State Responsibility When Transferring Non-consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from the Asylum Case Law

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With the adoption of the 2008 Framework Decision, the EU has awarded 'the furthering of social rehabilitation' a new position in the context of the transfer of prisoners. The novelty consists of it being the guiding principle for the "unconsented" transfer of prisoners. Unconsented transfer of prisoners to their home state is now possible if the sending state has satisfied itself that such transfer furthers the social rehabilitation of the prisoners involved. This research looks into the legal and practical functioning of transfers conducted for the furtherance of the social rehabilitation. Drawing upon case law in relation to similar transfer mechanisms in asylum cases, it is established that Member States that use the 2008 Framework Decision and transfer non-consenting prisoners are vulnerable to state responsibility claims not only in relation to Art. 3 ECHR violations, but possibly also in relation to the social rehabilitation programmes available in the receiving state. In practice it is not possible to adequately substantiate that a transfer would further social rehabilitation and therefore it is not possible to avoid state responsibility. Therefore, it is argued that in order to avoid a deadlock, the proper functioning of the Framework Decision on the transfer of prisoners requires flanking measures specifically targeting the social rehabilitation of prisoners.

I. Introduction

Prisoners being transferred from one Member state to another with a view to having a prison sentence executed outside the sentencing Member State, is far from new. What is new in this context and will therefore be subject to analysis in this contribution, is the extension of the possibilities to transfer "non-consenting prisoners". The purpose of the new EU instrument is to facilitate the social rehabilitation of the sentenced person.[1] With that purpose in mind, the consent of the sentenced person involved is now also lifted for transfers that further their social rehabilitation. This novelty is stressed in all related documents.[2]

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[1] Art 3.1 Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27,5.12.2008 (hereafter the Framework Decision).

[2] Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention reference is made to the declarations made by the Member States. COM (2014) 57 final of 5.2.2014, 12, p. 7 (hereafter the Commission Report 2014).

In light thereof, this paper analyses the scope of state responsibility when transferring non-consenting prisoners to another Member State with a view to furthering social rehabilitation. The paper has a double objective: (1) demonstrate that state responsibility for Art. 3 ECHR violations in another Member State are not limited to asylum cases where ECtHR and ECJ case law exists, but can also emerge in cases related to the transfer of prisoners and (2) argue that the central position awarded to furthering social rehabilitation raises questions with respect to the existence of a mirroring form of state responsibility for violations of the "furthering social rehabilitation"-requirement. Those objectives require an analysis that combines three concepts, being (i) the transfer of non-consenting prisoners, (ii) the social rehabilitation perspective and (iii) the possible state responsibility in relation thereto. The following paragraphs will introduce all three concepts.

1. Transfer of non-consenting prisoners

The first central concept in this analysis is the transfer of non-consenting prisoners. Originally, transfers were always subject to the consent of the prisoner involved. Several international cooperation instruments were adopted in that sense, amongst others the 1983 Council of Europe Convention on the transfer of sentenced persons. The consent of the prisoner involved was first lifted at the level of the Council of Europe. It was not until the introduction of the 1997 additional protocol to the 1983 Council of Europe Convention that – in exceptional situations-[3] transfer of non-consenting prisoners was made possible. The development of cooperation instruments to facilitate the transfer of prisoners was not only pursued at Council of Europe level. Initiatives were also taken at the level of the European Union (EU). Aiming to do better amongst their smaller group, the EU Member States voiced their ambition to intensify cooperation amongst them, by extending the possibility to enforce a cross-border execution not only without the consent of the receiving Member State, but also – more importantly – without the consent of the prisoner involved. Today, at EU level, the transfer of prisoners is governed by Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereafter the Framework Decision).No consent is required when transfer of the sentence is done to further the social rehabilitation of the person involved (Art 6 Framework Decision). In doing so, the possibilities to transfer non-consenting prisoners were extended and the decision thereto placed solely in the hands of the sentencing Member State. To motivate the introduction of that more stringent regime, it was argued that transfers

[3] In that sense, Art 2.3 Protocol details that when a person has fled to another country, before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence. The consent of the sentenced person shall not be required to the transfer of the execution of the sentence. Art 3.1 Protocol details that unconsented transfer is possible where the sentence passed includes an expulsion or deportation order or any other measure as the result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison.

done to further the social rehabilitation of the prisoner involved should be facilitated and should not be dependent on the explicit consent of the prisoner involved (who would not have any reason not to consent) nor the receiving Member State involved (which would not be allowed not to consent as that would compromise the social rehabilitation objective).[4]

In essence, lifting the requirement for Member States to consent to a transfer is a political decision reflecting whether or not and to what extent Member States are willing to give up a part of their state sovereignty and trust that only prisoners would be transferred to them where such transfer would clearly further their social rehabilitation. That political choice links in perfectly with the increased European integration and the growing trust in decisions taken by other Member States (the mutual recognition philosophy),[5] and will not, as such, be subject to analysis in this contribution.

Lifting the requirement for the prisoners involved to consent to a transfer is of an entirely different nature. Many authors have commented on the lifting of the consent requirement, arguing that it has a significant negative impact on the position of the prisoner involved.[6] Disconnecting 'consent to transfer' and 'social rehabilitation' in itself is already highly questionable. Given that social rehabilitation intrinsically requires the cooperation and thus consent of the person involved, any assumption related to the furtherance of social rehabilitation without giving absolute priority the opinion of the person involved seems counterproductive. It seems only logical that lifting the consent requirement solely based on the presumption that a person is better off in another Member State must be complemented with strict criteria to be assessed in the transferring Member States and a possibility to appeal and/or otherwise hold the Member States accountable where a decision was taken that (clearly) goes against the best social rehabilitation-interests of the prisoners involved. Therefore, the analysis focusses on the impact of non-consented transfer of prisoners and the possible consequences of disconnecting 'consent to transfer' and 'social rehabilitation'.

2. Furthering social rehabilitation

The second central concept in this analysis is the social rehabilitation perspective. The EU Member States have emphasised the importance of furthering the social

[4] See e. g. Draft Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. DOC 6912/06 of 2.3.2006, p. 7 (hereafter Austrian Presidency 2006).

[5] *W. De Bondt* and *G. Vermeulen*, First things first: Characterising mutual recognition in criminal matters, in M. Cools (ed.), EU Criminal Justice, Financial & Economic Crime: New Perspectives 2011, Vol. 5, pp. 17-38, *H.G. Nilsson*, Mutual trust or mutual distrust,in G. De Kerchove& A. Weyembergh (eds.), La confiancemutuelledansl'espacepénaleuropéen/Mutual trust in the European criminal area 2005 pp. 29-40, *H. Satzger* and *F. Zimmermann*, From traditional models of judicial assistance to the principle of mutual recognition: new developments of the actual paradigm of the European cooperation in penal matters, in C. Bassiouni, V. Militello and H. Satzger (eds.), European Cooperation in Penal Matters: Issues and Perspectives 2008 pp. 337-361 and *A. Suominen*, The principle of mutual recognition in cooperation in criminal matters. A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States 2011.

