



Ministerie van Buitenlandse Zaken

# The Treaty on the Transfer of Sentenced Persons

---

A search for best practices

**Maarten Hendrik Bos**

**7/14/2013**

**Student details:**

10062661

m.h.bos@studentmail.hhs.nl

The Hague University of Applied

Sciences | European Studies

Final Project for graduation

Supervisors: Mr. M. van Munster, J.

van Hoorn, L. Nietvelt

# Executive summary

---

This paper about the recently ratified Treaty on the Transfer of Sentenced Persons (TTSP) and the execution of sentences imposed by judgments between Brazil and the Netherlands aims to explore best practices and potential obstacles concerning its implementation. This is based on the experiences of the countries Portugal, Spain, the United Kingdom (UK) and Brazilian authorities.

In chapter 1, an understanding of the Treaty's background and potential motives for its establishment is obtained through an exploratory and inductive desk-research and secondary literature analysis.

The backbone of this paper is established by having conducted in-depth qualitative interviews with state officials from Brazil, Portugal, Spain and the UK in order to obtain detailed information on the functioning of their TTSP's in practice. These processes are analyzed in three case studies in chapter 2 with the aim to identify best practices. The same chapter also provides a general workflow from which the Netherlands can deduce how the transfer procedure of a Dutch sentenced person will function.

In the last chapter the paper presents the recent developments on the decision-making around the implementation of the Dutch TTSP with Brazil. It is concluded with a SWOT-analysis which is based on the identified complications in the case studies and the recent developments concerning the implementation of the TTSP between Brazil and the Netherlands. On the basis of the analytical work, a framework of general recommendations of best practices is formulated.

Based on the experiences of other European countries and the decision-making in the Netherlands, the following conclusions are drawn. Portugal lets a transfer process run its course and does not proactively follow-up procedures. It therefore takes them around three years to transfer a sentenced person. Spain and the UK generally take around one to two years to transfer a person as they proactively follow-up procedures.

A transfer procedure under the Dutch TTSP with Brazil will most likely be a very long and bureaucratic process and its enforcement will be a great challenge. It is expected that few people will actually qualify for a transfer under a regular TTSP. There is a possibility to implement the same practices as Spain and the UK, or to enforce other alternatives, in order to accelerate the process. This way the Treaty can be implemented more effectively. Specific procedures under article 14 of the TTSP for criminal fugitives will also face a long duration, though due to its higher priority it is expected that these will obtain more positive results.

# Table of contents

---

|   |    |
|---|----|
| Preface .....   | 5  |
| Introduction .....  | 6  |
| The research questions.....   | 8  |
| Methodology .....   | 8  |
| Desk-research .....   | 9  |
| Qualitative in-depth interviews .....                               | 10 |
| 1. The Transfer of Sentenced Persons .....                          | 11 |
| 1.1. Possible motives for establishment of TTSP .....               | 11 |
| 1.1.1. Humanitarian motives for a TTSP .....                        | 11 |
| 1.1.2. Political motives and self-interests for a TTSP .....        | 13 |
| 1.1.3 Diplomatic motives for a TTSP .....                           | 14 |
| 1.2. The TTSP's roots.....  | 14 |
| 1.3. Bilateral TTSP versus Multilateral TTSP .....                  | 15 |
| 1.4. Continued enforcement versus conversion.....                   | 18 |
| 1.5. Conclusion.....  | 18 |
| 2. TTSP Brazil – Portugal, Spain and UK .....                       | 20 |
| 2.1. General Workflow .....   | 20 |
| Workflow TTSP Brazil to other countries .....                       | 21 |
| Workflow Federal Case .....   | 22 |
| Workflow Regional Case.....   | 23 |
| Workflow Expulsion Process (without pending transfer process) ..... | 24 |
| Workflow general transfer process.....                              | 26 |
| 2.2. Case Study I: TTSP Brazil – Portugal .....                     | 27 |

|  |    |
|--|----|
| 2.2.1. Basic information TTSP Portugal.....                    | 27 |
| 2.2.2. Implementation in practice TTSP Brazil – Portugal ..... | 29 |
| Workflow TTSP Brazil – Portugal in practice .....              | 32 |
| 2.2.3. Conclusion.....   | 32 |
| 2.3. Case study II: TTSP Brazil – UK .....                     | 33 |
| 2.3.1. Basic information TTSP UK.....                          | 33 |
| 2.3.2. Implementation in practice TTSP Brazil – UK .....       | 36 |
| Workflow TTSP Brazil – UK in practice .....                    | 38 |
| 2.3.3. Conclusion.....   | 39 |
| 2.4. Case study III: TTSP Brazil – Spain .....                 | 39 |
| 2.4.1. Basic information TTSP Spain .....                      | 39 |
| 2.4.2. Implementation in practice TTSP Brazil – Spain .....    | 40 |
| 2.4.3. Conclusion.....   | 43 |
| 3. TTSP Brazil – Netherlands .....                             | 44 |
| 3.1. Basic information about detainees and TTSP .....          | 44 |
| 3.2. Motives for establishment and recent developments .....   | 45 |
| 3.2.1. Motives for TTSP Brazil – the Netherlands .....         | 45 |
| 3.2.2. Recent developments .....                               | 46 |
| 3.3. Early expulsion trend .....                               | 50 |
| 4. Benefits and Challenges.....                                | 51 |
| 4.1. Potential benefits TTSP .....                             | 51 |
| 4.1.1. Authentication of documents.....                        | 51 |
| 4.1.2. Translations .....                                      | 52 |
| 4.1.3. Article 14.....   | 52 |
| 4.1.4. Early expulsion.....                                    | 52 |
| 4.2. Potential complications TTSP.....                         | 53 |

