984.[2] The UK entered into its first bilateral prisoner transfer agreement (PTA) with Thailand in 1990 and since then has become party to a further twenty PTAs.[3]

The UK joined the Scheme for the Transfer of Convicted Offenders within the Commonwealth, 1990 on 27 June 1991.[4] In practice, this Scheme is only used to transfer prisoners to Grenada.[5] The main multilateral scheme relied on by the British Government is the Council of Europe's Convention on the Transfer of Sentenced Persons, 1983 (hereafter COE Convention).[6] Under current bilateral and multilateral agreements, the British Government may transfer prisoners to and accept persons convicted by over one hundred States and territories.[7]

The current inter-state system will change, however, due to the UK's ratification of the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons, 1997 (hereafter the Additional Protocol) on 17 July 2009.[8] Further changes will be effected when the European Union Council Framework Decision 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[9] (hereafter the EU Framework Decision) comes into force on 5

---

[1] See M Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Freiburg im Breisgau: Max-Planck-Institute, 1993) 143-147.
[2] Available at: http://www.uklegislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1984/cukpga_19840047_en_1 (visited 30.11.10).
[3] PTAs with Thailand, Egypt, Hong Kong, Barbados, Venezuela, Cuba, Sri Lanka, Peru, Antigua and Barbuda, India, Pakistan, Ghana, Libya, Laos, Lesotho, Mexico, Morocco, St.Lucia, Brazil, Suriname and Nicaragua are currently in force. The agreements with Guyana, the Commonwealth of Dominica, the Dominican Republic, Jamaica, Rwanda, Vietnam, and Uganda are not yet in force.
[4] Of the 53 states in the Commonwealth, only fifteen countries have deposited their relevant domestic legislation with the Commonwealth Secretariat as required by Art19.
[5] Interview with Graham Wilkinson, UK Home Office,18 June 2009.
[6] Treaty No. 112, entered into force 1 July 1985. The UK ratified the Convention on 30 April 1985 and it entered into force in the UK 1 August 1985.
[7] See *Prison Service Instruction PSI 35/2008* "Repatriation" 3 October 2008, available at http://psi.hmprisonservice.gov.uk/PSI_2008_35_repatriation.doc (visited 30 November 2010).
[8] Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons, entered into force 1 November 2009.
[9] EU Framework Decision 2008/909/JHA, adopted 27 November 2008.

December 2011.[10] From this date, the EU Framework Decision will replace the COE Convention and the Additional Protocol between EU Member States.[11]

The ICJ system for the transfer of international prisoners is a younger system, having been in operation for just over a decade.[12] The legal framework for the system's operation in the UK is younger still. The International Criminal Court Act, 2001[13] contains provisions which enable the British Government to implement sentences of imprisonment imposed by the International Criminal Court (ICC) in the UK. As the implementing legislation enacted to enable cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY)[14] in 1996 did not deal with the enforcement of sentences, the ICC Act also enables the British Government to enforce ICTY sentences of imprisonment.[15] The term 'and any other tribunal of a similar character' extends these enabling provisions to sentences imposed by the Special Court for Sierra Leone (SCSL).[16] The British Government formalised its commitment to implement international sentences of imprisonment by entering into bilateral enforcement agreements (BEA) with the ICTY,[17] SCSL[18] and ICC[19] in March 2004, July 2007 and November 2007 respectively.

III. BASIC CONDITIONS FOR TRANSFERS UNDER THE CURRENT SYSTEMS

The legal frameworks for both systems contain many similar provisions relating to the transfer procedure, required documentation, communications etc. Both systems also have the same procedural pre-conditions: the judgment must be final and the prisoner must have at

[10] ibid, Art 29(1).
[11] ibid, Art 26(1).
[12] The first bilateral enforcement agreement was signed between the ICTY and Italy on 6 February 1997 (see http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation) and the first international prisoner (Zlatko Aleksovski) was transferred from the ICTY's detention facility (the United Nations Detention Unit) to a national prison system (Finland) to serve an international sentence of imprisonment on 22 September 2000 (see http://www.icty.org/sections/TheCases/KeyFigures (visited 30 November 2010).
[13] International Criminal Court Act, 2003. Available at http://www.opsi.gov.uk/acts/acts2001/ukpga_20010017_en_1 (visited 30 November 2010).
[14] The United Nations (International Tribunal for the Former Yugoslavia) Order 1996, S.I 1996 No. 716.
[15] ICC Act (n 13 above) Art 77(3).
[16] ICC Act (n 13 above) Art 77(4).
[17] Available at http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation (visited 30 November 2010).
[18] Available at http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx (visited 30 November 2010).
[19] Available at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/ (visited 30 November 2010).

least six months (in some cases one year[20]) of a determinate sentence left to serve or have an indeterminate sentence.[21] Beyond these basic similarities, however, the systems begin to diverge.

3.1 *Nationality*

One of the most fundamental pre-requisites for the transfer of a prisoner to the UK from another State under the inter-state system is that the prisoner is a national or citizen of, or has close ties with, the UK or its territories (and vice versa).[22] Nationals of, and persons with permanent residence in Member States of the European Union, are also classified as UK nationals for the purpose of transfers under the COE Convention.[23]

Under the ICJ system, nationality is not a pre-condition for the transfer of international prisoners from the detention facility of an international criminal court to the UK to serve their sentences.[24] Although the transferee's nationality is an indirect consideration, insofar as it relates to the safety of the prisoner, his ability to fit in with the national prison population and to maintain links with his family while serving his sentence in the proposed enforcing State;[25]

[20] See Art 4(d)(iii) UK-Hong Kong PTA, Art 4(1)(e) UK-Laos PTA, Art 4(e) UK-Morocco PTA, Art 3(d) UK-Thailand PTA and Art 4(e) UK-Vietnam PTA.

[21] For the inter-state system, see Art 3 of the majority of the UK's PTA (except for Pakistan, Egypt, Cuba, Hong Kong, Laos, Morocco and Vietnam, see Art 4), Art 3(1)(b), (c) and (e) COE Convention and Art 4 Commonwealth Scheme.
For the ICJ system, see ICTY Rules of Procedure and Evidence Rule 103(b); Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment, 1 September 2009, para 2, (hereafter ICTY PDD); SCSL Practice Direction for Designation of State for Enforcement of Sentence, 10 July 2009, para 5 (hereafter SCSL PDD); Rules of Procedure and Evidence of the ICC, Rule 202; and Headquarters Agreement between the ICC and the Host State, ICC-BD/04-01-08 (7 June 2006), Art 50(1)-(2).

[22] See Arts 1 and 3 UK-Thailand PTA, Art 3(1)(a) and 3(4) COE Convention, the UK's declarations at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=8&DF=&CL=ENG&VL=1 (visited 30 November 2010) and Art 4(1)(a) and 4(3) Commonwealth Scheme.

[23] See Agreement on the Application Among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons, (1987), Art 2.

[24] There is nothing to prevent states insisting on a nationality or social link requirement being inserted in bilateral enforcement agreements with international criminal courts. See A Klip, 'Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia' (1997) 5(2) *European Journal of Crime, Criminal Law and Criminal Justice* 144, 148-149, 152. However, an insistence on a nationality or residency condition can lead to the breakdown of negotiations as this can result in non-cooperation in practice. Interview with Sabrina Fofana, Associate Legal Officer, Legal Advisory Section, Registry, ICTY, 29 August 2007. For this reason, Sweden removed its condition relating to nationality. Interview with Håkan Friman, Ministry of Justice, Sweden, 22.09.08.

[25] ICTY PDD (n 21 above) paras 4(a), (d)-(e) and 5; SCSL PDD (n 21 above) paras 4(i), (v) and 5; and Rome Statute of the International Criminal Court, Art 103(3)(d)-(e), 1998, UN Doc A/CONF.183/9, 2187 UNTS 3 (ICC Statute).

the primary focus during the process of designating an enforcing State[26] is on the suitability of the national prison system to effectively enforce the international sentence of imprisonment.[27] This involves the consideration of practical issues (can the State enforce the sentence under its current domestic law, provide modern, humane and secure facilities for its implementation and cover associated costs[28]) and procedural issues (will the prisoner have to be transferred back to the court to stand as a witness and as a consequence, will he have to be relocated as a protected witness[29]).

3.2 *State Consent*

State cooperation under both systems is voluntary at present. Under the UK's current inter-state system, the requested State retains the right to refuse to agree to a transfer.[30] To enable the requested State to make an informed decision, the sentencing State must provide information on the judgment, the sentence and the prisoner.[31] Some agreements contain possible grounds for refusal. These non-exhaustive lists cover issues relating to security, sovereignty, public order, criminal justice process, the form of penal sanction imposed and the grounds for its imposition.[32]

The ICJ system's procedure is very similar. International sentences of imprisonment are served in States which have indicated their willingness to accept internationally convicted persons and which have been designated by the international court to do so.[33] Following a declaration of willingness to cooperate in relation to enforcement, the UK and the relevant international court set out the terms that will govern this relationship in a bilateral

[26] See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 (1993) 36, Annex and S/25704/Add.1 (1993), UN Doc S/RES/827, Art 27 (ICTY Statute); Rules of Procedure and Evidence of the ICTY, Rule 103(A) (ICTY Rules); ICTY-UK BEA, Art 2; Statute of the Special Court for Sierra Leone, Art 22(1) (SCSL Statute); Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 103(A) (SCSL Rules); SCSL-UK BEA, Art 2; ICC Statute, Art 103; Rules of Precedure and Evidence of the ICC, Rules 200, 201 and 203-205 (ICC RPE); and ICC-UK BEA. Art 2.

[27] See ICC Statute, Art 103(3)(e).

[28] ICTY PDD, paras 3(a), 4(f)-(h); SCSL PDD, paras 4(viii)-(ix); and Rome Statute of the ICC, Art 103(3)(b) and (e).

[29] ICTY PDD, paras 4(b)-(c) and SCSL PDD, paras 4(ii)-(iii).

[30] See UK-Antigua and Barbuda PTA, Art 3(2); UK-Egypt PTA, Art 6(5); COE Convention, Art 3(1)(f); Explanatory Report to the COE Convention, para 10, available at http://conventions.coe.int/treaty/en/Reports/Html/112.htm (visited 30 November 2010); 4(1)(e) Commonwealth Scheme, Art 4(1)(e).

[31] See UK-Sri Lanka PTA, Art 6(2); Commonwealth Scheme, Art 8; and COE Convention, Art 6.

[32] See for example UK-Morocco PTA, Art 3(1)(a) and (b); UK-St. Lucia PTA, Art 2(4); UK-India PTA, Arts 3(1)(b), (d), (g)-(h); UK-Thailand PTA, Art 3(c); UK-Peru PTA, Art 3(b); UK-Laos PTA, Art 4(1)(g); and UK-Vietnam PTA, Art 4(g).