[6] *M. Abdul-Aziz*, Transfer of prisoners: international perspective, in C. Bassiouni (ed.), International criminal law 1999 pp. 487-504 and *E. De Wree*, Internationale overbrenging van veroordeelden. De veroordeelde als subject 2011.

rehabilitation of prisoners and have awarded it a central position in the Framework Decision governing the transfers amongst them. Irrefutably, the following five examples come to testify to that. First, Rec. 9 states that enforcement of the sentence in another Member State should enhance the possibility of social rehabilitation and transferring Member States should satisfy themselves thereof before seeking cross-border execution of prison sentences. Second, Art. 3.1 stipulates that the purpose of the Framework Decision is to facilitate the social rehabilitation of the sentenced person. Third, Art. 4.2 provides that the forwarding of the certificate may take place where the competent authority of the issuing state is satisfied that the enforcement of the sentence by the executing state would serve that purpose. Fourth, Art. 4.4. allows the receiving Member State to provide a reasoned opinion that the enforcement of the sentence in its state would not serve the purpose of facilitating social rehabilitation and successful reintegration of the person into society. Fifth and final, in the certificate under letter (g) transferring/issuing Member States are to indicate that the judgement is forwarded to the executing state because the issuing authority is satisfied that the enforcement of the sentence by the executing state would serve the purpose of facilitating the social rehabilitation of the sentenced person.

Furthermore, the importance of the social rehabilitation goal and the obligation that arises from it (i.e. to only seek the cross-border execution of prison sentences where that would further the social rehabilitation of the prisoner involved), was stressed in the political debates leading up to the adoption of the instrument and the political debates on the implementation of the instrument. The political debate leading up to the adoption of the instrument reached a high in the autumn of 2006 following the proposal of the Czech Republic, Slovakia and Poland to introduce a refusal ground allowing an approached Member State to refuse a judgement if it considered that the purpose of social rehabilitation would be better pursued in the issuing state. The majority of the Member States were against the proposal. The political compromise reached by the Member States was based on the decision that rather than introducing a refusal ground, it would be better to provide for the obligation of the issuing state to only forward a judgement under the framework decision if it is satisfied that to do so will serve the purpose of facilitating social rehabilitation of the sentenced person.[7] More recently, when debating the implementation status of the Framework Decision, the European Commission has reiterated the central position of the social rehabilitation perspective.[8] It argued that when reviewing the national implementation provisions, sufficient attention should be paid to the guarantees foreseen to ensure that the Framework Decision reaches its social rehabilitation objective.

[7] Note from the Presidency to the Coreper and Council on the Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. DOC 13080/1/06 REV 1 of 29.9.2006, p. 2 (hereafter Finnish Presidency 2006).

[8] European Commission 2014 pp. 5, 7.

As a result, since November 2008, when the Framework Decision on cross-border execution of prison sentences was adopted and even more so since December 2011 when the Member States' deadline to comply with the Framework Decision passed, social rehabilitation constitutes the core of the new EU philosophy supporting the future transfer of prisoners.[9]

It is most unfortunate that – despite the central role attributed to social rehabilitation – the concept remains undefined. 'Social rehabilitation' is not included in the list of concepts defined in Art. 1 Framework Decision. In absence thereof, the definition anticipated by the European policy makers can only be deduced from contextual elements. In the explanatory memorandum to the original proposal of the Framework Decision, it is argued that the objective of social rehabilitation of the sentenced person is not served if such a person is kept in a foreign state when it is likely that he will no longer (be permitted to) remain in that state after having served the sentence. Therefore, there should be "*a duty on Member States to allow nationals, permanent residents and persons with other close links to serve their custodial sentences or detention orders on the territory of that state*".[10] Refusing to execute a foreign sentence where the execution would clearly be in the best 'social rehabilitation'-interest of the prisoner involved is inacceptable. It can be deduced that social rehabilitation entails serving a sentence in the Member State to which the person involved has some ties, for example because it is the Member State where the person will carry on with life after having served the sentence. However, no other elements can be deduced from the preparatory legal or political documents. Surely, merely having ties to the country where you are serving your prison sentence is below the anticipated EU social rehabilitation standards. In light of the lack of a common understanding in literature of what social rehabilitation should entail and how it should be translated into concrete programmes in prisons, this is problematic. The analysis will focus on the implications of the lack of a definition.

3. State responsibility issues

The third and final concept in this analysis is the state responsibility that might be linked to transferring persons from one Member State to another. The introduction of this third element is motivated by the recent case law of both the ECtHR and the CJEU. For long, it was assumed that a transfer within the European Union, based on an EU-wide obligation to transfer as found in a cooperation instrument, was unproblematic. EU countries were considered safe destination countries in which transferred persons could not encounter any problems. Recently, this assumption has been subject to considerable debate. The debate has predominantly focussed on the transfer of asylum seekers under the Dublin mechanism set up by the Member States and entailing that – in principle – asylum seekers are to be sent

[9] These can be read out from the Framework Decision.

[10] Draft Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU, The explanatory memorandum, DOC 5597/05 ADD 1 of 22.4.2005 (hereafter the explanatory memorandum).

back to the country of first entry. This transfer mechanism was set up with a view to divide the responsibility to assess asylum applications and to avoid 'asylum shopping' whereby asylum seekers could either lodge parallel asylum applications or try to undermine the asylum decision of one Member State by starting another asylum procedure in another Member State. The debate related to this transfer mechanism focussed on the state responsibility that arises when a Member State transfers an asylum seeker to another Member State where the transferring Member State could not have been unaware of the unacceptable conditions in which the asylum seekers would end up.

Thus far, the debate on this impact of this case law remains within the asylum context. However, the impact of this debate potentially stretches beyond the asylum context. After all, similar transfer mechanisms also exist in other contexts. One of those possible contexts is the transfer of prisoners using the new Framework Decision as a basis. Moreover, looking into the transfer of non-consenting prisoners is an interesting case study precisely because of the introduction of the vague concept of 'furthering social rehabilitation' and the additional impact disconnecting consent and transfer should have. Though much has been written on different aspects of that Framework Decision,[11] what has not been subject to analysis is possible state responsibility arising from unconsented transfers as detailed by the courts in the asylum case law, and thus the position of the transferring Member State in relation to transfers of non-consenting prisoners. Complex legal issues arise with respect to the extent to which a transferring Member State should bear responsibility for its transfer decision and be held accountable for the execution of its prison sentences in another Member State.

4. Research focus and structure

Combining these three concepts, this paper analyses the scope of state responsibility when transferring non-consenting prisoners to another Member State and the impact the objective to further social rehabilitation should have. In light of the links with the debate with respect to state responsibility in asylum cases, it will first be demonstrated that the case law of the courts should equally apply in transfer of prisoner cases. To that end, both transfer mechanisms will to be compared (below 2.1). Thereafter, the case law of the courts will be summarised to clarify which elements are central to state responsibility for Art. 3 ECHR violations (below 2.2). Based on that analysis, it will be assessed what the impact would be of an extension of this state responsibility to violations of the "furthering social rehabilitation"-requirement (below 3.), before providing concluding remarks (below 4.)

[11] *N. Paterson* and *G. Vermeulen*, Differences in Material Detention Conditions & Sentence Execution. A Threat To The Area Of Freedom, Security & Justice?, in L. Pauwels & G. Vermeulen (eds.), Actualiastrafrecht en criminologie 2010, Vol. 4, pp. 21-42, *M. Plachta*, EU Prisoner Transfers: creative transformation or betrayal of principles? International enforcement law reporter, 2007, 23(4) pp. 154-161, *G. Vermeulen et al.*, Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures 2011, Vol. 40.

II. State responsibility for unconsented transfers

1. Parallels between unconsenting asylum seekers and unconsenting prisoners

As the existing case law on transfer-related state responsibility relates to transfers in the context in asylum cases, the evaluation is conducted against the background of that transfer mechanism.

Handling asylum requests has gradually evolved from being an individual responsibility for each of the states to being a shared responsibility within the European Union before any form of European integration, each state was responsible to handle the asylum applications lodged with its authorities. When elaborating on the lifting of the internal borders and the establishment of an area in which checks on individuals would no longer be performed, it became clear that cooperation with respect to the examination of asylum applications was needed.[12] In 1990, the Member States had already signed the Dublin Convention, establishing a mechanism to decide which of the Member States would be responsible to examine a person's asylum application.[13] Even though in the meantime the Convention has been replaced by Regulation No 343/2003,[14] which in its turn has been replaced by Regulation No 604/2013,[15] the basic rules[16] have more or less stayed the same. Since the existing case law on state responsibility is linked to Regulation No 343/2003, that instrument will be used as a basis to elaborate on the transfer mechanism (hereafter the Regulation).

