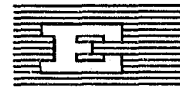


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COMMITTEE ON CRIME PREVENTION AND CONTROL  
Tenth session  
Vienna, 22-31 August 1988  
Item 4 of the provisional agenda\*

IMPLEMENTATION OF THE CONCLUSIONS AND RECOMMENDATIONS OF  
THE SEVENTH UNITED NATIONS CONGRESS ON  
THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS

Supervision of foreign offenders who have been conditionally  
sentenced or conditionally released

Preliminary report of the Secretary-General

Summary

The Economic and Social Council, in its resolution 1986/10, section VIII, of 21 May 1986, requested the Committee on Crime Prevention and Control to formulate a model agreement on the transfer of supervision of foreign offenders conditionally sentenced or conditionally released for possible consideration by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, taking into account work previously accomplished in this area. This request of the Council was based on resolution 13 of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in which the Committee was requested to study this subject and to consider the possibility of formulating such a model agreement. The present preliminary report focuses on the purpose of the institution of the transfer of supervision and the need for a clear differentiation between various forms and solutions and the diversity of the legal and technical problems involved. The draft model agreement, which is contained in an annex to the present report and based to a great extent on the results of the International Expert Meeting on United Nations and Law Enforcement, held at Baden, Austria, in 1987, recognizes the traditions and cultural identity of Member States. The draft model agreement sets out, on the basis of a general consensus, principles accepted by the international community so that favourable consideration can be given to their use within the framework of national legislation and practice.

\*E/AC.57/1988/1.

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## INTRODUCTION

1. The Economic and Social Council in its resolution 1986/10, section VIII, of 21 May 1986, requested the Committee on Crime Prevention and Control to formulate a model agreement on the transfer of supervision of foreign offenders who had been conditionally sentenced or conditionally released for possible consideration by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, taking into account work previously accomplished in this area. The Council also requested the Secretary-General, in co-operation with the United Nations regional and interregional institutes for the prevention of crime and the treatment of offenders, as well as the intergovernmental and non-governmental organizations concerned, to assist the Committee in its task, inter alia, by studying the principles on which such a model agreement could be based and by preparing a preliminary report for consideration by the Committee at its tenth session. The General Assembly welcomed these requests in its resolution 41/149 of 4 December 1986.

2. The requests of the Council in resolution 1986/10 were based on resolution 13 of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in which the Committee was requested to study this subject and to consider the possibility of formulating a model agreement for the transfer of supervision of foreign offenders who had been conditionally sentenced or conditionally released. 1/ In addition, principle 39 of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, which were recommended by the Seventh Congress for national, regional and international action, emphasized the importance of international co-operation in penal matters by, inter alia, the development of model instruments. 2/ Furthermore, the recommendations on the treatment of foreign prisoners stipulated, in recommendation 9, that "the conclusion of bilateral and multilateral agreements on supervision of and assistance to offenders given suspended sentences or granted parole could further contribute to the solution of the problems faced by foreign offenders". 3/

3. The General Assembly, in its resolution 40/32 of 29 November 1985, endorsed the resolutions of the Seventh Congress and recommended the Guiding Principles for national, regional and international action, as appropriate. In doing so, the Assembly took into consideration the report of the Secretary-General on the implementation of the conclusions of the Seventh Congress, which stated, inter alia, that the United Nations would also continue its function of standard-setting, in response to the strong support given by the Congress to the adoption of instruments (model agreements etc.) (A/40/751, para. 47).

4. The notable achievements of the Seventh Congress would not have been possible without other efforts to strengthen international co-operation in this field, such as the XIIIth International Congress on Penal Law, held at Cairo, Egypt, in 1984, and an international seminar held by the International Institute of Higher Studies in Criminal Sciences at Siracusa, Italy, in 1985 (A/CONF.121/NGO/22). Further relevant recommendations were made by the Permanent European Conference on Probation and Aftercare, held at Frascati, Italy, in 1986, and the 15th Conference of European Ministers of Justice, held at Oslo, Norway, in 1986. 4/

## I. THE TRANSFER OF SUPERVISION

5. The present report focuses on two major alternatives to imprisonment:

At the trial stage. Conditional or suspended sentence, including probation, namely conviction of the offender either without pronouncement of a sentence involving deprivation of liberty or with pronouncement of such a sentence and suspension of its enforcement;

At the post-conviction stage. Conditional release or parole, namely conviction of the offender with enforcement of a sentence involving deprivation of liberty and release of the offender before the full sentence has been served. Both conditional sentence and conditional release are dependent on the offender's conduct for a specific period after the decision has been taken and may be combined with special conditions imposed on the offender.