[33] ICTY Statute, Art 27; ICTY Rules, Rule 103(A); SCSL Statute, Art 22(1); ICC Statute, Art. 103(1)(A).

enforcement agreement.[34] After sentencing, the Registrar of the international court approaches the UK informally with a view to securing an indication of its preparedness to enforce the sentence imposed on the particular individual.[35] If the UK agrees, the President/Presidency of the international court may then make a designation decision naming the UK as the intended State for the enforcement of that particular sentence and subsequently forward a formal request to the British Government.[36] To enable the British Government to make an informed decision, the international court provides information on the identity of the convicted person, the convicted person's health, medical treatment he or she is receiving, the judgment, the sentence and the remaining time to be served etc.[37] The British Government retains the right to decline the formal request from the international court.[38] If this happens, the President/Presidency starts the process again and designates another State.[39] As a formal request will only be made after a positive response to the initial informal request has been received, a public refusal to the formal request is highly unlikely. States have, however, responded negatively to informal requests from the Registrar. These refusals have been attributed to a range of reasons including capacity issues, cost, the nationality, ethnicity or personal circumstances of the prisoner, the security status of the prisoner, the location of the prisoner's family, the length of the sentence, prevailing political/popular hostility toward foreigners, the reluctance of Governments to accept inspections of their prisons by external monitoring bodies, and a State's lack of an appropriate socio-cultural environment in its prisons for international prisoners.[40]

3.3 *Prisoner's Consent*

[34] Preambles to the ICTY/SCSL/ICC-UK BEAs.
[35] ICTY/SCSL PDD, para 2.
[36] ICTY/SCSL PDD, paras 5-7; and ICTY/SCSL/ICC BEAs, Art 2(1).
[37] ICTY PDD, para 2; SCSL PDD, para 3; ICC Rules, Rule 204; ICTY/SCSL-UK BEAs, Art 2(3); and ICC-UK BEA, Art 2(1).
[38] ICTY/SCSL PDD, paras 8-9; ICC Statute, Art. 103(1)(c); ICTY/SCSL-UK BEA, Art 2(4); and ICC-UK BEA, Art 2(2).
[39] ICTY/SCSL PDD, para 9 and ICC Rules, Rule 205.
[40] See para. A.1(9), Chapter XII, "Enforcement of Sentences" in *ICTY Manual on Developed Practices* (ICTY, UNICRI; Turin, 2009)152. Interviews with Bob Daw and Graham Wilkinson, UK Home Office, 24 May 2006; Interview with Alejandra Vicente, Associate Legal Officer, OLAD, ICTY, 16 February 2007; Interview with Gregor Schusterschitz, Legal Counsellor, Austrian Permanent Representative to the EU, 5 February 2008; Interview with Juhani Korhonen, Legal Advisor, International Affairs Section, Ministry of Justice, Finland, 2 June 2008; Interview with Sari Mäkelä, Legal Counsellor, Legal Department (Unit for Public International Law), Ministry for Foreign Affairs, Finland, 1 July 2008; Interview with Irene Koeck, Ministry of Justice, Austria, 13 August 2008; Interview with Hakan Friman, Ministry of Justice, Sweden, 22 September 2008; and Interview with Christer Isaksson, Chief of Security, Swedish Prison Service, 7 October 2008.

While both systems require the consent of the enforcing State for transfers to occur, only the current inter-state system requires the consent of the proposed transferee – the prisoner. With the exception of the Additional Protocol, the bilateral and multilateral treaties currently in force in the UK require the prisoner's consent to an inter-state transfer.[41] The prisoner's consent must be written,[42] given freely and with full knowledge of the legal consequences of the transfer.[43] If the prisoner, due to his age, physical or mental condition cannot give consent, it may be given on his behalf by his legal representative.[44] The requested enforcing State must be given an opportunity to verify that this consent was given in this manner[45] and it may specify what information the sentencing State should provide to the proposed transferee.[46]

In sharp contrast, the ICJ system does not require the consent of the international prisoner. The Presidents of the ICTY and SCSL may hear the views of the convicted persons before making designation decisions.[47] The ICC Presidency, on the other hand, must take the views of the prisoner into account when making designation decisions.[48] Irrespective of whether or not the international court has a duty to consult with the proposed transferees, international prisoners cannot veto the President's or Presidency's final decision regarding the State they will be transferred to in order to serve their sentence.[49] The international prisoner's views are only one factor to be taken into account when deciding which cooperating State to designate as the enforcing State.

3.4 *Contemporary Conditions for Transfers*

The different conditions for transfer may be attributed to the different reasons for the creation of the two systems. The ICJ system was a necessary structural development.[50] As the international criminal courts do not have penal facilities in which the sentences they impose

[41] See for example UK-Thailand PTA, Art 3(9); Commonwealth Scheme, Art 4(1)(d); and COE Convention, Art 3(1)(d).
[42] See for example UK-Egypt PTA, Art 7(2)(c) and UK-Cuba PTA, Art 6(2)(d).
[43] See for example UK-Pakistan PTA, Art 7; UK-Peru PTA, Art 5(6); Commonwealth Scheme, Art 8(1); and COE Convention, Art 7(1).
[44] See for example UK-Laos PTA, Art 4(1)(d); Commonwealth Scheme, Art 4(1)(d); and COE Convention, Art 3(1)(d).
[45] See for example UK-Barbados PTA, Art 6(2); Commonwealth Scheme, Art 8(2); and COE Convention, Art 7(2).
[46] See for example UK-India PTA, Art 4(1)(g).
[47] ICTY/SCSL PDD, para 5.
[48] See ICC Statute, Art 103(3)(c); ICC Rules, Rule 204(d); and ICC-UK BEA, Art 2.
[49] See ICTY-Poland BEA, Art 3(2).
[50] See C Kreß and G Sluiter 'Imprisonment' in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002)1770.

can be implemented,[51] international prisoners are dispersed among the national prison systems of cooperating States.[52] Consequently, the ICJ system requires only that the prison system of the proposed enforcing State is suitable for the enforcement of international sentences of imprisonment and that the requested State consents to the transfer.

The inter-state system, in contrast, was established to enable States to give prisoners the opportunity to return home to serve their sentences for humanitarian and penological purposes.[53] Hence, the inter-state system requires that the prisoner be a 'national' of the enforcing State and that both the prisoner and the enforcing State agree to the transfer proposed by the sentencing State. Recent changes in the motivations for inter-state transfers have, however, resulted in radical changes to the inter-state transfer process, which have in turn resulted in the alignment of inter-state and ICJ systems.

IV. TRANSFERS WITHOUT THE PRISONER'S CONSENT

The previous section highlighted that the current inter-state system requires the tripartite consent of the sentencing State, the enforcing State and the prisoner. The ICJ system requires only the bipartite consensus of the sentencing international court and the requested enforcing State. Recent developments, particularly within Europe, have altered prisoner consent requirements under the inter-state system.

4.1 *Multilateral Agreements*

The Additional Protocol to the COE Convention introduced the possibility of transferring prisoners from the UK to other contracting parties without their consent. There is currently a proposed Second Additional Protocol to the Convention which would have a similar effect in relation to prisoner consent.[54] The EU Framework Decision also adopts

[51] See *Prosecutor v Erdemovic* (Sentencing Judgment) IT-96-22 (29 November 1996) para 71.
[52] See ICTY Statute, Art 27; ICC Statute, Art. 103(1)(a); and SCSL Statute, Art. 22(1). See also M Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law' (2000) 15 *American University International Law Revie*w 321, 389.
[53] See COE Convention, Preamble.
[54] See the Proposal of the Hellenic Republic for a Second Additional Protocol to the European Convention on the Transfer of Sentenced Persons, Appendix III of the Report of the European Committee on Crime Problem's Restricted Group of Experts on International Cooperation, PC OC (2007) 06 Rev, 3-4 May, available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/transnational_criminal_justice/2_pc-oc/PC-OC%20Mod%20(2007)%2006%20E%20Summary%20Meeting%20Report%20(3-4%20May%202007)%20REV3.asp (visited 30 November 2010).

the position that the sentenced person's 'involvement in proceedings should no longer be dominant by requiring in all cases his or her consent'.[55]

The Additional Protocol facilitates both the transfer of the sentence and the transfer of the convicted person. 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 presumes that such persons have impliedly consented to the transfer of the sentence to their State of nationality for enforcement purposes.[56]

More radically, Article 3 of the Additional Protocol enables States to transfer prisoners without their consent to States which have ratified the Additional Protocol and to which they will be deported or expelled at the end of their sentences.[57] Although the prisoner's consent is not required, the administering State must not make its decision on the transfer before having taken the prisoner's views into account.[58]

The Additional Protocol recognises that there is 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 sentence. It therefore enables contracting States to opt out of the latter mechanism.[59] To date, Ireland and Turkey have issued declarations stating that they will not apply or take over the execution of sentences under the circumstances set out in Article 3 until notification to the contrary. Belgium has limited the application of Article 3 to persons who are not habitually resident in the country at the time of their arrest and Russia's declaration ruled out taking over the execution of sentences under Article 3 but not its application.[60]

The EU Framework Decision requires the consent of sentenced persons for transfers between EU Member States *unless* the proposed transfer is to a Member State

a) of nationality in which the sentenced person lives; or
b) to which the sentenced person will be deported upon release or;

[55] Preamble EU Framework Decision (n 9 above), para 5.
[56] See Additional Protocol (n 8 above), Art 2 and Explanatory Report to the Additional Protocol, paras 12, 14 and 20.
[57] Additional Protocol (n 8 above), Art 3(1).
[58] ibid, Art 3(2).
[59] ibid, Art 3(6).
[60] Available at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=167&CM=8&DF=04/12/2010&CL=ENG&VL=1 (visited 03.12.10).

c) to which the sentenced person has fled with a view to avoiding pending or completed criminal proceedings against him in the issuing State.[61]

Although the sentenced person's consent is not required in these circumstances, the issuing State must give proposed transferees on their territory the opportunity to express their views, orally or in writing.[62] Where the issuing State considers it necessary in view of a sentenced person's age or physical or mental condition, the sentenced person's legal representative may do so on his behalf.[63] The sentenced person's views must be taken into account by both States.[64] The EU Framework Decision also enables prisoners to request transfer and therefore to give their consent.[65]

While these initiatives are both European in origin, they are not limited to Europe in terms of their influence or effect. The Additional Protocol may extend beyond Europe as non-members of the Council of Europe may ratify it.[66] Perhaps more significantly, the EU Framework Decision states that existing and future bilateral and multilateral agreements entered into by EU Member States may only be relied on in so far 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 the enforcement of sentences.[67] It is unclear how this treaty provision will be interpreted in practice, but it seems to suggest the EU Member States should pursue 'no consent' transfer mechanisms in their agreements with non-EU States.