The legal framework governing the transfer of prisoners has had a similar evolution. Originally, Member States were responsible to each individually execute the sentences they had imposed themselves. However, in light of (i) the upcoming international cooperation in criminal matters,[17] (ii) the concerns for nationals incarcerated in a foreign country and (iii) the increasing awareness of the rising population of foreign prisoners,[18] states agreed that under certain conditions the

[12] *K. Hailbronner* and *C. Thiery*, Schengen II and Dublin: Responsibility for asylum applications in Europe. Common Market Law Review, 34, 1997 p. 960.

[13] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, the Dublin Convention of 1990, OJ C 254/1, 19.8.1997.

[14] Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1,25.2.2003.

[15] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6.2013.

[16] See e. g. *A.N.J. Goudappel* and *H. Raulus*, The future of asylum in the European Union. Problems, proposals and human rights 2011.

[17] *L. Gardocki*, Transfer of proceedings and transfer of prisoners as new forms of international co-operation,in A. Eserand O. Lagodny (eds.), Principles and procedures for a New Transnational Criminal Law 1992 pp. 317-324, *A.M.M. Orie*, Problems with the effective use of prisoner transfer treaties, in R. Atkins (ed.), The alleged transnational offender 1995 pp. 59-67.

[18] *M. Abdul-Aziz*, Transfer of prisoners: international perspective,in C. Bassiouni (ed.), International criminal law 1999 pp. 487 and 503, *H. Epp*, Transfer of prisoners: The European Convention, in C. Bassiouni (ed.), International Criminal Law 1999 p. 563.

cross-border execution of sentences should be possible. Early instruments to that end were adopted amongst others at the level of the Council of Europe. Under the initial Council of Europe regime found in the 1983 Convention on the Transfer of Sentenced Persons, sentenced persons may be transferred to serve the remainder of their sentence only to their state of nationality and only with their consent and that of the states involved.[19] The transfer of non-consenting prisoners was only made possible in the 1997 Additional Protocol to that Convention. Art. 2.3 and 3.1 therein, allow for the transfer of non-consenting prisoners, if the transfer takes place to respectively either the state to which the person has fled seeking to avoid the execution or further execution of the sentence in the sentencing state or the state to which the person would be transferred once he is released from prison following an expulsion or deportation order or any other measure with the same effect.[20] Though many authors have commented on the impact of the decision to allow for the transfer of non-consenting prisoners,[21] the question of state responsibility did not arise. In 2008, the EU took the initiative to extend the mechanism for the transfer of non-consenting prisoners, as a result of which a new opportunity presents itself to look into questions on state responsibility.

To be able to demonstrate the parallel between the transfer of non-consenting asylum seekers and the transfer of non-consenting prisoners, the comparability between both transfer mechanisms will be uncovered. Demonstrating that parallel is paramount to argue that the existing case law handed down not only by ECtHR but also by CJEU with respect to state responsibility in asylum cases is also applicable to transfer of prisoner cases. The transfer mechanisms can be summarized along three characteristics: (1) the development of criteria to identify the destination country, (2) the quasi-automatic character of the mechanism and (3) the unconsented character of the transfer.

a) Criteria to identify the destination country

The first characteristic of the mechanism underlying the transfer of asylum seekers is the development of criteria to identify the destination country. A series of criteria is drawn up to identify the Member State responsible to examine the asylum application. Underpinning the Dublin system to transfer asylum seekers is the identification of the Member State responsible for the examination of the asylum application with a view to realizing the one-chance-only principle.[22] To that end, criteria to identify the responsible Member State are included in the Regulation. Member States have agreed that whenever it is established on the basis of proof or circumstantial evidence that an asylum seeker has irregularly crossed the border by land, sea or air into a Member State, having come from a third country,

[19] Council of Europe Convention on the Transfer of Sentenced Persons, CETS no. 112, Strasbourg, 21.3.1983.

[20] Council of Europe Additional Protocol to the Convention on the Transfer of Sentenced Persons, CETS no. 167, Strasbourg, 18.12.1997.

[21] See e. g. *De Wree* (fn. 6).

[22] *Hailbronner* and *Thiery* (fn. 12) p. 964 and *M. Kjaerum*, The Concept of Country of First Asylum, International Journal of Refugee Law, 1992/4, pp. 514-530.

the Member State thus entered shall be responsible for examining the asylum application.[23] In practice, this means that whenever an asylum application is received, a Member State will verify whether the responsibility for the examination thereof rests with another Member State. In sum, the responsible country is identified based on the links between the asylum seeker and that country, being that it is the country via which the asylum seeker first entered the common area.

Analysis reveals that – based on a similar philosophy – a set of criteria is drawn up to identify the Member State responsible to execute the prison sentence in light of the social rehabilitation of prisoners. With the adoption of the Framework Decision, it was made explicit that the main goal underlying the cross-border execution of prison sentences ought to be the furtherance of the social rehabilitation of the prisoners.[24] To justify this objective, it was argued in the explanatory memorandum to the original proposal that a duty lies on each of the Member States to allow nationals, permanent residents and persons with other close links to serve their custodial sentences or detention orders on the territory of that State.[25] In light thereof, the Framework Decision is built on the presumption that social rehabilitation can better be achieved either the Member State of nationality of the sentenced person in which he lives or the Member State of nationality, to which, while not being the Member State where he lives, the sentenced person will be deported, once he is released from the enforcement of the sentence.[26] Member States have agreed that whenever it is established that either of the criteria apply, the Member State thus identified, shall be responsible for the execution of the sentence. From that perspective the criteria listed in Art. 4.1. a) and b) Framework Decision governing the identification of the state that ought to be considered responsible for the execution of the sentence are of the same nature as the criteria listed in Art. 10 and following of the Regulation that also govern the identification of the state that ought to be considered responsible for the examination of the application. Here too, the responsible country is identified based on the links between the person involved and that country.

The fact that the criteria themselves are different (country of first entry vs country of nationality), does not influence the analysis. The essential characteristic is that based on a predefined set of criteria the responsible country is identified.

b) Quasi-automatic transfer mechanism

The second characteristic of the mechanism underlying the transfer of asylum seekers is the quasi-automatic character of the transfer to the responsible country. Upon the identification of the Member State responsible to handle the asylum application, that Member State will be notified thereof. Accepting responsibility – after being contacted in accordance with the Dublin rules for being identified as

[23] Art. 10.1 Regulation.
[24] Art. 3.1 Framework Decision
[25] The explanatory memorandum.
[26] Art 4.1 a) and b) Framework Decision.

the country responsible to examine the application –is often done silently. Subsequently, the asylum seeker involved will be notified not only of the fact that the application will not be dealt with in the state where it was lodged but also of the fact that an agreement exists between Member States to transfer the asylum seeker to the responsible Member State.[27] Even though the transfer is characterized as obligatory in some articles of the Regulation, elsewhere the Regulation makes clear that even where it is established that another Member State is responsible for the examination of the asylum application, by way of derogation, any Member State retains the competence to examine an application for asylum lodged with its authorities, even if it is not its responsibility.[28] This clause is commonly referred to as the sovereignty-clause.[29] Though in practice the Dublin system is essentially an export-system to transfer asylum seekers to the responsible Member State with a view of having the examination of the application conducted in that Member State, the so-called sovereignty clause allows for derogation. Either using, or not, the possibility to derogate from the export-system is the sole prerogative of the initiating Member State. Therefore, transfer is not obligatory and automatic, but subject to Member State discretion and therefore better characterized as *quasi*-automatic, i. e. not dependent on anything else but the decision of the initiating Member State. This derogation option is an important element when looking into state responsibility for a transfer decision. After all, having the option to derogate and not use it, adds to the moral responsibility for the transfer.