6. It is clear that many more foreign offenders would be released from prisons if sentencing States were confident that they would be adequately supervised by their home countries (countries of ordinary residence). In the absence of international agreements providing for supervision in the offenders' home countries, however, sentencing States have no legal instrument with which to monitor the convicted foreigners' conduct and their compliance with specific conditions or directions after their return to their home countries. Consequently, sentencing States are unable to ensure that the conditional sentence or conditional release will be revoked if the offenders fail to comply with the conditions set by the sentencing State. Conditional sentence or conditional release may, therefore, often not be granted to foreign offenders, although this may be the practice of the sentencing State in relation to other offenders.

7. The situation even exists where the court does not give specific directions to the offender and revocation of the conditional sentence or the conditional release depends solely on the commission of a new offence during a probation period. Although in such cases criminal records could be requested from the offender's home country through mutual assistance in criminal matters, the sanction might not be enforceable after an eventual revocation if the offender's home country would not extradite its own nationals or enforce the decisions of a foreign court.

8. While concern over the predicament of foreign prisoners is a primary consideration behind facilitating the international transfer of supervision, States that are involved in such transfers may have other diverse, and sometimes conflicting, concerns and interests. Sentencing States may have an interest in the transfer inasmuch as it can shift the burden of supervision to the offenders' home countries (administering States). Yet, sentencing States may also be concerned that the transfer might result in a loss of their control over the offenders' supervision or endanger the compensation of the victims or of their dependants in the case of the victims' deaths. Therefore, sentencing States frequently require that the supervision should be carried out by administering States in principally the same way as it is imposed by the sentencing States. Administering States, for their part, may be interested in receiving their nationals or residents who have been sentenced abroad in order to alleviate their plight and to facilitate their contact with, and reintegration into, their families and communities.

9. In order to contribute to an increase in the use of alternatives, reduction of the prison population and improvement of the resettlement of offenders, international co-operation could be intensified, as recommended in resolution 16

of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 5/ Such co-operation could go further than the mere exchange of information on the conditionally sentenced or conditionally released offenders' conduct. States could, for example, improve co-operative efforts in facilitating the reintegration of offenders into their communities, establish better co-operation regarding the revocation of a suspended sentence or a conditional release, and provide for mutual enforcement of court decisions after revocation. The Committee, in formulating a model agreement on the transfer of supervision of foreign offenders, might take into account the relevant issues and properly balance the interests of both the offenders and the States involved in the transfer.

## II. EXISTING INSTRUMENTS

10. Several bilateral treaties on the transfer of foreign prisoners to their home countries include provisions for the transfer of supervision of conditionally sentenced or conditionally released offenders, as both issues are closely related. These treaties exist in both Roman-law and common-law countries. In fact, provision for the transfer of supervision is included, for example, in treaties for the transfer of prisoners between Austria and Yugoslavia, Canada and Mexico, Canada and the United States of America, Mexico and the United States, and Turkey and the United States.

11. At the multilateral level, the Council of Europe formulated the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964.\* The Convention establishes a framework whereby conditional measures such as suspended sentence, probation and early release, which take effect concurrently with or subsequent to a sentence imposed on the offender by one State, may be carried out in another State. 6/ A further example of a multilateral arrangement is provided by the Nordic Agreement of 1963 on co-operation on the enforcement of sentences in the offender's native country.\*\*

## III. THE SCOPE OF THE MODEL AGREEMENT

12. In principle, the model agreement could apply to conditions imposed on foreign offenders by:

(a) Prosecutors, where they use their discretion not to initiate or continue proceedings, combining this decision with specific conditions (conditional waiver of prosecution); 7/

(b) Courts, as part of their sentence;

(c) Courts or the administration, as part of their decision to grant the release of an offender;

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\*European Treaty Series No. 51. The Convention entered into force on 22 August 1975. As of February 1975, it had been ratified by Austria, Belgium, France, Italy, Luxembourg, the Netherlands and Sweden, and signed by Denmark, Germany, Federal Republic of, Greece, Portugal and Turkey.

\*\*The Agreement is in force in Denmark, Finland, Iceland, Norway and Sweden.

(d) The competent authority, as part of its decision to grant the release of an offender by way of pardon.

13. For practical reasons, the model agreement might provide for transfer of supervision of conditions imposed in all the circumstances mentioned in the preceding paragraph. In cases covered by (a) above, however, it might be preferable to consider those conditions under the transfer of proceedings in criminal matters.\*

14. The authority that would be competent to decide on the transfer of supervision in the requested State could be a judicial body or, for practical reasons, an administrative organ, in particular the one that is already responsible for the supervision of the enforcement of sentences. This latter option was adopted in the Nordic Agreement of 1963. There are also reasons, however, supporting the competence of a court to decide the issue in view of the need for due process, and the fact that transfer of supervision may sometimes require the conditions imposed in a sentence to be adapted to some extent (see para. 22 below).