4.2 *Bilateral Agreements*

[61] See EU Framework Decision (n 9 above), Arts 4(1), 6(1)-(2).
[62] ibid, Art 6(3).
[63] ibid.
[64] ibid.
[65] See EU Framework Decision (n 9 above), Art 4(5).
[66] The Additional Protocol is open to accession by the non-member States of the Council of Europe that have acceded to the 1983 Convention. See COE Convention, Arts 18(1) and 19(1); Explanatory Report to the COE Convention, paras 11 and 79; and Additional Protocol (n 8 above), Arts 4-5. Although none have currently done so, these provisions pave the way for potential transfer of prisoners without their consent from the UK to Australia, the Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Honduras, Israel, Japan, Korea, Mauritius, Mexico, Panama, Tonga, Trinidad and Tobago, US, Venezuela and vice versa, should these States ratify the Additional Protocol. See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG (visited 30 November 2010).
[67] EU Framework Decision (n 9 above), Art 26(2)-(3).

This approach has been adopted by the British Government; it has made clear its intention to conclude, where possible, 'no consent' prisoner transfer agreements with other States.[68] To facilitate this policy decision, the UK's primary domestic legislation, the Repatriation of Prisoners Act 1984, has been amended so that the prisoner's consent is now only necessary if required by the relevant international arrangement.[69]

Recent UK PTAs with Ghana and Libya do not contain provisions requiring the prisoner's consent. However, Ghanaian domestic legislation requires the prisoner's consent to the transfer, and the UK Government does not intend to use the Libyan agreement on a 'no consent' basis.[70] The UK's PTA with Uganda was the first agreement to introduce a 'no consent' transfer scheme.[71] This is not a full 'no consent' agreement, as Ugandan national legislation requires the consent of a prisoner being transferred from Uganda to the UK.[72] When the agreement enters into force, however, it will facilitate the transfer of Ugandan prisoners imprisoned in the UK to Uganda without their consent.[73] There are currently seventy-seven Ugandan prisoners in the UK and no UK prisoners in Ugandan jails.[74]

The first full 'no consent' prisoner transfer agreement concluded by the UK was signed with Rwanda on 11 February 2010.[75] The agreement states that, where both Parties agree, a prisoner may be transferred in accordance with the provisions of the PTA by the sentencing State to the other State to serve his sentence, without his consent.[76] Unlike the UK's previous bilateral PTAs, the agreement with Rwanda introduces a new condition for transfer – the sentenced person must be subject to an order for deportation or removal from the sentencing State.[77] This condition aligns this bilateral 'no consent' procedure with the rationale for involuntary transfers under the Additional Protocol and EU Framework Decision.

---

[68] Explanatory Memorandum to the UK and Rwandan Agreement on the Transfer of Sentenced Persons, para 9, available at http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2010/RwandaTransferSentenced (visited 1 December 2010).

[69] See Police and Justice Act 2006, Art 44, available at http://www.opsi.gov.uk/Acts/acts2006/ukpga_20060048_en_1 (visited 30 November 2010).

[70] Interview with Graham Wilkinson, UK Home Office, 18 June 2009.

[71] This agreement is not in force yet.

[72] See UK-Uganda PTA, Arts 1(g), 2(4)(b) and 3(f).

[73] See UK-Uganda PTA, Art 2(3).

[74] See C Ariko and B Manisula, 'Uganda: Britain to Deport 40 Ugandan Inmates' (2 June 2009), available at http://allafrica.com/stories/200906030024.html (visited 30 November 2010).

[75] This agreement is not yet in force.

[76] UK-Rwanda PTA, Art 2(3).

[77] ibid, Art 3(b).

Although a prisoner may still request, and indeed consent to a transfer under this agreement,[78] it is likely to be used primarily on a 'no consent' basis. If it is used in this manner, the sentenced person must be given an opportunity to present his views in writing to the transferring State before the final decision has been reached.[79] To prevent prisoners insisting on the application of other transfer schemes that require consent, thereby giving them a veto over the transfer, the Ugandan and Rwandan PTAs state that their provisions prevail over any other multilateral agreements governing the transfer of sentenced persons.[80]

With these developments, the procedure for inter-state transfers in the UK is moving away from requiring tripartite consent to a system based on the bipartite consensus of the sentencing and enforcing States. By relegating the prisoner's view from the status of veto to the position it holds in the ICJ system (one factor among many to be taken into consideration[81]), the inter-state system has become more aligned with the ICJ transfer process. Consequently, both the inter-state and ICJ systems may now result in the involuntary transfer of a prisoner to another country.

4.3 *Human Rights Implications of Involuntary Transfers for Sentencing States*

Although involuntary transfers may serve the rehabilitative needs of the prisoners in question,[82] 'no consent' transfers risk violating prisoners' rights under the European Convention on Human Rights, in particular the right to respect for family life and the right to freedom from torture, inhuman or degrading treatment or punishment.[83] The need to protect the prisoners' fundamental rights has been recognised. For example, the EU Framework Decision states that sentenced persons must be provided with adequate safeguards to ensure that the Framework Decision is implemented and applied in a manner which respects principles of equality, fairness and reasonableness, and the prisoners' fundamental rights.[84] Involuntary transfers under the Additional Protocol must comply with the requirements of

[78] ibid, Art 8(1).
[79] ibid, Arts 4(4) and 8(4).
[80] See ibid, Art 2(2) and UK-Uganda PTA, art 2(2).
[81] See Additional Protocol (n 8 above), Art 3(2); EU Framework Decision (n 9 above), Art 6(3); UK-Uganda PTA, Art 8(4); UK-Rwanda PTA, Art 8(4); and Explanatory Memorandum to the UK-Rwandan Agreement, para 9.
[82] See Explanatory Report to the Additional Protocol, para 21; para. 9 Preamble and Articles 3(1), 4(2) EU Framework Decision (n 9 above), Preamble para 9 and Art 3(1) and 4(2); and Explanatory Memorandum to the UK-Rwanda Agreement, para 6.
[83] J Murdoch, *The Treatment of Prisoners; European Standards* (Council of Europe: 2006) 324.
[84] EU Framework Decision (n 9 above), Preamble paras 5, 6, 13 and Art 3(4).

Protocol No. 7 to the European Convention on Human Rights:[85] prisoners must be given an opportunity to submit reasons against their transfer and to have their cases reviewed with the benefit of representation.[86] However, the UK has neither signed nor ratified this protocol.[87]

The UK's Human Rights Joint Committee has drawn attention to the limited opportunities prisoners will have to challenge transfer decisions on human rights grounds under 'no consent' mechanisms.[88] At present, prisoners have no formal right to appeal against Ministerial[89] decisions to transfer them out of the UK without their consent, but they can seek judicial review of such decisions.[90] When making transfer decisions, the relevant Minister must take into consideration whether the proposed transfer is compatible with the Human Rights Act 1998 and the European Convention on Human Rights.[91]

While the Home Office feels that a challenge on the ground that an involuntary transfer violates the prisoner's right to family life[92] is unlikely to succeed given that involuntary transfers are linked to deportation to the prisoner's State of nationality, it recognises that issues may arise in cases where the prisoner's family is entitled to remain in the UK, and/or if the prisoner is an EU citizen entitled to the benefit of the right to freedom of movement.[93]

The jurisprudence of the European Court of Human Rights would seem to support this view. Article 8, which protects the right to private and family life, is one of the 'most open-ended provisions'[94] of the European Convention on Human Rights. Article 8 does not operate to prevent expulsion or guarantee a right of residence.[95] Moreover, interference with family life may be justified if the decision is made in accordance with the law, is necessary in a democratic society and serves a legitimate aim.[96] In other words, the transfer will not violate

---

[85] Explanatory Report to the Additional Protocol, para 30.
[86] See Protocol No. 7 to the European Convention on Human Rights, entered into force 1 November 1988, E.T.S. 117, Art 1.
[87] The ratification status of Protocol No. 7 is available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=09/11/2009&CL=ENG (visited 30 November 2010).
[88] Letter from the Chair of the Human Rights Joint Committee to the RtHon Jack Straw, 17 March 2009 at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/71/7105.htm (visited 30 November 2010).
89 The transfer of sentenced persons to and from England and Wales is the responsibility of the Secretary of State for Justice; the transfer of sentenced persons to or from Scotland is the responsibility of Scottish Ministers; and the transfer of sentenced persons to or from Northern Ireland is the responsibility of the Secretary of State for Northern Ireland. See Explanatory Memorandum to the UK-Rwanda Agreement, para 5.
[90] Explanatory Memorandum to the UK-Rwanda Agreement, para 9.
[91] ibid.
[92] European Convention on Human Rights, 223 UNTS 221 (ECHR).
[93] Interview with Graham Wilkinson, UK Home Office, 18 June 2009
[94] R C A White and C Ovey, *The European Convention on Human Rights* (Oxford; 5th edn, OUP, 2010) 334.
[95] ibid 345.
[96] ECHR (n 92 above), Art 8(2).

the prisoner's rights if the decision is based on accessible and foreseeable criteria, if the action is justified by a pressing social need and it is proportionate to the aim pursued. All of these elements will typically be present in the transfer of convicted criminals to a country with which they have social and legal links to facilitate their rehabilitation.

When making their decisions, however, States should take into consideration a number of factors outlined by the European Court of Human Rights: 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 produced children, and if so, their ages; whether the couple lead a real and genuine family life; and the difficulties a spouse would face in the prisoner's country of origin (although this cannot by itself preclude an involuntary transfer).[97] For example, it may violate Article 8 to transfer a prisoner without his consent to a country that the prisoner has not lived in for most of his life,[98] particularly if the prisoner is dependent on family support due to a disability.[99] Ultimately, however, the prisoner's right to family life will be balanced against the wider interests of the community.