Analysis reveals that a similar quasi-automatic transfer mechanism is introduced with respect to the transfer of the prisoners. Upon the identification of the Member State responsible pursuant to Art. 4.1 a) or b) Framework Decision, a transfer is possible. In practice, here too, the transfer mechanism will be *quasi*-automatic. Having identified prisoners eligible for transfer and respectively the Member States responsible for the execution of the sentences, it will be up to the initiating Member State to decide whether or not the transfer will take place. Unlike the Dublin provisions governing the transfer of asylum seekers, the provisions governing the transfer of prisoners do not hold an explicit sovereignty clause in which it is stipulated that the Member State involved retains the right to execute the prison sentence itself. In this context such a right is self-evident. Art. 4.1. stipulates in which circumstances a Member State *may* initiate cross-border execution, excluding an interpretation that would suggest obligatory transfer. Either or not using the possibility to transfer is the sole prerogative of the initiating Member State. Furthermore, the obligation to satisfy itself of the social rehabilitation prospects in another Member Stated too, is an important element to counter an interpretation that would consider the transfer to be automatic. To the contrary, it could even be argued that due to the need to look into the effect of the transfer (which cannot be found in the asylum instruments), the responsibility of the Member State for a

[27] Art 19.1 Regulation.
[28] Art 3.2 Regulation.
[29] M.S. S. v Belgium and Greece, § 339.

transfer is potentially bigger when compared to the responsibility in asylum cases. Therefore, transfer is not obligatory and automatic, but subject to Member State discretion and therefore better characterized as *quasi*-automatic, i. e. not dependent on anything else but the decision of the initiating Member State.

c) Unconsented transfers

The third characteristic of the mechanism underlying the transfer of asylum seekers is the unconsented character of the transfers. The transfer is not dependent on the consent of the asylum seeker involved. Should the asylum seeker disagree with the transfer decision, ex post appeal or review is possible, but that will not suspend the implementation of the transfer.[30]

What sparked the analysis underlying this paper, is precisely the similarity between the unconsented transfer mechanism is introduced with respect to the transfer of the prisoners and the existing unconsented transfer mechanism introduced with respect to the transfer of asylum seekers. Art 4.1. a) and b) juncto Art 6.2. c) Framework Decision stipulate that the consent of the prisoner is not required when the transfer is done to the Member State of nationality of the sentenced person in which he lives or the Member State of nationality, to which, while not being the Member State where he lives, the sentenced person will be deported, once released from prison on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment.[31] Though the transfers take place without the consent of the prisoner involved, the prisoner will be allowed the opportunity to state ex ante his or her opinion on the transfer either orally or in writing.[32] Different from the legal framework governing the transfer of asylum seekers, the Framework Decision does not include a formal ex post appeal or review procedure based on the Framework Decision. In this context too, the ECtHR has clarified that ex post appeal has no suspending effect. Moreover, the ECtHR has even not questioned the continued imprisonment of the transferred persons although the applicants allege that that would be contrary to their Art. 3 ECHR rights.[33]

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[30] Art. 19.2 Regulation. It may be added that appeal will not suspend the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this. However, since the analysis underlying the paper focusses on the provisions at EU level, the specificities of the national provisions are not included in the analysis.

[31] It may be added that consent is equally unnecessary when transfer is done based on Art. 4.1 c) juncto Art. 6.2 c) Framework Decision to any other Member State to which he has fled or otherwise returned. The distinction between this scenario and the scenarios in Art 4.1. a) and b) is interesting as this type of the transfer requires the consent of the executing Member State, and may result in the conclusion that the responsibility for the transfer of the non-consenting prisoner involved, is split over both the sending and the receiving Member State. However, because in this scenario, the line of argumentation on the possible responsibility of the transferring Member State is entirely similar to the line of argumentation in the other two scenarios, the article will not go into this scenario, which would unnecessarily complicate the reasoning.

[32] Art. 6.3 Framework Decision.

[33] See e. g. Altosaar v Finland, ECtHR no. 9764/03, 14 June 2004, Willcox v United Kingdom, ECtHR no. 43759/10, 8 January 2013.

d) Conclusion

From the brief elaboration on the transfer mechanisms, the parallels become apparent. The mechanism underlying the transfer of prisoners without the consent of the receiving Member State mirrors the mechanism underlying the transfer of asylum seekers. Both systems work with criteria for the identification of the responsible Member State, opening the door to a possible transfer. A Member State may always decide to either examine the asylum application itself or execute the sentence itself, as a result of which the transfer can be characterized as *quasi*-automatic.

The comparison established that the mechanisms underlying the transfer of either non-consenting asylum seekers or non-consenting prisoners are largely similar and entail similarities and minor differences. The hypothesis underlying the analysis and tested in the following sections is that the mechanisms are similar enough so that where the European courts have argued that state responsibility exists for the transfer of non-consenting asylum seekers under the Dublin mechanism, it is reasonable to assume that the European courts will uphold similar standards to assess state responsibility for the transfer of non-consenting prisoners.

Given that the legal framework governing the transfer of non-consenting prisoners does not provide an appeal or review procedure, the analysis of the state responsibility when transferring non-consenting asylum seekers must take due account of the extent to which it was deemed relevant that appeal and review are provided for in the legal framework governing the transfer of non-consenting asylum seekers.

2. State responsibility for torture and inhumane treatment

Having demonstrated the similarity between the mechanisms, it is fair to assume similarity in the application of the reasoning behind state responsibility for Art. 3 ECHR violations in another Member State, especially since the occurrence of those violations is not limited to asylum cases where the ECtHR and ECJ case law exists, but can also emerge in cases related to the transfer of prisoners.

With respect to the transfer of non-consenting asylum seekers, both the ECtHR as well as the CJEU have decided that regardless of the introduction of criteria to identify the responsible Member State and a *quasi*-automatic transferring mechanism, Member States will be held responsible should the transfer leave the prisoner involved in *'poor conditions'* in the receiving Member State. State responsibility is linked to the justiciable right not to be subjected to torture or inhuman treatment as found in Art. 3 ECHR. It is generally accepted that states can be held responsible even for the poor conditions in which an asylum seekers find themselves in the receiving Member State following an unconsented transfer, when those conditions amount to Art. 3 ECHR violations. Existing case law of both the ECtHR as well as the CJEU focuses predominantly on the material detention conditions to which asylum seekers are exposed in the receiving Member State.[34] Two cases are

[34] *M. Provera*, The Detention of Asylum Seekers in the European Union and Australia: A Comparative Analysis 2013.

particularly noteworthy for they explicitly reflect on the established case law, being the above mentioned *M.S. S. vs Belgium and Greece*-case of the European Court of Human Rights and the *N.S. vs United Kingdom*-case of the Court of Justice of the European Union.[35] In both cases, the asylum seekers lodged a complaint against the state responsible for their transfer to Greece, arguing that the conditions to which they were exposed after their transfer amounted to inhuman and degrading treatment within the meaning of the Charter, for which the sending state should bear (co-)responsibility.