15. Another issue related to the transfer of supervision is the status of the sentence in the administering country. The question that arises in this regard is whether an offender should be considered a recidivist if he or she commits a new offence since an earlier sentence involving supervision has been enforced by the administering State. Normally, sentences imposed by foreign courts are not considered in this connection. The situation might be different if the later sentence would be enforced in the administering country, due to the fact that the authorities responsible for the enforcement would have records of this enforcement.

#### IV. THE TYPES OF TRANSFER

16. It seems advisable to provide for the following types of transfer in the model agreement: transfer of full responsibility from the sentencing to the administering State, including supervision, enforcement of conditions, the right of revocation and, in the latter case, the transfer of further enforcement of the judicial decision, possibly with the requirement that standards or criteria similar to those of the sentencing State should be used. Thus, the transfer proposed would provide for practical solutions, particularly if there is cultural affinity between States and similarity between their penal systems.

17. The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders also provides for the following two other types of transfer, which may be less suitable for inclusion in a global model, although they may have their own merits at the regional level:

(a) Transfer of supervision only, with the establishment of a reporting system, but leaving the responsibility for drawing conclusions entirely to the sentencing State. Should that State revoke the suspended sentence or conditional release, the administering State would have to extradite the offender, even if he or she were a national of the administering State, or the sentencing State would have to wait until the offender had returned to its territory. Because of these requirements, this type of transfer may be useful only in special circumstances;

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\*A separate report on this subject has been prepared for the consideration of the Committee on Crime Prevention and Control (E/AC.57/1988/6).

(b) The sentencing State may request the administering State to supervise the offender and, in addition, enforce appropriate sanctions after revocation of the suspended sentence or conditional release by the sentencing State. As in the case mentioned under (a) above, it might be advisable to exclude this type of transfer from a global model agreement in view of the complexity of the procedure.

## V. BASIC PRINCIPLES

### A. National sovereignty

18. The model agreement should define the ways in which the principles of respect for national sovereignty and jurisdiction and non-interference in the internal affairs of States would be applied in transferring responsibility for enforcing conditional sentence and conditional release.

### B. Dual criminality

19. The model agreement should recognize the principle of dual criminality: the act would have to constitute a punishable act in both the sentencing and the administering States in order for the transfer of supervision to occur. This requirement is usually also part of co-operation agreements in other penal matters.

### C. Rights of the victim

20. In line with the spirit of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 8/ the rights of the victim should not be affected as a result of the transfer of supervision. This applies in particular to the victim's right to participate or to be adequately represented in the proceedings and the victim's claim for restitution or compensation if it were made during the original proceedings in the sentencing State or if the decision on probation or parole is specifically dependent on payment of compensation or provision of restitution. In the event of the death of the victim, this principle should extend to his or her dependants accordingly.

### D. Double jeopardy (non bis in idem)

21. An agreement between States to transfer supervision could lead to the recognition of judicial decisions in both the sentencing and the administering States. This would mean that the administering State would be barred from initiating criminal proceedings for the same offence when complying with a request for supervision (non bis in idem). Similarly, the sentencing State would adhere to the administering State's decision. If the administering State would revoke the conditional sentence or enforce the sanction after revocation, the sentencing State would accept that action.

### E. Adaptation

22. In many cases, the type of conditions imposed by courts in the sentencing State is not available in the administering State due to different national laws and practices. Thus, it appears advisable to adapt the conditions imposed in the sentencing State to make them compatible with the administering State's legislation. Such adaptation would, however, be restricted to the differences in national legislation and practice, and should not result in an aggravation of the offender's penal situation, as noted in the following paragraph.

#### F. Non-aggravation

23. Another prerequisite governing every aspect of the model agreement should be the requirement that the transfer of supervision would under no circumstances result in an aggravation of the offender's situation. States involved in the transfer of supervision should ensure that supervisory measures authorized in the administering State would not be more severe with respect to their nature and duration than those prescribed in the sentencing State.

#### VI. ELABORATION OF THE MODEL AGREEMENT

24. The Committee on Crime Prevention and Control, at its ninth session, had before it a conference room paper on the transfer of supervision of foreign offenders who have been conditionally sentenced or conditionally released (E/AC.57/1986/CRP.5). Subsequently, the Secretariat formulated the draft model agreement contained in the annex to the present report, taking into account work previously accomplished in this area. Thus, the draft model agreement is based to a great extent on the results of the International Expert Meeting on United Nations and Law Enforcement, which was held under the auspices of the United Nations Office at Vienna at Baden, Austria, from 16 to 19 November 1987.