In sharp contrast, a balancing argument has been rejected by the European Court of Human Rights in relation to the right to freedom from torture, inhuman or degrading treatment or punishment under Article 3 ECHR. The UK, intervening in *Saadi v. Italy*,[100] proposed that the risk of ill-treatment to a transferred individual by the authorities of another State should be balanced against the dangerousness the individual poses to the community of the transferring State. A unanimous Grand Chamber 'emphatically rejected that position and reaffirmed the majority view in *Chahal*'[101] that the conduct of the person concerned is irrelevant.[102] The court felt that it was not possible to balance risk and dangerousness as these concepts can only be assessed independently of each other.[103] The Grand Chamber also rejected the UK argument that where the individual posed a threat to national security, the proposed transferee should have to produce a higher standard of evidence to establish a risk of ill-treatment. The court stressed that it already required substantial grounds to establish the

[97] 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.
[98] See *Maslov v. Austria* App No 1638/03 (23 June 2008), para 75 and *Moustaquim v. Belgium* App No 12313/86 (18 February 1991).
[99] *Nasri v. France* App No 19465/92 (13 July 1995).
[100] *Saadi v. Italy* App No 37201/06 (22 February 2008)
[101] D Moeckli, 'Saadi v. Italy: The Rules of the Game Have Not Changed' (2008) 8(3) *Human Rights Law Review* 534, 543.
[102] See *Chahal v. UK* App No 70/1995/576/662 (11 November 1996), para 79.
[103] *Saadi* (n 100 above), para 139.

existence of a real risk of ill-treatment, which was attested to by the fact that it only rarely found such a risk.[104] Daniel Moeckli feels that the court's rejection of the UK arguments is based on the need to avoid legitimating a two-tier system whereby nationals would have a right to an absolute prohibition on torture, whereas foreign nationals could be exposed to the risk of ill-treatment if they were considered to be dangerous.[105] Such a system would be based on the indefensible premise that 'such individuals do not deserve human rights (…) as they are less human',[106] and would therefore 'represent an attack on the very idea of human rights'.[107] Accordingly, Article 3 places a positive and absolute obligation on State Parties not to transfer individuals to countries in which there is a real risk that they will be subjected to torture, inhuman or degrading treatment or punishment.[108]

Under the inter-state system, the day-to-day regime is dictated by the domestic law and policy of the enforcing State.[109] Involuntary transfers should, therefore, never occur if detention in the enforcing State would put the prisoner's fundamental right to freedom from torture, inhuman or degrading treatment at risk. The absolute duty that arises under Article 3 applies irrespective of the nature of the crimes for which the prisoner was convicted or the threat he is deemed to pose to national security or public order.[110] Moreover, it applies not only to transfers to States with poor human rights records, but also to transfers to countries that are bound by the ECHR if the receiving State has a record of persecuting people from the same background as the proposed transferee[111] or if it is likely that the receiving State will send the prisoner to a third State in which there is a risk that he would be subject to prohibited treatment.[112] Consequently, the British Government will have to consider whether involuntary transfers under both the Additional Protocol and the EU Framework Decision have the potential to violate individual prisoners' rights under Article 3.

Article 3 may also invalidate a proposed involuntary transfer on medical grounds. The substantive right does not create any entitlement to a particular or minimum standard of

[104] ibid, para 142.
[105] Moeckli (n 101 above) 548.
[106] *Saadi* (n 100 above), Concurring Opinion of Judge Zupančič, para 2.
[107] Moeckli (n 101 above) 548.
[108] See *Saadi* (n 100 above) paras 146 and 149; *Soering v. UK* App No 14038/88 (7 July 1989), para 91; *Chahal* (n 102 above) paras 79-80; and *D v. UK* (1997) 24 EHRR 423, para 47.
[109] See UK-Sri Lanka PTA, Art 9; Commonwealth Scheme, Art 11(2); COE Convention, Art ((3); and EU Framework Decision (n 9 above), Art 17(1).
[110] See D Harris et al, *Law of the European Convention on Human Rights*, (Oxford: 2nd edn, OUP, 2009) 69, 86-7.
[111] *Shamayev and Others v. Georgia and Russia* App No 36378/02 (12 April 2005).
[112] *T.I. v. UK* App No 43844/98 (7 March 2000)

medical care.[113] However, it will prevent involuntary transfers in situations where it would hasten death, and thereby cause acute mental and physical suffering, exposing the individual to the real risk of dying under distressing circumstances.[114] However, the circumstances of the prisoner's medical and social situation must be of an exceptional nature to bring the transfer within the threshold of Article 3.[115]

The discussion of human rights implications to this point has addressed ways in which a State may be liable under human rights law for a decision to transfer prisoners without their consent. In a bid to protect the rights of prisoners who have been transferred without their consent, the British Government has included a unique provision in its 'no consent' agreements with Uganda and Rwanda, which states that each Party must 'treat all sentenced persons transferred (…) in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman and degrading treatment or punishment."[116] This new treaty provision mirrors established practice in the ICJ system.

4.4 *ICJ 'No Consent' Transfers*

The ICJ system also recognises the importance of human rights law. All of the international criminal courts have included a similar provision in their bilateral enforcement agreements with the UK: international sentences of imprisonment must be implemented in the UK in accordance with international human rights standards governing imprisonment.[117] To ensure this is happening, the international courts monitor the implementation of international sentences in the UK both directly and through inspections of the European Committee for the Prevention of Torture (CPT).[118] The international courts cannot demand that changes be made in the UK prison system. They can only consult with the UK on the findings of inspections and request that a report be submitted on changes made in light of any

[113] See *N v. UK* App No 26565/05 (27 May 2008) para 44.
[114] See *D v. UK* (n 108 above) paras 50-54.
[115] See *N v. UK* (n 113 above) para 50; *Amegnigan v The Netherlands* App No 25629/04 (25 November 2004); and *Ammari v Sweden* App No 60959/00 (22 October 2002).
[116] UK-Uganda PTA, Art 9 and UK-Rwanda PTA, Art 9.
[117] See ICTY/SCSL-UK BEAs, Art 3(3)); ICC Statute, Arts 103(3)(b) and 106(1)-(3); and ICC-UK BEA, Art 5.
[118] ICTY Statute, Art 27; ICTY Rules, Rule 104; SCSL Statute, Art 22(2); ICC Statute, Arts 103(3)(b), 106(1)-(3); ICC Rules 199, 211(1)(a), (c); ICC Regulations, Regulations 113(1)(a); ICTY/SCSL-UK BEAs, Arts 3(2) and (6); and ICC-UK BEA, Arts 6-7 [Note: the majority of enforcing states in the ICJ system have appointed the International Committee of the Red Cross as the inspecting body].

recommendations.[119] They can however, either on their own initiative or following a request from a prisoner, terminate the enforcement of a particular sentence and transfer the international prisoner to another State to serve his sentence of imprisonment.[120]

4.5 *Post-Transfer Oversight in the Inter-State System*

While the inter-state system also enables the sentencing entity to terminate enforcement agreements, this has not been linked to the welfare of the transferred prisoner and bilateral treaty provisions typically only provide a procedural tool to withdraw cooperation.[121] Nonetheless, consent PTAs typically state that 'notwithstanding any termination, this Treaty shall continue to apply to the enforcement of sentences of sentenced persons who have been transferred under this Treaty before the date on which such termination takes effect'.[122] The UK's 'no consent' agreements with Uganda and Rwanda go further, with both stating that 'notwithstanding any termination, this Agreement, *and any assurances or undertakings given pursuant to it*, shall continue to apply to the enforcement of sentences of sentenced persons who have been transferred'.[123]

It seems that when the British Government was concluding these 'no consent' PTAs, it hoped to continue its practice in relation to deportations and expulsions,[124] of seeking diplomatic assurances that transferred individuals would not be subjected to treatment prohibited by Article 3 of the ECHR. In addition, therefore, to the bilateral treaty provision which places the enforcing State under an obligation to treat transferred prisoners with respect for their human rights,[125] the agreements also discuss the possibility of concluding a supplementary memorandum of understanding[126] or requesting information, undertakings or assurances in relation to the conditions or treatment that will be afforded to the transferred prisoner.[127]

Diplomatic assurances may be taken into account when assessing the risk of ill-treatment, but they should not be a decisive factor.[128] The fact that a proposed enforcing State

[119] ICTY/SCSL/ICC-UK BEAs, Art 6(2).
[120] ICTY/SCSL-UK BEAs, Arts 9(1)(d) and 9(2); ICC Statute, Art 104(1)-(2); ICC Rules, Rules 209(1)-(2), 210(1) and 210(3); and ICC-UK BEA, Arts 12(1)-(2) and 13(1)(c).
[121] See for example UK-Ghana PTA, Art 13(2)-(3) and COE Convention, Art 24.
[122] See for example UK-Vietnam PTA, Art 16(4) and UK-Libya PTA, Art 14(3).
[123] UK-Uganda PTA, Art 15(3)-(4) and UK-Rwanda PTA, Art 16(3)-(4) [emphasis added].
[124] Moeckli (n 101 above) 536-7.
[125] UK-Uganda PTA, Art 9 and UK-Rwanda PTA, Art 9.
[126] UK-Uganda PTA, Art 2(6) and UK-Rwanda PTA, Art 2(5).
[127] UK-Uganda PTA, Art 4(7) and UK-Rwanda PTA, Art 4(7).
[128] Harris et al (n 110 above) 84.

has ratified human rights treaties is not sufficient to displace the sentencing State's human rights obligations to the prisoner, particularly if there is evidence to show that prohibited practices are used or tolerated by State authorities.[129] Diplomatic assurances may not provide adequate guarantees or protection and they may be outweighed by evidence that establishes that there remains a real risk of ill-treatment.[130] In the light of evidence that there may be a risk of ill-treatment, diplomatic assurances will be deemed to be inadequate, particularly given that they are not legally binding, they often fail to provide for effective post-transfer monitoring or any remedial action in the event that assurances are not being respected.[131]

Under the UK's 'no consent' PTAs, the sentencing State may seek information, undertakings or assurances in relation to monitoring post-transfer conditions and the treatment of the prisoner. However, the enforcing State is under no duty to comply with such requests; the enforcing State is only obliged to consider such requests and provide undertakings or assurances where possible and appropriate.[132] This discretionary approach is unlikely to provide the required level of protection for transferred prisoners or, indeed, access to effective remedial action. Accordingly, it seems that these provisions will be insufficient to displace the sentencing State's duty not to transfer a prisoner without his consent if there is a real risk of ill-treatment.

Despite the inter-state system's alignment with the ICJ system's practice of insisting on international standards for imprisonment post-transfer, the 'no consent' model for inter-state transfers has not introduced a mechanism that enables the transfer of prisoners back to the sentencing State in situations of default. Any disputes in this regard must be settled through diplomatic channels.[133] Consequently, in order to comply with their human rights obligations, sentencing States must be certain that involuntary transfers will not violate the prisoner's rights before any final decisions are made.