Torture and inhuman or degrading treatment or punishment are prohibited by Art. 3 ECHR, constituting one of the most fundamental values of democratic societies. The prohibition is absolute, i. e. irrespective of the circumstances and of the victim's conduct.[36] Over the years, the ECtHR has specified in its case law which circumstances would amount to a violation of Art. 3 ECHR. Reference can be made to not being allowed e. g. to go outdoors, to make a telephone call, to have clean sheets and sufficient hygiene products[37] or to access any recreational activities.[38]

The question arose whether a Member State applying the Dublin mechanism, is responsible to assess whether the Member State identified as responsible for the examination of the asylum application, complies with its international obligations in matters of asylum and human rights. The ECtHR has continuously reiterated that expulsion of an asylum seeker may indeed give rise to an issue under Article 3 ECHR, and hence engage the responsibility of that state.[39] The CJEU has recently come to the same conclusion.[40] This section will elaborate on the scope of state responsibility detailed in the courts' case law when transferring non-consenting asylum seekers to demonstrate what the scope of state responsibility entails when transferring non-consenting prisoners. The argumentation in the case law of both courts can be summarised into a three-step reasoning: (1) allowing an assumption, (2) provided that it is rebuttable and the burden of which is not left solely with the applicant and (3) demonstrating substantial grounds for systematic deficiencies not minor infringements.

a) Assumption of compliance

Though state responsibility is traditionally linked to the duty to investigate, the case law derogates from that general principle and allows for the use of an assumption of compliance. Traditionally, States are required to assess whether a real risk exists that a person is exposed to violations of fundamental human rights in the receiving state.[41] In contrast to the generally accepted duty to investigate, the CJEU

[35] N.S. v United Kingdom, CJEU case C-411/10, 21 December 2011.
[36] At § 218.
[37] S.D. v. Greece, ECtHR no 53541/07, §§ 49-54, 11 June 2009.
[38] Tabesh v. Greece, ECtHR no 8256/07, §§ 38-44, 26 November 2009.
[39] At § 365.
[40] N.S. v United Kingdom, CJEU case C-411/10, § 78-80, 21 December 2011.
[41] *E. C. Gillard*, There's no place like home: states' obligations in relation to transfers of persons, International Review of the Red Cross, 2008, 90(871) p. 737.

has ruled that as a starting point" *it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR"*.[42] In doing so, the court supports the basic assumption of compliance included in Rec. 2 of the Regulation that all Member States are considered to be safe countries for third-country nationals. Thereby, the court effectively lifts the duty to investigate. That ruling is based on a double line of argumentation: firstly, the raison d'être of the European Union and the creation of the area of freedom, security and justice which is necessarily based on mutual trust and the presumption of compliance and secondly, the existence of international and European human rights standards and standards concerning the treatment of asylum seekers in support of that trust and presumption.[43] Any other assumption would undermine the functioning of the area of freedom, security and justice of the European Union.

When reviewing that double line of argumentation against the background of the transfer of prisoners, it must be concluded that the assumption of compliance is mutatis mutandis also valid in the context of transferring non-consenting prisoners. Firstly, similar international and European standards on the treatment of prisoners exist. Secondly, the transfer of prisoners is also part of the creation of an area of freedom, security and justice based on the mutual trust underlying the mutual recognition principle. Furthermore, the CJEU has even repeated the justifiability of such an assumption in its case law related to the use of the European Arrest Warrant to surrender persons from one Member State to another. In its I. B. case, the CJEU stated that *"given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters"*.[44]

It can be concluded that – in light of state responsibility for Art. 3 violations – a similar assumption of compliance will apply.

b) Rebuttable assumption

The assumption of compliance is not the end point in the reasoning of the courts. Even a justifiable assumption of compliance must be rebuttable based on information with respect to the law and practice in another Member State. Notwithstanding the acceptance of an assumption of compliance, it is not inconceivable that in some Member States asylum seekers are treated in a manner incompatible with their fundamental rights.[45] The CJEU has rightly argued that given the existence of unanimous reports of international non-governmental organisations, correspondence sent by the United Nations High Commissioner for Refugees and the Commission reports on the evaluation of the Dublin system, existing ongoing problems are known to the Member States.[46] The transfer of an

[42] At § 78-80.
[43] At § 83.
[44] I.B., CJEU case C-306/09, § 44, 21 October 2010.
[45] At § 81.
[46] At § 92.

asylum seeker is therefore not allowed where – based on available information – a transferring Member State *"cannot be unaware that systematic deficiencies in the asylum procedure and the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter [of Fundamental Rights of the European Union]"*.[47] In that situation the assumption is effectively rebutted by the information available to the initiating Member State.

In its case law, the ECtHR has clearly stated that the burden to rebut the assumption should not rest entirely on the applicant if considerable information on the problematic character of another Member State's asylum system is available. It has argued that when numerous reports and materials are available detailing the deficiencies in the system of another Member State, the application of the Dublin rule cannot avoid Member State responsibility.[48] The Member State is responsible to take account of the information readily available to assess to what extent the assumption of compliance should be rebutted in an individual case.

It can be concluded that – in light of state responsibility for Art. 3 violations – a similar rebuttability-requirement applies. There is no reason to assume that the court rulings would be different in cases concerning the transfer of non-consenting prisoners. This reasoning should mutatis mutandis also apply in the context of transferring non-consenting prisoners. Given that equally as much (if not more) information is available specifically on the prison conditions of the Member States, it is safe to say that this exception to the assumption should also prevent the transfer of prisoners and give way as state responsibility should transfer take place anyhow. States can be held responsible if they could not have been unaware of the conditions in the receiving Member State.

c) Substantial grounds for systematic deficiencies

As a final step in the reasoning, the courts explain which substantive information should effectively block an unconsented transfer. It is clarified that only information on substantial grounds for systematic deficiencies prevents the transfer of an asylum seeker. The ECtHR has ruled that states may be held responsible where substantial grounds are available for believing that the person concerned faces a real risk of being subject to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, States are obliged to refrain from expelling an individual to that country.[49] The CJEU has argued that it would not be compatible with the aims of the Regulation were the slightest infringements would be sufficient to prevent the transfer of an asylum seeker to the Member State that is primary responsible for the examination of the asylum request.[50] Allowing minor infringements to stand in the way of a transfer would "*endanger the realisation of the*

[47] N.S. v United Kingdom at § 94 see also *A. Suominen*, Grundläggande rättigheter och straffrättsligt samarbete, Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) 1-2/2014, pp. 22-54.

[48] M.S. S. v Belgium and Greece§ 347-352.

[49] At § 365.

[50] N.S. v United Kingdom, § 84.

objective of quickly designating the Member State responsible for examining the asylum claim lodged in the European Union".[51] By contrast, only substantial grounds for believing that there are systematic flaws in the Member State's system, should prevent a transfer. The CJEU has continued down the same path in the fairly recent Abdullahi-case where it has stated that *"the only way in which the applicant for asylum can call into question to choice of that criterion is by pleading systematic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter [of Fundamental Rights of the European Union]"*.[52] It is important to note that existence of domestic laws, accession to international treaties and/or diplomatic assurances in themselves are not sufficient to ensure adequate protection against the risk of ill-treatment[53] and are therefore insufficient to escape state responsibility. Given that the rationale underlying the transfer of prisoners is equally based on the quick designation of the Member State that should be responsible for the execution of the sentence, it is safe to say that only substantial grounds for believing that there are systematic flaws in the Member States' sentence execution system, should prevent a transfer.