In its work, the Meeting focused on the purpose of the institution of the transfer of supervision and the need for a clear differentiation between various forms and solutions, and the diversity of the legal and technical problems involved.

#### VII. CONCLUSIONS

25. Given the noted desirability of transferring supervision of conditionally sentenced or conditionally released offenders to the offenders' home countries, and the need for further international or bilateral agreements effectively facilitating such transfers, the formulation of a model agreement in this area by the United Nations would be an important step towards intensified international co-operation in criminal justice matters.

26. In this context, the Committee could draw on the experience gained from pertinent existing conventions, treaties and agreements. In the draft model agreement, the traditions and cultural identity of Member States have been recognized. The model agreement sets out, on the basis of a general consensus, principles accepted by the international community so that favourable consideration could be given to their use within the framework of national legislation and practice.

27. The Committee on Crime Prevention and Control, in pursuing its task, may wish to take into account the draft model agreement contained in the annex to the present report and may deem it appropriate to finalize the draft model agreement at its tenth session, for submission, through the Economic and Social Council, to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders for its consideration and adoption.

#### Notes

1/ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: Report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. E.13.

2/ Ibid., sect. B.

3/ Ibid., sect. D, annex II.

4/ Council of Europe, Comprehensive (European) Convention on Inter-State Co-operation in the Penal Field: preliminary draft: 15th Conference of European Ministers of Justice, Oslo, 17-19 June 1986 (Strasbourg, 1986).

5/ Seventh United Nations Congress ..., chap. I, sect. E.16.

6/ See Ekkehard Muller-Rappard, "Judicial assistance and mutual co-operation in penal matters - the European system", in International Criminal Law, Volume II: Procedure, M. Cherif Bassiouni, ed. (New York, Transnational Publishers, 1986), pp. 101-103.

7/ See, for example, Peter J. P. Tak, "The legal scope of non-prosecution in Europe", Publication Series No. 8 (Helsinki, Helsinki Institute for Crime Prevention and Control affiliated with the United Nations, 1986), pp. 67-72; and "Non-prosecution in Europe - proceedings of the European Seminar", Publication Series No. 9 (Helsinki, Helsinki Institute for Crime Prevention and Control affiliated with the United Nations, 1986).

8/ Seventh United Nations Congress ..., chap. I, sect. C.

Annex

DRAFT MODEL AGREEMENT ON THE TRANSFER OF SUPERVISION OF FOREIGN OFFENDERS  
WHO HAVE BEEN CONDITIONALLY SENTENCED OR CONDITIONALLY RELEASED

Preamble

The \_\_\_\_\_ and the \_\_\_\_\_

Desirous of further strengthening international co-operation and mutual assistance in criminal justice, based on the principles of respect for national sovereignty and jurisdiction and of non-interference in the internal affairs of States,

Believing that such co-operation should further the ends of justice, the social resettlement of sentenced persons and the interests of the victims of crime,

Bearing in mind that the transfer of supervision of foreign offenders who have been conditionally sentenced or conditionally released can contribute to an increase in the use of alternatives to imprisonment,

Aware that the supervision in the offender's home country rather than the enforcement of the sentence in a country where the offender has no roots also contributes to an earlier and more effective reintegration into society,

Convinced, therefore, that the social rehabilitation of offenders and the increased application of alternatives to imprisonment would be promoted by facilitating the supervision of conditionally sentenced or conditionally released foreign offenders in their State of ordinary residence,

Conscious of the need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,

Have agreed as follows:

I. THE TRANSFER OF SUPERVISION

1. This Agreement shall be applicable if, according to a final court decision, a person has been found guilty of an offence and has been:

- (a) Placed on probation without the sentence having been pronounced;
- (b) Given a suspended sentence involving deprivation of liberty;
- (c) Given a sentence, the enforcement of which has been modified (parole) or conditionally suspended, in whole or in part, either at the time of the sentence or subsequently.

2. The State where the decision was taken (sentencing State) may request another State (administering State) to take responsibility for applying the terms of the decision, including enforcement in the event of revocation (transfer of supervision).

3. A request for the transfer of supervision shall be made in writing and shall be accompanied by the original or a copy of any decision referred to in the preceding provision.

4. The competent authorities of the administering State shall examine what action to take on the request for supervision in order to comply, as fully as possible, with the request under their own law, and shall promptly communicate their decision to the sentencing State.