4.6 *Differentiating the Systems*

The inter-state and ICJ systems may be differentiated on the basis of their conditions for transfer. The new 'no consent' inter-state system in the UK remains linked to the prisoner's nationality and therefore to humanitarian concerns about the prisoner's relationship with his

[129] *Saadi* (n 100 above), para 147.
[130] *Chahal* (n 102 above), para 105 and *Saadi* (n 100 above) paras 146-7
[131] See *Committee on the Prevention of Torture's 15th General Report* CPT/Inf (2005) 17, para 39-40; and *Interim Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/60/316, (30 August 2005) paras 46, 51.
[132] UK-Uganda PTA, Art 4(7) and UK-Rwanda PTA, Art 4(7).
[133] UK-Uganda PTA, Art 14 and UK-Rwanda PTA, Art 15.

family and penological concerns to improve the likelihood of successful resocialization and reintegration.[134] Therefore, although the sentencing State is obliged to ensure the transfer respects the prisoners' fundamental human rights, responsibility for the prisoners' welfare and reintegrative needs is passed to States with which the prisoners have social and/or legal links.

In contrast, a person convicted by an international court and transferred to an enforcing State under the ICJ system is unlikely to be sent to a State with which he has either social or legal links. Even where a transfer to the prisoner's State of origin is possible under the legal framework governing enforcement,[135] it is unlikely to occur given the difficulties a State emerging from a protracted conflict will face in providing the material conditions required[136] and to guarantee the safety of convicted war criminals from attacks by other prisoners.[137] Moreover, the enforcing State in the ICJ system will rarely be the international prisoner's final destination. The British Government retains the right to transfer or deport internationally convicted persons following the completion of their sentence.[138] Without a condition requiring that internationals prisoners be nationals of, or have social links with, enforcing States, the international courts cannot rely on the humanitarian and penological justifying rationales used by countries in the inter-state systems. In other words, the involuntary nature of transfers in the ICJ system cannot be justified by referring to the need to maintain and develop the prisoner's familial, linguistic, cultural, social, professional and economic ties in order to facilitate the prisoner's rehabilitation and reintegration.[139]

The international courts do however seek to avoid any mistreatment of international prisoners by scrutinising the conditions and treatment of prisoners in potential enforcing States before transfer using information gathered during visits and public documents from international and regional governmental and non-governmental bodies.[140] Following the prisoner's transfer, they engage in dialogue with the enforcing States about inspection reports

[134] See EU Framework Decision (n 9 above) para 9 Preamble and Arts 3(1) and 4(2); Letter from Rt. Hon. Baroness Scotland of Asthal, QC, Minister of State, Home Office to the Chairman of the Select Committee on the EU, 11 July 2005, Correspondence re the European Enforcement Order and the Transfer of Sentenced Persons Between Member States in the Select Committee on European Union's Forty-Fifth Report, 25 July 2006 available at http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/243/243248.htm (visited 30 November 2010).
[135] SCSL Statute, Art 22(1).
[136] See R Mulgrew 'On the Enforcement of Sentences Imposed by International Courts: Challenges Faced by the Special Court for Sierra Leone' (2009) 7(2) *Journal of International Criminal Justice* 373, 376-7.
[137] See *Rodić and Others v Bosnia and Herzegovina* App No 2893/05 (27 May 2008).
[138] See ICTY/SCSL-UK BEA, Art 9(4) and ICC-UK BEA, Art 14(1).
[139] See EU Framework Decision (n 9 above) paras 9, 17 Preamble and Arts 3(1), 4(2), (4) and (6); and Draft Explanatory Report to the proposed Second Additional Protocol, paras 3-5 and 6(a).
[140] ICTY PDD, para 4(f);SCSL PDD, para 4(viii); and ICC Statute, Art 103(3)(b).

and recommendations of the CPT, which in extreme circumstances may result in the termination of enforcement in that State and the prisoner's transfer to another State. In contrast to the inter-state system, therefore, the international courts in the ICJ system retain responsibility for the welfare of international prisoners and accordingly, exercise a supervisory role over the enforcement of international sentences of imprisonment in the national prison systems of cooperating States**.**

V. TRANSFERS WITHOUT THE ENFORCING STATE'S CONSENT

Presently, States under both systems retain the right to decline a request to accept a person convicted and sentenced by a foreign judicial body into custody for the enforcement of their sentence. This will soon change within the EU, however, due to the EU Framework Decision.

5.1 *Compulsory Inter-State Transfer Systems*

The requirement to obtain the enforcing State's consent has been removed by the EU Framework Decision. From 5 December 2011, the UK *must* recognise and enforce sentences of imprisonment imposed by other EU Member States, if the prisoner is a national of the sentencing State or if the prisoner would be deported to the State forwarding the judgment after the sentence is completed.[141] This compulsory system has also been advocated within the Council of Europe in the proposed Second Additional Protocol.[142] Both instruments set out numerous procedural, substantive and human rights grounds under which a State can refuse to recognise and/or enforce a particular sentence.[143] However, EU Member States are asked to refrain from invoking these grounds of non-recognition. Instead, they are encouraged to adapt the sentence, postpone enforcement or partially enforce the sentence rather than prevent the transfer.[144]

Both the EU and the proposed Council of Europe schemes represent a fundament shift from a principle of consent to a system of mandatory acceptance and would mean that States now have a duty, rather than a right, to enforce certain foreign penal sanctions. The inter-state

[141] EU Framework Decision (n 9 above), Art 4(1)(a)-(b).The only time the enforcing state's consent is required is when the state is one in which the prisoner lived continuously for at least five years and continues to have a right of permanent residence. See also EU Framework Decision (n 9 above), para 7 Preamble and Art 4(1)(c).
[142] Art 2(1) of Proposed Second Additional Protocol and Draft Explanatory Report to a Second Additional Protocol, para 6(a).
[143] See EU Framework Decision (n 9 above), para 13 Preamble, Arts 8(1) and 9(1); Art 2(2) of Proposed Second Additional Protocol; and Draft Explanatory Report to a Second Additional Protocol, para 8.
[144] See EU Framework Decision (n 9 above), paras. 19, 21 Preamble and Arts 9(2)-(3), 10(1)-(2) and 11.

system is therefore moving from a system based on tripartite consent to a system based on the unilateral decision of the sentencing entity. Moving from a consensual system to a mandatory system would enhance the efficiency of the current ICJ transfer process.[145] For instance, the EU Framework Decision envisages that transfers will occur within four months unless there are exceptional and unforeseen circumstances.[146] Some international prisoners have waited over a year in international remand centres after the finalization of their sentence while waiting to be transferred to the State in which they will serve their sentence of imprisonment.[147] A swifter ICJ transfer process would free up capacity at the international detention facilities thereby reducing costs. Most importantly, perhaps, it would provide the international criminal courts with guaranteed access to suitable penal capacity. Some international prisoners have served the entirety of their sentences in an international remand centre as the current consensual system has not always provided the international courts with sufficient numbers of cooperating States.[148] A compulsory system would ensure that international prisoners could be transferred to prisons that conform to international standards as soon as possible after the finalization of their sentences.

5.2 *Compulsory Enforcement in the ICJ System*

Although it would undoubtedly bring benefits, it seems unlikely that a compulsory enforcement process could be introduced in the ICJ system. The most apparent reason is that States have previously rejected all opportunities to introduce such a system: all of the founding instruments of the international criminal courts establish a consensual system. When drafting the Rome Statute, States removed the option to create a compulsory system for the recognition and enforcement of international sentences of imprisonment, opting for a procedure that required the double consent of States.[149] Moreover, the Rome Statute codified the desire of States for the burden of enforcing international sentences to be spread among as

[145] See Draft Explanatory Report to a Second Additional Protocol, paras 4-5 and 7.
[146] EU Framework Decision (n 9 above), Para. 22 Preamble, Arts 12(2)-(3) and 15(1)-(2).
[147] See *ICTY Manual on Developed Practices* (n 40 above), 153, para A2(13).
[148] ibid, 154, para A2(13).
[149] See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, 50th Session, Supp Not 22 A/50/22, 1995, 237, 239; Preparatory Commission Report on the Establishment of an International Criminal Court, Vol. I Proceedings, GA, 51st Session, Supp No 22, A/51/22, 1996, 436-7, para 12.a; 'Enforcement' Preparatory Commission Report on the Establishment of an International Criminal Court, Vol. II, Compilation of Proposals, GA, 51st Session, Supp. No. 22, A/51/22, 1996, 593-4, Part 8; Report of the Inter-Sessional Meeting of the Preparatory Commission on the Establishment of an International Criminal Court, 19-30 January 1998, A/AC.249/1998, L.13, 306; Part 10, 'Enforcement' Draft Statute and Draft Final Act, Report of Prep Com on the Establishment of an International Criminal Court (A/Conf. 183/2/Add.1, 1998), 198-9, Part 10; and ICC Statute, Part 10 'Enforcement'.

many countries as possible.[150] The ICTY recently amended its Practice Direction on Designation to reflect this practice of equitable distribution of enforcement among all cooperating States.[151] There does not therefore appear to be any political will to impose a legal duty on States in the ICJ system to impose international sentences of imprisonment.

Beyond this obvious political impediment, there are more systemic obstacles to the introduction of compulsory transfers in the ICJ system. When the relationship between the participating entities is analysed, it becomes clear that the ICJ system operates on a more vertical basis than the inter-state system.

The Movement of Prisoners

Inter-State	ICJ
State ↔ State	International Court ↓ State

In the inter-state system, prisoners move in two directions between States. While some States may be net exporters and others may be net importers, the inter-state system is intended to bring reciprocal benefits to all participating countries.

In comparison, movement in the ICJ system is uni-directional. As the ICJ system was created due to the pragmatic necessity to provide the international criminal courts with penal capacity, prisoners move from a supranational institution, the international court, to a cooperating State. Governments provide international courts with prison cells in which international sentences of imprisonment can be implemented to demonstrate their solidarity with the international criminal justice goal of ending impunity. Cooperation in the ICJ system involves the provision of infrastructural capacity for a supranational body and it is not intended to bring any reciprocal benefits.

The EU system for compulsory inter-state transfers was possible due to its origin in a highly integrated political system in which participating States share a mutual respect for and

[150] ICC Statute, Art 103(3)(a) and ICC Rules, Rule 201.
[151] See ICTY PDD, para 3(b).

confidence in each others legal systems.[152] This level of integration enabled the EU to move away from the consensual inter-state transfer system's procedure that gave enforcing States the choice whether to continue to enforce the foreign sentence or to convert the foreign sentence into a corresponding national sentence.[153] The system now operates on the basis of the principle of mutual recognition, whereby States must recognise and continue to enforce the sentences of imprisonment of other EU Member States.[154] Although the sentence may still be adapted in cases of incompatibility with national law, conversion is no longer an option.[155]

This form of procedural fast-tracking is not possible in all transfer systems. Members of the Council of Europe have recognised that it may not be possible to incorporate the principle of mutual recognition into the compulsory prisoner transfer scheme proposed by the Second Additional Protocol as the Council of Europe scheme may be used by non-member States,[156] which may have different political and legal systems.[157] Cooperation would instead be based on the 'common responsibility of the State Parties to cooperate for the effective operation of their penitentiary systems'.[158]

The ICJ is founded upon cooperation that enables the effective operation of the international penal system. While the majority of States in the ICJ system that have indicated their willingness to cooperate with international criminal courts in relation to penal enforcement accept the validity of the judgments of these courts,[159] States retain the right to submit international sentences to national courts for recognition purposes.[160] Although the UK has favoured continued enforcement in all of its bilateral enforcement agreements,[161] some States, such as Italy and Germany, prefer to use a conversion or exequatur procedure.[162] The automatic recognition and continued enforcement of international sentences of imprisonment is not currently possible for all cooperating States in the ICJ system.