It can be concluded that – in light of state responsibility for Art. 3 violations – a similar severity standard applies. The analysis of the case law elaborating on the state responsibility when the detention conditions of non-consenting asylum seekers in the receiving Member State are contrary to the Article 3 standard, can be used to formulate what state responsibility when transferring non-consenting prisoners is assumed to look like. *"State responsibility for the transfer of non-consenting prisoners will be dependent on the taking into account of the vast amount of information on the prison detention conditions in other Member States with a view to rebut where appropriate the assumption of compliance in the event there are substantial grounds for systematic deficiencies in the prison systems of other Member States. The Member States have an obligation to obtain such information themselves and may not rely on the prisoner to bring it to their attention."*

III. State responsibility for not furthering social rehabilitation?

Given the strong emphasis on the self-imposed obligation to use transfers of non-consenting prisoners only to further their social rehabilitation, the question arises whether a mirroring state responsibility mechanism should be applicable for violations of the "furthering social rehabilitation"-requirement. As elaborated upon in the introduction, it is irrefutable that the social rehabilitation objective is awarded a central position in the Framework Decision. Reference can be made not only to the wording of the text itself,[54] but also to the opinions voiced in the debates

[51] At § 85.
[52] Abdullahi, CJEU case C-394/12, § 60, 10 December 2013.
[53] M.S. S. v Belgium and Greece§ 353-354.
[54] See e. g. recital 9, Art. 3.1, Art.4.2, Art 4.4.Framework Decision and point g) in the annexed certificate.

leading up to the adoption of the instrument[55] as well as in the debates governing the review of the national implementation legislation. It is consistently made very clear that an obligation rests on Member States to only forward a judgement under the framework decision when being satisfied that to do so will serve the purpose of facilitating social rehabilitation of the sentenced person.[56]

However, in spite of the importance attached to only using the instrument to further social rehabilitation, the European legislator has failed to introduce a subjective right to only be subjected to unconsented transfer if that would further the person's social rehabilitation. As it stands, "furthering social rehabilitation" is not a justiciable right for the person involved. Given the strong emphasis on the importance of social rehabilitation, the abandonment of the consent of the person involved and the worrying argumentation found in literature that the Framework Decision will be used as an export mechanism not taking account of the social rehabilitation perspectives of the persons involved,[57] it can be argued that there is ample reason to introduce a control mechanism, be it or not in the form of a legal remedy for the person involved.

In order to evaluate the feasibility of introducing a mirroring state responsibility mechanism, the question arises to what extent the three-step reasoning – (1) allowing an assumption, (2) provided that it is rebuttable and the burden of which is not left solely with the applicant, (3) demonstrating substantial grounds for systematic deficiencies not minor infringements – can also be used in this context and whether other legal/practical problems would arise. Analysis revealed that the feasibility is hindered in three ways: first, the criteria underpinning the acceptance of an assumption of compliance with Art. 3 ECHR are not present with respect to the compliance with the social rehabilitation requirement (below 3.1.), second, even if an assumption of compliance could be derived from the provisions in the legal framework, the lack of a clear definition and common understanding of what constitutes social rehabilitation, let alone furthering social rehabilitation would be problematic (below 3.2.), third, even if there would be a definition and common understanding of what constitutes (furthering) social rehabilitation, too little information is available about the situations in prisons across the EU to satisfy the furthering effect a transfer would have on the person's social rehabilitation.

1. Assumption of compliance?

First, to be able to apply the same three-step state responsibility reasoning, it should be assessed whether there is a will to introduce an assumption of compliance to lift the duty to investigate. To that end, the phrasing of the provisions on social rehabilitation in the adopted instrument and the opinions voiced during the

[55] See e. g. the 2006 proposal of the Czech Republic, Slovakia and Poland to introduce a social rehabilitation related refusal ground.

[56] Austrian Presidency 2006, the Framework Decision and the Finnish Presidency 2006 p. 2.

[57] *D. Van Zyl Smith* and *J.R. Spencer*, The European Dimension to the Release of Sentenced Prisoners, in N. Padfield (ed.), Release from Prison: European Policy and Practice Routledge 2010 p. 43. This comment has also been made in light of the transfer practice of the United States, see e.g. *C. Bassiouni*, United States Policies and Practices on Execution of Foreign Sentences, in C. Bassiouni (ed.), International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms 2008, Vol. 2 p. 588.

political debates in the months leading up to the adoption of the instrument should be reviewed. On the one hand, the duty vested in the transferring Member State to satisfy itself that any transfer would further the social rehabilitation of the prisoner involved, is a clear argument against the will to introduce an assumption. If anything, that is an explicit reminder of the duty to investigate. On the other hand, the duty to ascertain itself that a transfer furthers social rehabilitation is implicitly limited to variables governing the relation between the prisoner and the receiving Member State. That implicit limitation might be interpreted to suggest that the legislator wanted to introduce an assumption that any other variables, such as the variables related to the specificities of the social rehabilitation programmes available in prison, are assumed to be sufficiently comparable between the different Member States to lift the duty to investigate those aspects. The existence of a will, therefore, to introduce an assumption of equal compliance is not conclusive.

Additionally, it should be assessed whether that assumption finds justification in the existence of international and European instruments holding social rehabilitation standards. Analysis reveals that though there are multiple instruments referring to a duty to pursue social rehabilitation of prisoners, the instruments are not binding upon the Member States and either only include an implicit reference to social rehabilitation or are unclear about the meaning of and difference (if any) between social rehabilitation and reintegration of prisoners. The first international instrument implicitly referring to the social rehabilitation goal is the 1957 United Nations Standard Minimum Rules for the Treatment of Prisoners. Rule 58 clarifies that society can only really be protected against crime "*if the period of imprisonment is used to ensure that upon his return to society, the offender is not only willing but also able to lead a law-abiding and self-supporting life*". In the same sense, Art. 10(3) of the 1966 International Covenant on Civil and Political Rights stipulates that *"the penitentiary system shall comprise treatment of prisoners"* and that the aim of that treatment *"shall be their reformation and social rehabilitation"*. The Human Rights Committee has further stressed that penitentiary systems should not be solely retributory, but that it is essential to seek reformation and social rehabilitation, an argument that is also commonly found in academic literature.[58] Specifically relevant in a European context are the 2006 European Prison Rules. Recital 4 provides as a general base line that prison conditions should be ensured which do not infringe human dignity and which offer meaningful occupational activities and treatment programs to inmates, thus preparing them for their reintegration into society. Rule 17.1 states that prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation. Rule 72.3 holds that the duty of prison staff goes beyond those required of mere guards and shall take account of the need to facilitate the reintegration of prisoners into society after their sentence has been completed through a programme of positive care and assistance. Finally, rule 83.b refers to the duty to ensure proper co-ordination of all the departments, both inside and outside the prison, that provide services for prison-

[58] A. Duff, Punishment, Communication and Community 2001 p. 4 and *G. Vermeulen* and *E. De Wree*, Offender reintegration and rehabilitation as a component of international criminal justice 2014 p. 72.

ers, in particular with respect to the care and reintegration of prisoners.[59] Those references are included in non-binding instruments and the exact interpretation of what constitutes social rehabilitation of prisoners or a programme of positive care and assistance is not further elaborated on. As such, no standards on social rehabilitation exist. No case law exists to help with that interpretation, unlike the vast amount of case law to help interpret the ECHR and other prison standards.

Given the weaknesses in both lines of argumentation, it is rather questionable whether the courts will mirror their decision to allow the introduction of an assumption of compliance lifting the more traditional duty to investigate. More fundamentally, even an accepted assumption of compliance with internationally accepted social rehabilitation requirements would not be sufficient to counter state responsibility in this specific context. After all, the obligation to satisfy oneself that transfer would *further* social rehabilitation introduces a more stringent responsibility. Even an uncontested demonstration of compliance in itself will not be sufficient to argue that state responsibility should be discarded. The required *furtherance* of social rehabilitation always requires an investigation substantiating why social rehabilitation can be better ensured in a prison in the receiving Member State.