## II. DUAL CRIMINALITY

5. Requests for transfer of supervision can be complied with only if the act on which the request is based would be an offence if committed in the territory of the administering State.

## III. GROUNDS FOR REFUSAL\*

6. If the administering State refuses acceptance of a request for transfer of supervision, it shall communicate the reasons for refusal to the sentencing State. Acceptance may be refused where:

(a) The sentenced person is not ordinarily resident in the administering State;

(b) The act is an offence under military law, which is not also an offence under ordinary criminal law;

(c) The offence is in connection with taxes, duties, customs or exchange;

(d) The offence is regarded by the administering State as being of a political nature;

(e) The administering State, under its own law, can no longer carry out the supervision or enforce the sanction in the event of revocation because of the lapse of time.

## IV. THE POSITION OF THE SENTENCED PERSON

7. Whether sentenced or standing trial, a person may express to the sentencing State his or her interest in a transfer of supervision and his or her willingness to fulfil any conditions to be imposed. Similarly, such interest may be expressed by his or her legal representative or close relatives. Where appropriate, the Contracting States shall inform the offender or his or her close relatives of the possibilities under this Agreement.

## V. THE RIGHTS OF THE VICTIM

8. The sentencing State and the administering State shall ensure in the transfer of supervision that the rights of the victim of the offence, in particular his or her rights to restitution or compensation, shall not be affected as a result of the transfer. In the event of the death of the victim, this provision shall apply to his or her dependants accordingly.

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\*This section provides an illustrative list of grounds for refusal. States, when negotiating on the basis of this Model Agreement, may wish to add other grounds for refusal or conditions to this list, for example, relating to the nature or gravity of the offence, the protection of fundamental human rights or considerations of public order.

VI. THE EFFECT OF THE TRANSFER OF SUPERVISION ON THE SENTENCING STATE

9. The acceptance by the administering State of the responsibility for applying the terms of the decision rendered in the sentencing State shall extinguish the competence of the latter State to enforce the sentence.

VII. THE EFFECT OF THE TRANSFER OF SUPERVISION ON THE ADMINISTERING STATE

10. The supervision transferred upon agreement and the subsequent procedure shall be carried out in accordance with the law of the administering State. That State alone shall have the right of revocation. That State may, to the extent necessary, adapt to its own law the conditions or measures prescribed, provided that such conditions or measures are, in terms of their nature or duration, not more severe than those pronounced in the sentencing State.

11. If the administering State revokes the conditional sentence or conditional release, it shall enforce the sentence in accordance with its own law without, however, going beyond the limits imposed by the sentencing State.

VIII. REVIEW, PARDON AND AMNESTY

12. The sentencing State alone shall have the right to decide on any application to reopen the case.

13. Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other law.

IX. INFORMATION

14. The Contracting Parties shall keep each other informed, insofar as it is necessary, of all circumstances likely to affect measures of supervision or enforcement in the administering State. To this end, they shall transmit to each other copies of any decisions that may be relevant in this respect.

15. After expiration of the period of supervision, the administering State shall provide to the sentencing State, at its request, a final report concerning the supervised person's conduct and compliance with the measures imposed.

X. COSTS

16. Supervision and enforcement costs incurred in the administering State shall not be refunded, unless otherwise agreed by both the sentencing State and the administering State.

XI. FINAL PROVISIONS

17. This Agreement shall be applicable to the supervision of offenders sentenced either before or after its entry into force.

18. This Agreement is subject to ratification. The instruments of ratification shall be deposited as soon as possible in \_\_\_\_\_.

19. This Agreement shall enter into force on the thirtieth day after the day on which the instruments of ratification are exchanged.

20. Either Contracting Party may denounce this agreement in writing to the \_\_\_\_\_.  
Denunciation shall take effect six months following the date on which the notification is received by the \_\_\_\_\_.

In witness whereof the undersigned, being duly authorized thereto by the respective Governments, have signed this Agreement.

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UNITED NATIONS  
ECONOMIC  
AND  
SOCIAL COUNCIL



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COMMITTEE ON CRIME PREVENTION AND CONTROL  
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Corrigendum

Page 12

Section XI should read

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In witness whereof the undersigned, being duly authorized thereto by the respective Governments, have signed this Agreement.

\_\_\_\_\_  
Done at \_\_\_\_\_ on \_\_\_\_\_ 19.. in [duplicate] in the  
\_\_\_\_\_ and \_\_\_\_\_ languages [ both ] texts being equally  
[ all ]  
authentic.

\*Reissued for technical reasons.

\*\*E/AC.57/1988/1.