5.3 *Control over the Length of the Sentence*

[152] See EU Framework Decision (n 9 above), Preamble para 5.
[153] See COE Convention, Art 9(1)(a)-(b).
[154] EU Framework Decision (n 9 above), paras 1-3 Preamble and Art 3(1).
[155] EU Framework Decision (n 9 above), Art 8(2)-(4).
[156] See Proposed Second Additional Protocol, Arts 5(1) and 6(1).
[157] See Finland and Germany's comments at the Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters (PC-OC), 4th Meeting Report, 24 April 2007, PC-OC Mod (2007) 05.
[158] Meeting Report of the Restricted Group of Experts on International Cooperation (PC-OC Mod), 4th Meeting, 3-4 May 2007, PC-OC Mod (2007) 06 Rev, 3, para 11.
[159] See Prep Com Report on the Establishment of an International Criminal Court, Vol. I, *Proceedings*, GA, 51st Session, Supp No 22, A/51/22, 1996, 436, para 12.a (351).
[160] See ICTY-Slovakia BEA, Art 3(4)-(5).
[161] ICTY/SCSL-UK BEAs, Art 3(1) and ICC-UK BEA, Art 4(1).
[162] See Klip (n 24 above), 149-150.

While the UK retains the right to choose how to adopt the international judgment and sentence in the ICJ system, it does not have control over the length of time that the international prisoner must serve. As the ICJ system operates in the UK, only the sentencing entity, the international court, can make decisions relating to the release of an international prisoner. Although the triggers for release eligibility differ among the international courts,[163] the decision-making process does not. After considering the prisoner's views[164] and other relevant criteria,[165] the President/Presidency of the international criminal court makes a final decision on the appropriateness of release. Although an international prisoner 'shall be treated for all purposes (…) as if he were subject to a sentence of imprisonment imposed in the exercise of its criminal jurisdiction by a court in (…) the UK',[166] the ICC Act makes it clear that an international prisoner is not to be treated as a national prisoner for release purposes.[167] The UK must therefore give effect to the President's/Presidency's decision on release.[168]

While enforcing States in the inter-state system that continue to enforce a sentence are also bound by the nature and duration of the sentence imposed by the sentencing entity,[169] their power to make decisions relating to the implementation of the sentence has been interpreted differently in the various multilateral and bilateral schemes to which the UK is party. Although the sentencing State may no longer enforce the sentence if the enforcing State considers the enforcement of the sentences to have been completed,[170] the agreements contain differing provisions in relation to the site of decision-making power in relation to

[163] For ICTY and SCSL prisoners serving in the UK, eligibility is triggered by the UK's domestic law.
See ICTY Statute, Art 28; ICTY Rules, Rule 123; ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, 15 August 2006, IT/146/Rev.1 (hereafter ICTY PDER), para 1; SCSL Statute, Art 23; SCSL Rules, Rule 123; and ICTY/SCSL-UK BEAs, Art 8(1).
Release eligibility for ICC prisoners is pre-determined by the ICC Statute. ICC Statute, Art 110(3) states that the prisoner must serve a minimum of two thirds of a determinate sentence and 25 years of an indeterminate sentence before he can be considered for early release.
[164] See ICTY PDER, para 5; ICC Statute, Art 110(2); and ICC Rules, Rule 224(1).
[165] See ICTY Statute, Art 28; ICTY Rules, Rule 125; ICTY PDER para 8; SCSL Statute, Art 23; SCSL Rules, Rule 124; ICC Statute, Art 110(4); and ICC Rules, Rule 223.
[166] ICC Act, Art 44(4).
[167] See ICC Act, Art. 44(6) and Schedule 7.
[168] See ICTY Statute, Art 28; ICTY Rules, Rule 124; ICTY PDER, para 11; SCSL Statute, Art 23; ICTY/SCSL-UK BEAs, Art 8(2); ICC Statute, Arts 105(2), 110(1); and ICC-UK BEA, Arts 4(4) and 10.
[169] For the inter-state system see UK-India PTA, Arts 7 and 8; Commonwealth Scheme, Art 12; and COE Convention, Art 10(1).
For the ICJ system see ICTY/SCSL-UK BEAs, Art 3(1)-(2) and ICC-UK BEA, Arts 4(1), (4) and 5.
[170] See UK-Ghana PTA, Art 6(2); Commonwealth Scheme, Art 14; and COE Convention, Art 8(2).

early release. Several agreements omit any discussion of early release.[171] A number of instruments enable the enforcing State to reduce the term of the sentence by granting parole, conditional release or remission.[172] Some follow the multilateral models[173] and allow either State to make such decisions,[174] while others state that unless both parties agree differently, only the sentencing State may grant pardon, amnesty or commutation.[175] Finally, some agreements grant the sole power to make decisions relating to pardon, amnesty and commutation to the sentencing State, prohibiting any revision, modification or cancellation of the judgment by the enforcing State.[176] The range of possibilities in relation to the release of prisoners transferred under the inter-state system contrasts sharply with the uniformity of the UK's procedure for international prisoners transferred under the ICJ system.

The difference in the sites of power in relation to release decisions may be attributable to the purposes that govern the two systems. As the inter-state system is primarily geared towards facilitating the prisoner's reintegration, it makes sense to give the enforcing State the power to make release decisions: it is best placed to judge the prisoner's ability to do so. The ICJ system, created out of pragmatic necessity, does not have any stated penological objectives. As the UK is unlikely to be the international prisoner's final destination,[177] the international criminal institution retains control over the length of the sentence that should be served.

5.4 *Review of the Judgment*

In contrast to the variation in relation to early release, only the sentencing State may review the judgment in both systems.[178] A recent case, however, demonstrated that there may be grey areas in the inter-state system in situations where a request for pardon also involves a review of the sentence imposed by the foreign court. Following his transfer from Bulgaria to the UK

[171] UK-Libya, Nicaragua and Pakistan PTAs.
[172] See UK-Hong Kong PTA, Art 6(3); UK-Laos PTA, Art 8(3); UK-Thailand PTA, Art 6(1); UK-Vietnam PTA, Art 9(2); and UK-Sri Lanka PTA, Art 11(1). See also EU Framework Decision (n 9 above), Arts 17(1)-(4) and 19(1).
[173] See Commonwealth Scheme, Art 13(1) and COE Convention, Art 12.
[174] See UK-Guyana PTA, Art 11; UK-India PTA, Art 10(2); UK-Morocco PTA, Art 16; and UK-Sri Lanka PTA, Art 11(1).
[175] See UK-Egypt PTA, Art 12 and UK-Sri Lanka PTA, Art 11(2) (refers to pardon only).
[176] See UK-Peru PTA, Art 8(1)-(2); UK-Laos PTA, Art 7; UK-Thailand PTA, Art 5; and UK-Vietnam PTA, Art 8.
[177] See ICTY/SCSL-UK BEAs, Art 9(4) and ICC-UK BEA, Art 14(1).
[178] For the inter-state system see UK-Guyana PTA, Art 9(1); Commonwealth Scheme, Art 13(2); COE Convention, Art 13; and EU Framework Decision (n 9 above), Art 19(2).
For the ICJ system, see ICTY/SCSL-UK BEAs, Arts 3(1) and 8; ICC-UK BEA, Arts 4(1) and 10; and ICC Statute, Arts 105 and 110.

under the COE Convention to serve a ten year sentence imposed following a murder conviction, Michaels Shields petitioned the UK Justice Secretary to grant him a free pardon. Problems arose as a free pardon requires a finding that the prisoner is morally and technically innocent; a decision based on evidence that has not been and can no longer be considered by the sentencing courts, while remaining dependent on the findings of fact of the Bulgarian courts. The petition was declined by the Justice Secretary as although Article 12 of the COE Convention states that the enforcing State 'may grant pardon (…) of the sentence', Article 13 is equally unequivocal; 'the sentencing State alone shall have the right to decide on any application for review of the judgment'.[179] The Justice Secretary wished to avoid creating a perception that the British Government would interfere with foreign judgments imposed on transferred prisoners and therefore renege on its international treaty obligations.[180] Following a judicial review of this decision, the High Court ruled that the Justice Secretary did have the power to grant pardon under Article 12 of the COE Convention but that it was up to the discretion of the Secretary whether or not to do so.[181] After another refusal,[182] a pardon was finally granted in September 2009 following sustained public pressure and new evidence demonstrating Mr. Shields' innocence.[183]

To avoid this confusion, the British Government now includes an explicit provision in its PTAs which states that 'the transferring State shall retain exclusive jurisdiction for the review of the judgment'.[184] Accordingly, a request for pardon from transferred prisoners cannot involve a review of the judgment passed by the court in the sentencing State.

5.5 *Post-Transfer Responsibility*

When control over release is considered alongside post-transfer responsibility for the welfare of transferred prisoners, it becomes clear that the two systems operate from a very different basis. In the inter-state system, although there are signs of an increasing interest in the post-transfer welfare of prisoners transferred against their will, responsibility for the prisoner is

[179] See *R (Michael Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin) (17 December 2008), para 35.
[180] Interview with Graham Wilkinson, UK Home Office, 18 June 2009.
[181] See *R (Michael Shields) v Secretary of State for Justice* (n 179 above), para 35.
[182] See M Tran, 'Jack Straw refuses to pardon jailed Liverpool fan Michael Shields' *The Guardian* (London, 2 July 2009), available at http://www.guardian.co.uk/politics/2009/jul/02/straw-refuses-pardon-michael-shields (visited 30 November 2010).
[183] See the Justice Secretary statement, 9 September 2009, available at http://www.justice.gov.uk/news/announcement090909b.htm (visited 30 November 2010).
[184] UK-Rwanda PTA, Art 6.

transferred with the prisoner to the enforcing State. The sentencing State retains control over the judgment only. In the ICJ system, in contrast, the relevant court retains responsibility for the welfare of the international prisoner and control over both the judgment and the length of time that the prisoner must serve. In other words, while the sentencing entity in the inter-state system transfers responsibility for the prisoner and the sentence to the enforcing State, the sentencing entity in the ICJ system only delegates responsibility for the practical aspects of the implementation of the sentence to the enforcing State. States implement the international sentence 'on behalf'[185] of the international court in the ICJ system. As the international criminal institutions ultimately remain responsible for fundamental aspects of enforcement, a compulsory system that would place a duty on States to accept international prisoners is unworkable. Without a full transfer of control over the length of the sentence to be served or responsibility for the prisoner, States cannot be compelled to accept individuals convicted by an international court into their custody.