2. Criteria for the investigation?

Second, underpinning an argumentation substantiating the furtherance of social rehabilitation, is the existence of a common understanding of the meaning of social rehabilitation and which criteria would need to be assessed to satisfy that a transfer would further a person's social rehabilitation. Only such a common understanding will allow the Member State involved, the prisoner involved and possibly the court involved, to assess the impact of the transfer on the prisoner's social rehabilitation and decide on its furthering effects. Notwithstanding the absence of a pre-existing legal definition, neither the preparatory works nor the final provisions of the Framework Decision provide for a definition for social rehabilitation. In the explanatory memorandum to the original proposal, it is stipulated that the opportunity for social contact with relatives and friends helps prepare the sentenced person for a return to the community,[60] suggesting not only that social rehabilitation consists of preparing the sentenced person for a return to the community, but also that proximity to relatives and friends is vital. Rec. 9 of the Framework Decision directs Member States to consider family, linguistic, cultural, social or economic and other links. The appreciation of whether or not a transfer would further a person's social rehabilitation is thus limited to a review of variables governing the links between the Member State and the prisoner. A limitation like that can only be justified in one of two ways. Either social rehabilitation is limited to being imprisoned in a Member State to which a prisoner has family, linguistic, cultural, social or economic and other links, or though social rehabilitation is dependent on far more variables that extend

[59] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

[60] The explanatory memorandum p. 5.

beyond the links between the Member State and the prisoner involved, the social rehabilitation programmes offered in the various Member State are sufficiently similar to argue that the programme related variables would not impact on the social rehabilitation possibilities of the prisoner involved, leaving only the links-related variables. The validity of either of those justifications can only be tested if a common understanding on the meaning of social rehabilitation can be found to be able to deduce the programme related social rehabilitation variables and empirically demonstrate the justifiability of an assumption of comparability and in doing so demonstrate the irrelevance of those variables when a Member State seeks to assess whether a transfer would further social rehabilitation.

Offender rehabilitation has been subject to significant debate in scholarly literature. Antisocial behaviour is said to be the result of various socio-cognitive deficits that impair the capacity to deal with everyday problems.[61] The rehabilitative ideal can be best described as the treatment to change the character, attitude and behaviour of offenders, to strengthen the social defence against unwanted behaviour and make prisoners law-abiding citizens when they return to society.[62] The idea that rehabilitation can be reached through isolation, silent reflection, hard labour and/or physical discipline is outdated.[63] To date, there is no common understanding of desistance and rehabilitation theories, and hence no common understanding of what a social rehabilitation programme should comprise. The current situation is one of paradigm conflicts.[64] Some authors defend the PIC-R model which focusses on Personal, Interpersonal and Community Reinforcement, whereas other authors defend the GLM, the Good Lives Model.[65] The central question is how and why people change. Regardless of the model defended, to achieve cognitive transformation, reference is made to education programmes and vocational training programmes,[66] to psychological, psychological programs and

[61] *A. Day*, Offender Rehabilitation: Current Problems and Ethically Informed Approaches to Intervention, Ethics and Social Welfare, 5(4), 2011 p. 349, *M. McMurran et al.*, Stop & Think! Social Problem-solving Therapy with Personality-disordered Offenders, Criminal Behaviour and Mental Health, 11, 2001 p. 275 and *R. R. Ross* and *E. A. Fabiano*, Time to think: A cognitive model of delinquency prevention and offender rehabilitation, 1985.

[62] *F. Cullen* and *K. Gilbert*, Reaffirming Rehabilitation 2011 p. 21, *Duff* (fn. 58) p. 5, *R. McLennan*, The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 2008 pp. 1776–1941 and *M. Phelps*, Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U. S. Prison Programs, Law & Society Review, 45(1), 2013 p. 34.

[63] *N. Morris* and *D. Rothman*, The Oxford History of the Prison: The Practice of Punishment in Western Society 1995.

[64] *G. Bernfeld*, *D. P. Farrington* and *A. Leschied*, Offender rehabilitation in practice 2001, *E. De Wree*, *T. Vander Beken* and *G. Vermeulen*, The transfer of sentenced persons in Europe: much ado about reintegration. Punishment and Society, 11(1), 2009 p. 114 and *F. McNeill*, Four forms of 'offender' rehabilitation: towards an interdisciplinary perspective. Legal and Criminological Psychology, 17(1), 2012 pp. 18-36.

[65] *D. A. Andrews*, *J. Bonta* and *J. Wormith*, The Risk-Need Responsivity model: Does the Good Lives Model contribute to effective crime prevention?, in Criminal Justice and Behaviour, 38, 2011 pp. 735-755, *A. Day*, *T. Ward* and *L. Shirley*, Reintegration Services for Long-term Dangerous Prisoners: A Case Study and Discussion, in Journal of Offender Rehabilitation, 50, 2011 pp. 66-80 and *T. Ward* and *S. Manura*, Rehabilitation 2007.

[66] *J. Cid*, The penitentiary system in Spain: the use of imprisonment, living conditions and rehabilitation. Punishment and Society, 7(2), 2005 p. 156; *M. Lynch*, Rehabilitation as Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practices. Punishment and Society(2), 2000 p. 45, *R. Martinson*, What Works? Questions and Answers About Prison Reform, on Public Interest, 35, 1974 pp. 22-53, Phelps (fn. 62) p. 42 and *E. Rotman*, Beyond punishment, in A. Duff & D. Garland (eds.), A reader on punishment 1994 pp. 281-306. Oxford: Oxford University Press, p. 286.

medical treatment[67] which could include pharmacological treatment of prisoners[68] and drug treatment programs,[69] programmes teaching inmates how to productively use social and leisure time,[70] but also house placement assistance and half-way houses[71] and various services directed to meeting the imprisoned offender's intellectual, social and spiritual needs.[72]

It should be concluded that in the absence of a common understanding of what a social rehabilitation programme should comprise, it is impossible to provide empirical evidence of the comparability of the programmes to justify the limitation of the duty to investigate to variables related only to the links between the prisoner and the receiving Member State. Therefore, even though the Framework Decision implicitly limits the duty to investigate to variables such as family, linguistic, cultural, social or economic and other links, arguing a furtherance of social rehabilitation based solely on those variables will be insufficient to escape state responsibility should the situation in the receiving Member State lead to the conclusion that the transfer clearly went against the best social rehabilitation interests of the prisoner involved.

3. Limited availability of information

A first hurdle would be the availability of information on foreign social rehabilitation programmes. Whereas the case law on state responsibility with respect to the material detention conditions in the receiving Member States is quite stringent for the Member States involved, that stringency is based on the level of information that is available to conduct an assessment. As repeatedly mentioned in the case law, a vast amount of standards with respect to the material detention conditions exists and the situations in the Member States are well-documented. Various NGOs such as Human Rights Watch and Amnesty International issue regular reports on prison conditions and the international standards are complemented with peer-evaluation mechanisms.[73] No such reports or peer-evaluation mechanisms are available to provide information specifically on the social rehabilitation programmes. An investigation into the extent to which transfer would further the social rehabilitation of the prisoner involved, would require the gathering of independent and reliable information for each specific case.

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[67] *Cid* (fn. 66) p. 156; *Rotman* (fn. 66) p. 286.
[68] *Martinson* (fn. 66) pp. 22-53.
[69] *Cid* (fn. 66) p. 157; *Lynch* (fn. 66) p. 45; *Phelps* (fn. 62) p. 42.
[70] *D. Clemmer*, The Prison Community 1940.
[71] *Lynch* (fn. 66) p. 45; *Phelps (fn. 62)* p. 42.
[72] *Rotman* (fn. 66) p. 286.
[73] See e. g.: the reports drawn up by human rights watch on issues related to prison conditions (https://www.hrw.org/sitesearch/prison%20conditions); the country reports drawn up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (http://www.cpt.coe.int/en/); the country reports drawn up by the European Prison Obervatory that analyses the present conditions of the national prison systems in Europe, underlining their peculiarities and weaknesses, and comparing these conditions to the international norms and standards relevant for the protections of inmates' fundamental rights (http://www.prisonobservatory.org/); the expertice compiled by organsiations such as penal reform international (http://www.penalreform.org/priorities/prison-conditions/key-facts/).