VI. A THIRD WAY?

Despite the more vertical nature of the relationship between the participating entities in the ICJ system, it does not appear to be possible to introduce a compulsory system of enforcement. This is unfortunate as, over the years, the international criminal institutions have struggled to secure sufficient cooperation from States for enforcement purposes. To promote cooperation, the international criminal courts have incorporated the principle of equitable distribution of the burden of enforcement into their designation decision-making processes.[186] At the same time, however, the international courts are also striving to implement a policy of regional placement.[187]

6.1 *Regional Placement Policy in ICJ System*

[185] *Prosecutor v Erdemovic* (Trial Chamber Sentencing Judgment) IT-96-22-T (29 November 1996), para 71.
[186] See ICTY PDD, Art 3(b) and ICC Statute, Art 103(3)(a).
[187] See for example the Sixth Annual Report of the President of the Special Court, June 2008 - May 2009, available at http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx (visited 30 November 2010) 28 and 39.

To date, all ICTY prisoners have been transferred to States in Europe.[188] The International Criminal Tribunal for Rwanda (ICTR)[189] has transferred all its African prisoners to Mali and Benin[190] and its only non-African convict, a Belgian national, was transferred to Italy.[191] The SCSL has transferred all its prisoners to Rwanda.[192] Although designation decisions may result in international prisoners being transferred against their will from the State in which the relevant court is situated, the regional placement policy aims to minimise the potential socio-cultural and linguistic isolation of international prisoners and to make it easier for them to maintain familial relationships.[193] However, in prioritising negotiations with States in the prisoners' region of origin, some courts are targeting developing and/or post-conflict States whose prison systems may not conform to international standards.

6.2 *Financial Implications of a Regional Placement Policy*

Importance is attached to designating a State with prison facilities that meet international standards[194] in order to enhance equality of treatment for persons convicted by the same court and to avoid aggravating the sentence imposed.[195] To reconcile the humanitarian objectives for enforcing international sentences of imprisonment in the prisoners' region of origin with the requirement to enforce such sentences in conditions that conform to international standards, the international courts are undertaking unprecedented commitments to help cooperating States raise funds to update their prison facilities to meet these standards.[196]

---

[188] ICTY prisoners have been transferred to Italy, Finland, Norway, Sweden, Austria, Germany, France, Spain, Denmark, UK, Belgium, Ukraine, Portugal, Estonia, Slovakia, Poland and Albania. See 'Key Figures of ICTY Cases' at http://www.icty.org/sections/TheCases/KeyFigures (visited 30 November 2010).

[189] The UK does not have an enforcement agreement with the ICTR. However, the ICTR's practice and enforcement agreements provide good illustrations of developments in the ICJ system.

[190] See the Status of Detainees at http://www.unictr.org/tabid/173/Default.aspx (visited 30 November 2010).

[191] See ICTR Press Release 'Georges Omar Ruggiu Transferred to Italy' ICTR/INFO-9-2-555.EN, 29 February 2008, available at http://www.unictr.org/tabid/155/Default.aspx?id=37 (visited 30 November 2010).

[192] SCSL Press Release, 'Special Court Prisoners Transferred to Rwanda to Serve Their Sentences' (31 October 2009), available at http://www.sc-sl.org/PRESSROOM/RegistryPressReleases/2009/tabid/214/Default.aspx (visited 12 November 2009).

[193] See *Prosecutor v Darko Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004), paras 105, 107; ICTY PDD, paras 4(a) and 5; and SCSL PDD, paras 4(1) and 5; and *ICTY Manual on Developed Practices* (n 40 above) 152, paras A.1(7) and (9).

[194] See *ICTY Manual on Developed Practices* (n 40 above), 152, para A.1(8); and ICTR/SCSL-Rwanda BEAs, Preamble.

[195] See C Safferling, *Towards an International Criminal Procedure* (Oxford: OUP, 2001), 355-7.

[196] See ICTR-Swaziland, Benin and Mali BEAs, Art 11(2)-(4), available at http://www.unictr.org/tabid/99/default.aspx (visited 30 November 2010). See also the European Parliament Resolution on the Special Court for Sierra Leone, B6-0244/2009, available at http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2009-0244&language=EN (visited 30 November 2010).

Recently the ICTR went further in its agreement with Rwanda, promising to directly pay for both the upgrade of cells to international standards of imprisonment and upkeep and maintenance costs relating to meals, communications, incidentals and special medical care for international prisoners.[197] In return for this financial contribution to the cost of implementing the sentence in Rwanda, the ICTR has guaranteed access to specifically constructed cells in a special wing in the new Mpanga Prison, two hours from Kigali.[198] To date, no ICTR prisoner has been transferred to Rwanda. However in March 2009, the ICTR helped to broker an enforcement agreement between Rwanda and the SCSL, which granted the SCSL access to cells at the Mpanga facility.[199] In return for a promise to cover the yearly upkeep and maintenance costs relating to meals, sanitation, communications and medical care for SCSL prisoners,[200] the Rwandan Government accepted all eight SCSL prisoners being housed at the SCSL's Detention Facility in Freetown into Rwandan custody.[201]

6.3 *Financial Implications for Inter-State 'No Consent' Systems*

It is interesting to note that as the UK moves towards a bipartite transfer procedure that does not require the prisoner's consent, the UK is accepting more responsibility for the prisoner's welfare post-transfer. As it does so, it wishes to retain greater control over the site of the implementation of the sentence[202] and, as a consequence, is incurring similar financial burdens as the international courts. For instance, the British Government recently provided the Ugandan Government with an initial sum of $400,000 to upgrade the infrastructure, accommodation, catering and administrative services and sanitation within Luzira Prison, to which around 40 Ugandan prisoners serving sentences in the UK will soon be sent.[203]

While this penal reform aid was provided following the conclusion of a 'no consent' agreement, there is also evidence that this form of aid is being provided to countries with which the British Government hopes to conclude 'no consent' agreements. For example, the

[197] See ICTR-Rwanda BEA, Art 11(1)(a)(iii)-(iv), available at http://www.unictr.org/tabid/99/default.aspx (visited 30 November 2010).
[198] See ICTR-Rwanda BEA, Art 11(1)(a)(iii); and *Prosecutor v Kanyarukiga*, (Decision on Prosecutor's Request for Referral to the Republic of Rwanda) ICTR-2002-78-R11bis (6 June 2008), para 91.
[199] See SCSL Statute, Art 22(1) and SCSL Press Release 'Special Court concludes Enforcement Agreement with Rwanda' (20 March 2009) available at http://www.sc-sl.org/PRESSROOM/RegistryPressReleases/2009/tabid/214/Default.aspx (visited 30 November 2010).
[200] See SCSL-Rwanda BEA, Art 11(1)(c) and (3), available at http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx (visited 30 November 2010) and SCSL Press Release, 'Special Court concludes Enforcement Agreement with Rwanda' (20 March 2009).
[201] See SCSL Press Release (n 192 above).
[202] See UK-Rwanda PTA, Art 4(7).
[203] See Ariko and Manisula (n 74 above) and R Baguma, 'UK Funds Luzira Prison Rehabilitation', (4 September 2009), available at http://allafrica.com/stories/200909040742.html (visited 30 November 2010).

British Government has prioritised the negotiation of a 'no consent' prisoner transfer agreement with Nigeria due to the large number of Nigerian prisoners serving prison sentences in the UK.[204] Like many States, Nigeria is cautious about creating a legal precedent that would lead to pressure from other States to sign similar agreements.[205] To overcome this political resistance, and to avoid human rights litigation challenging and perhaps preventing this form of transfer, the British Government has invested over one million pounds on the construction of new prison facilities in Nigeria, training custodial management and staff on international penal standards and establishing work and education programs that align with those in the British penal system.[206]

Therefore, in addition to the fundamental pre-requisite that the prisoner is a national or has close ties to the State to which he will be transferred, the new 'no consent' inter-state system is adopting the ICJ system's criteria: is the prison system of the enforcing State suitable in terms of conformity with international standards and can it effectively enforce international sentences of imprisonment (security and safety concerns).

6.4 *The Cost Implications of Change*

The cost of implementing the sentence of a transferred prisoner was traditionally borne by the enforcing State in both systems.[207] As the inter-state system adopts the ICJ procedure for 'no consent' transfers and the ICJ system adopts the inter-state system's focus on humanitarian objectives, sentencing entities in both systems are incurring previously unknown costs. In both systems, sentencing entities are undertaking positive obligations to provide funding to ensure that the facilities to which prisoners will be sent provide, and are operated in line with, international penal standards. To ensure access to the desired penal capacity, sentencing entities are accepting varying degrees of post-transfer responsibility for the welfare of the

[204] See the Statement of Parliamentary Under-Secretary of State for Justice, Hansard, Column 58WH, 22 February 2010, available at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100622/halltext/100622h0009.htm (visited 30 November 2010) and A Travis, 'Brown hopes to send home 3,000 foreign prisoners', *The Guardian* (London, 25 October 2007), available at http://www.guardian.co.uk/politics/2007/oct/25/prisonsandprobation.immigrationpolicy (visited 30 November 2010).

[205] Interview with Graham Wilkinson, UK Home Office, 18 June 2009.

[206] See J Slack, 'Britain to build £1m jail in Nigeria for 400 prisoners serving sentences here', *The Daily Mail* (London, 9 June 2009), available at http://www.dailymail.co.uk/news/article-1198401/Britain-build-3m-jail-Nigeria-400-prisoners-serving-sentences-here.html# (visited 30 November 2010).

[207] For the inter-state system, see UK-Thailand PTA, Art 8; COE Convention, Art 17(5); and EU Framework Decision (n 9 above), Art 24. An enforcing state in the inter-state system can opt to recover all or part of the costs from the sentenced person or other sources – see for example UK-Cuba PTA, Art 11(2).
For the ICJ system, see ICTY/SCSL-UK BEAs, Art 11; ICC Rules, Rule 208(1); and ICC-UK BEA, Art 17(1).

transferred prisoners. While this is related to international human rights obligations, it can also be attributed to budgetary considerations. A system of splitting costs may still be more financially feasible and politically acceptable than keeping convicted persons in the detention facilities of the sentencing entities.

VII. A PRINCIPLED OR PRAGMATIC EVOLUTION?

This article has described how the UK's inter-state system for the transfer of prisoners has evolved from a system founded on the tri-partite consent of the sentencing State, the enforcing State and the prisoner, to a bipartite process that does not require the prisoner's consent, and is evolving further to a system that may be initiated solely upon the unilateral decision of the sentencing State. While procedurally, the ICJ system still requires the bipartite consent of the international criminal court and the enforcing State, the prisoners' views have become a more integral part of the transfer process and designation decisions have become more influenced by humanitarian and penological considerations. Both systems now appear to be providing financial incentives to States to promote cooperation and funds to protect the transferred prisoners' welfare. As the transfer procedures have changed, so too has the priority accorded to the various rationales invoked to justify the international movement of prisoners.

The primary purpose cited for the inter-state transfer system is the facilitation of the prisoner's social rehabilitation and reintegration through transfer to a State in which the prisoner has linguistic, cultural, economic, and social ties and increased access to services that will prepare him for release.[208] Although the aim of furthering the ends of justice[209] has been cited as having equal equivalence, penological goals are given priority as justice may also be achieved by enforcing the same sentence in the sentencing State.[210] The process is also intended to have humanitarian benefits for the prisoner and his family; by serving the sentence in a State with which he has social or residency links, the risk of linguistic, cultural

[208] See UK-Cuba PTA, Art 3(3); COE Convention, Preamble; Explanatory Report to the COE Convention, para 9; Additional Protocol, Preamble; Explanatory Report to the Additional Protocol, para 21; Draft Explanatory Report to a Second Additional Protocol, paras 3-6; EU Framework Decision (n 9 above), Preamble and Art 4(4). See also E De Wree, T V Beken and G Vermeulen, "The Transfer of sentenced persons in Europe: Much ado about reintegration" (2009) 11(1) *Punishment and Society* 111, 121-3.

[209] See Preambles to the COE Convention and Additional Protocol.

[210] See Committee of Experts on the Operation of European Conventions in the Penal Field, 'Information on Obstacles to Ratification, Reasons for Reservations and Difficulties with Application of the Convention on the Transfer of Sentenced Persons', PC-OC (2000) 2, 25 January 2000, 6, paras 22-23.

and religious isolation is minimised and it is easier to maintain familial relations.[211] The system may be used to bring citizens imprisoned abroad home if prison conditions in the sentencing State are poor.[212] For instance, the UK recently relied on the inter-state system to have a pregnant woman convicted of drug smuggling in Laos returned to the UK to serve her sentence so that she could give birth near her family and with the benefit of British medical care.[213] The use of the inter-state transfer system to protect citizens that find themselves in difficulties abroad undoubtedly carries domestic political currency. The inter-state system is also used as a foreign policy tool to improve bilateral and multi-lateral cooperation in law and penal enforcement fields.[214]

With the removal of the requirement to obtain the prisoners' consent, a question mark may be raised in relation to the continued insistence that the inter-state system facilitates the rehabilitation of prisoners. Neither the prisoner's nor the enforcing State's view that the transfer is not conducive to rehabilitation can constitute a ground for refusal to enforce a sentence under the EU Framework Decision,[215] and such a view will only constitute a ground for refusal under the proposed Second Additional Protocol in exceptional circumstances.[216] The British Government therefore justifies the 'no consent' inter-state system on the basis of public protection.[217] Rather than simply deporting a convicted offender back to his State of origin after a sentence has been served, a transfer during the service of the sentence enables the national prison system to follow the prisoner's progress and to set up supervision mechanisms to monitor progress post-release.[218] With this relegation of rehabilitation, it is becoming more obvious that the inter-state system is no longer viewed primarily as a legal tool to bring citizens imprisoned abroad home, but also as an efficient means to remove

[211] See Płachta (n 1 above)150, 153, 158-9, 164, 166-7 and 206; Explanatory Report to the COE Convention, para 9; and Council of Europe's Parliamentary Assembly's Social and Health and Family Affairs Committee's Rapporteur Fernández-Capel Report 'Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – critical analysis and recommendations' Doc. 9137, 25 June 2001, paras 3-4 available at http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9137.htm (visited 30.11.10).

[212] See European Parliament Resolution 1527 (2001) 'Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – Critical Analysis and Recommendations', para 9(ii), available at http://assembly.coe.int/Documents/AdoptedText/ta01/erec1527.htm (visited 30 November 2010).

[213] See 'British Ambassador to Thailand on Sky News' at http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=20661706 (visited 12 November 2009).

[214] See Płachta (n 1 above), 134, 148-9, 154-6, 162, 164 and 166-7; Preambles to the UK's PTAs with Thailand, Cuba, Vietnam, Egypt, Sri Lanka, Laos, Morocco and Nicaragua and Preamble to the COE Convention.

[215] See EU Framework Decision (n 9 above), Preamble para 10 and Arts 4(4) and 6(3). Although this may be possible in cases where the prisoner only has residency links with the proposed enforcing state – see EU Framework Decision (n 9 above), Preamble para 8 and Art 4(3).

[216] See Draft Explanatory Report to the proposed Second Additional Protocol, Art 2(2)(h) and para. 9

[217] See the Statement of Parliamentary Under-Secretary of State for Justice, Hansard: Column 57WH, 22 February 2010.

[218] Interview with Graham Wilkinson, UK Home Office, 18 June 2009.

foreign national prisoners from overcrowded prisons.[219] Over the years, the rationale for the utilization of the inter-state transfer system has moved from penological, to humanitarian, to political, to public protection and finally to its current use as a penal capacity management tool.

The rationales for transfers in the ICJ system appear to have evolved in the opposite direction. The primary enforcement system of the international criminal courts was established due to the pragmatic necessity to create penal capacity. This reliance on States will continue until the international courts have the institutional capacity to directly implement their own sentences. In contrast to the traditional inter-state system, where prisoners are provided with an opportunity to serve their sentences in their home State if they so wish,[220] an enforcing State in the ICJ system is highly unlikely to be the international prisoner's State of origin[221] or indeed, their final destination.[222] The international criminal courts are, however, proactively seeking to conclude agreements with States in the prisoners' region of origin to address humanitarian concerns and to enhance the likelihood of successful reintegration.[223] It is evident that the international courts are moving away from a passive acceptance of the penal capacity provided by cooperating States and its utilization in a purely pragmatic manner, towards a more proactive approach that seeks to transfer prisoners to States in which humanitarian and penological objectives may be facilitated.

VIII. CONCLUSION

Both systems for the transfer of prisoners are modern phenomena, established due to the growing internationalization of both the causes and effects of crime. The internationalization of crime led to State cooperation in relation to penal issues. This in turn resulted in an increasing movement of prisoners across territorial and jurisdictional borders. Both systems

[219] See the House of Commons, Select Committee on European Scrutiny, 19th Report on 'European enforcement order and the transfer of sentenced persons', 25 April 2007, available at http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmeuleg/41-xix/4103.htm (visited 30 November 2010); Explanatory Memorandum to the Agreement between the UK and Libya on the Transfer of Prisoners, available at http://www.fco.gov.uk/en/about-us/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2009/PTA-Libya-Country (visited 30 November 2010); and Explanatory Memorandum to the UK-Rwanda Agreement, para 6.

[220] See Convention, Preamble and Art 2(2) and Commonwealth Scheme, Art 1.

[221] See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) U.N. Doc. S/25704 (3 May 1993), para 121; and Preamble of the European Parliament *Resolution on the Special Court for Sierra Leone*, B6-0244/2009, paras C and D, Preamble.

[222] See ICTY/SCSL-UK BEAs, Art 9(4); ICC Statute, Art 107; and ICC-UK BEA, Art 14(1).

[223] See ICTR Press Release 'Senegal Signs Agreement on Enforcement of ICTR Sentences', ICTR/INFO-9-2-660.EN (23 November 2010) available at http://www.unictr.org/tabid/155/Default.aspx?id=1178 (visited 30 November 2010).

operate contemporaneously in the UK and deal with the penal management of foreign national prisoners. The ICJ system is used to receive foreigners who committed crimes elsewhere into the national prison system, whereas the inter-state system is increasingly being viewed as a tool to remove foreigners who have committed crimes in the State but who are no longer considered to have a right to remain in the country.

Although they remain mutually exclusive schemes[224] with operational differences, the rationales used to justify the processes and the methods used to promote cooperation are becoming more aligned. The inter-state system has moved from a focus on principled reasons to a more pragmatic view of transfers, while the ICJ system has moved beyond a purely pragmatic reliance on national penal capacity, to a system that incorporates humanitarian and penological goals into the designation decision-making process. Both systems now appear to operate on the basis of a careful balance of principled and pragmatic reasons and aim to achieve political, humanitarian, penological and penal capacity management goals.

What may be surprising, given the above discussion of the possibilities for 'no consent' transfers under the UK's inter-state system, is that the UK was actually a net importer of prisoners last year. In 2009, while 64 British prisoners who had been sentenced abroad were transferred back to the UK, only 41 foreign prisoners were transferred to their own countries.[225] However, there are currently 7,824 convicted foreign national prisoners serving their sentences of imprisonment in the UK who are eligible for transfer.[226] With the ratification of the Additional Protocol and the forthcoming entry into force of the EU Framework Decision and the 'no consent' bilateral PTAs, this situation is likely to be reversed and the number of foreign prisoners transferred abroad is likely to increase significantly.[227] Under the ICJ system, in comparison, the UK may only ever import international prisoners, and to date, it has only received three ICTY prisoners.[228]

Despite the vast differences in numbers involved, both systems are a necessary and important tool for international penal cooperation. Moreover, as this article has demonstrated, the analysis of these systems for the international transfer of convicted prisoners can

[224] See ICC Act, Art 44(5)(a).
[225] See the Statement of Parliamentary Under-Secretary of State for Justice, Hansard, Column 57WH, 22 February 2010.
[226] See the Statement of Parliamentary Under-Secretary of State for Justice, Hansard, Column 56WH, 22 February 2010.
[227] See the Statement of Parliamentary Under-Secretary of State for Justice, Hansard, Columns 58-59 WH, 22 February 2010
[228] Radislav Krstić (35 year sentence) 20 December 2004, Blagoje Simić (15 year sentence) 27 March 2007, Momčilo Krajišnik (20 year sentence) 7 September 2009. See http://www.icty.org/sections/TheCases/KeyFigures (visited 30 November 2010).

contribute to wider debates on the purpose of punishment, penal capacity management and prisoners' rights.