4. Diversity throughout prisons within one Member State

A second hurdle would be deciding which prison to target when gathering that information. Rehabilitation programmes may differ across prisons in the receiving Member State, as a result of which a solid investigation into the furtherance of the social rehabilitation of the prisoner involved would require knowledge of the prison where the prisoner would ultimately serve his sentence. Identification of the prison where the sentence would be served is, however, not possible. Not only is this a hurdle in relation to transferring non-consenting prisoners, it is a hurdle encountered when transferring consenting prisoners, too. After all, how can a prisoner consent to being transferred if no information is available on the prison to which he will be transferred? From the perspective of looking into the furtherance of social rehabilitation, it is interesting to add that not only the prison in which the sentence would be served in the receiving state is unclear. In addition, the prison in which the sentence would be served in the sentencing state could be subject to change. Transfer of a prisoner need not necessarily be to a prison in another Member State. Transfer of prisoners also occurs within one Member State, amongst other reasons, for capacity and security. Therefore, the comparison between the social rehabilitation perspective not only suffers from an unidentified prison on the possibly receiving Member State but also suffers from an instability of the prison in the possibly transferring Member State. Though in theory it sounds good to have a Member State look into the social rehabilitation context and require it to substantiate that a transfer would further a person's social rehabilitation, in practice it is impossible to substantiate that.

It seems only possible to jump those hurdles turning back to the state responsibility test found in the case law reviewed in this analysis and seek to introduce a '*rebuttable assumption of compliance*'-like mechanism. That mechanism will only stand, if there is a clear will to introduce an assumption, standards to justify that assumption and sufficient information to rebut the assumption in an individual case. The only way to come out of the deadlock is to find a common understanding of what a social rehabilitation programme should look like, draft legally binding standards accordingly, and set up a peer-evaluation or other mechanism to guarantee the availability of information to document the situation in the different prisons of the Member States. Instead of providing the legal obligation for Member States to ascertain themselves that transfer would further social rehabilitation, it would be better to introduce an assumption of better social rehabilitation. Better social rehabilitation would be dependent on (1) compliance with the standards for which a rebuttable assumption would be introduced and (2) demonstrating that the receiving Member State is better placed to ensure social rehabilitation because of the links between the prisoner involved and the receiving Member State. The equation would be: adhering to the standards + family, linguistic, cultural, social or economic and other links = better social rehabilitation.

Allowing a transfer to take place as soon as a set of standards are met and links with the receiving Member State established, is less stringent than requiring a

Member State to demonstrate that a transfer would further a prisoners social rehabilitation without any further instructions so as to how that furtherance should be interpreted. Opting for a less stringent regime would also mitigate the so-called Azerbaijan-paradox that is the inevitable consequence of the introduction of the Framework Decision. The Azerbaijan-paradox is used to illustrate that – even though Member States aimed at facilitating transfers amongst their smaller group – transferring a prisoner to another EU Member State may prove to be more challenging than transferring a prisoner to another Council of Europe State, because of the introduction of all sorts of standards and requirements. It is not inconceivable that the introduction of the social rehabilitation philosophy would hinder a transfer from one Member State to another Member State, where a transfer to a Council of Europe state using the 1983 Convention as a legal basis would still be possible, in spite of clear knowledge that the social rehabilitation of the prisoner involved would suffer from it. From a policy perspective, such an evolution would be inconsistent.

Should the EU want to pursue the option to introduce binding standards to accommodate problems with state responsibility following transfers, the question arises what the appropriate legal basis (if any) for such standards would be. Art. 82.2 (b) of the Treaty on the Functioning of the European Union allows for the adoption of minimum standards with respect to the rights of individuals in criminal procedure and Art. 82.2(d) of that Treaty refers to other aspects of criminal procedure. In light thereof, the question arises whether social rehabilitation standards, which could be seen as an individual's rights during sentence execution, fall within the scope of criminal procedure. Though traditionally, the scope of 'criminal procedure' is limited to the investigation and prosecution of crimes, the broad interpretation of the Treaty provisions when used as the legal basis of other legal instruments suggest that an interpretation to include sentence execution rules need not be rejected *per se*. Some might argue that the way out would be the adoption of a social rehabilitation convention, which – based on the known problems experience with the ratification and implementation thereof – would not be a suitable alternative. Others might argue that social rehabilitation standards fall outside the EUs competence altogether.

IV. Conclusion: a hurdle too big to jump?

The transfer of prisoners has been high on the European political agenda for many years. For years, the EU has sought to take a next step in the European integration process and to further develop cooperation amongst the Member States and at the same time refine the underlying philosophy. That double aim resembles from the positioning of social rehabilitation in the Framework Decision. It resembles both the enhanced stringency in the cooperation between Member States limiting the Member States' possibility to refuse a transfer as well as the refined underlying philosophy stressing the importance of providing a long term post-sentence perspective for prisoners. In other words, with a view to furthering social

rehabilitation of the prisoners involved, neither the consent of the receiving Member State, nor that of the transferred prisoner, is necessary. It is the sole prerogative of the sentencing state either to start a transfer procedure, or not. Notwithstanding the undoubted good intensions of the European legislator, the introduction of enhanced stringency based on the social rehabilitation philosophy which leads to the transfer of non-consenting prisoners is not well-thought-through, not from a legal nor from practical perspective.

Firstly, transferring non-consenting prisoners to a non-consenting Member State puts an important responsibility on the shoulders of the transferring Member State. The transfer decision should not be taken lightly and should not be prompted by the beneficial effect transferring prisoners can have for national prison capacity challenges. The parallel with the transfer of non-consenting asylum-seekers in light of the Dublin regulation, demonstrated that introducing a mirroring mechanism to transfer non-consenting prisoners opens the door to a mirroring mechanism of state responsibility. That state responsibility ought to be an incentive for transferring Member States to evaluate the prison situation in the executing Member State.

Given the strong emphasis on the self-imposed obligation to use transfers of non-consenting prisoners only to further their social rehabilitation, the question arose whether that mirroring state responsibility mechanism should be extended to be equally applicable for violations of the "furthering social rehabilitation"-requirement. The analysis conducted leads to the conclusion that – in order to live up to the philosophy underlying the Framework Decision – a social rehabilitation add-on is required. That add-on could consist of extending the scope of the duties of the transferring states to look into the individual situation of each of the prisoners eligible for transfer. From a theoretical perspective, the assessment should not only comprise the personal links of the prisoner to the intended receiving state, but also compare the own social rehabilitation programmes in the facility where the prisoner is serving his sentence with that of the destination prison in the receiving state. Analysis revealed not only that this theoretical implication of the social rehabilitation philosophy suffers from the absence of a common understanding of what social rehabilitation should entail, but more importantly that even when such a common understanding was reached, there are insurmountable practical difficulties. It seems impossible for it to ever be able to work in practice because of the inability to identify the final destination of the prisoner up for transfer. Given the difficulties inherent to that interpretation of the social rehabilitation add-on, a more suitable alternative would be to opt for an add-on in the form of a legally binding instrument, holding minimum standards with respect to the social rehabilitation programmes that can be used to support a 'rebuttable assumption of compliance'. This option would require the search of a suitable legal basis and a change in the social rehabilitation objective. Transfers should not aim at furthering social rehabilitation in general, but aim for a better social rehabilitation that consists of compliance with the minimum standards and close links between the prisoner involved and the receiving Member State.