|  |    |
|--|----|
| 4.2.1. No proactive attitude from Consulate or Embassy ..... | 53 |
| 4.2.2. Semi-open and open regime issue .....                 | 54 |
| 4.2.3. Translations .....                                    | 54 |
| 4.2.4. Remaining time of sentence to serve .....             | 54 |
| 4.2.5. Criminal record .....                                 | 55 |
| 4.2.6. Expulsion process .....                               | 55 |
| 4.2.7. Early expulsion .....                                 | 55 |
| 4.2.8. SWOT-analysis .....                                   | 55 |
| Conclusion.....  | 59 |
| Recommendations .....  | 61 |
| Proactive attitude .....                                     | 61 |
| Semi-open and open regime .....                              | 61 |
| Translations .....   | 61 |
| Low-budget solutions .....                                   | 62 |
| Remaining time of sentence to serve in receiving state ..... | 62 |
| Criminal record .....  | 62 |
| Consular authentication of final sentence.....               | 63 |
| Expulsion process .....                                      | 63 |
| Early expulsion.....   | 63 |
| Literature .....   | 64 |
| Other sources.....   | 67 |
| List of acronyms .....                                       | 69 |

# Preface

---

Between February 1 and July 31, 2013, I did an internship at the Embassy of the Netherlands in Brasília, Brazil. During this period I was assigned to work with Dutch detainees in Brazil, visa procedures, consular cooperation in Brazil between member states of the European Union (EU) and to conduct research for the Embassy. The initial plan for research was to draw an inventory of consular services provided to detainees by EU member states. Though, unexpectedly, the Treaty on the Transfer of Sentenced Persons (TTSP) between Brazil and the Netherlands was ratified on February 4, 2013. Therefore the Embassy deemed it more important to conduct a research on the implementation of the Treaty in which best practices are identified.

It is very important that this research was conducted as the implementation of a similar Treaty between Venezuela and the Netherlands has shown many challenges which have led to negative media attention, questions from the parliament to the Minister of Justice and research by an ombudsman. This has caused an unnecessary increase of work and costs to several parties which could have been prevented by simply taking measures based on preliminary, in-depth and practical research before negotiating or implementing a TTSP. I hope that the outcome of my research in this paper will prepare the Dutch Ministry of Justice and the Embassy on potential challenges and that the identified best practices will be taken under consideration in order to avoid a similar situation as currently faced in Venezuela.

This research could not have been conducted without the help of all individuals of the institutions that have participated in my research. I would especially like to thank the official representations of Portugal, Spain and the United Kingdom, the Brazilian and Dutch Ministry of Justice, the São Paulo University, the Public Attorney of the Union in São Paulo (Defensoria Pública da União) and the United Nations Office on Drugs and Crime for providing me with all necessary information. I would also like to thank the Embassy of the Netherlands for providing me with this interesting opportunity and for giving me access to their network of contacts and information.

Last but not least, I would like to specifically thank my supervisors Levi Nietvelt, Maarten van Munster and Jan van Hoorn for accompanying my internship and research process from beginning to end.

# Introduction

---

On February 4, 2013, Brazilian president Dilma Vana Rousseff ratified the bilateral Treaty on the Transfer of Sentenced Persons and the execution of sentences imposed by judgments between Brazil and the Netherlands. With this approval from the Brazilian side, the Treaty entered into force. It was approved on January 23, 2009 by the Dutch government and signed by the Brazilian Federal Senate on April 9, 2011.

The TTSP is a bilateral agreement that can be considered as a consular service. It offers Brazilian and Dutch convicted persons the possibility to request a transfer of their sentence from the country where the crime was committed to the country of origin. Its implementation concerns the enforcement of an administrative procedure which is coordinated by the Ministries of Justice, as central authorities, of the respective states that have established a bilateral agreement.

It is crucial to state that a transfer is normally requested by the foreign detainee and that it will only take place with his or her consent. The approval of both the sentencing state and the receiving state are required. The sentencing state is the country where the person was convicted for a committed crime and from where he or she will be transferred. The receiving state is the country of nationality of the sentenced person to which he or she is transferred.

A transfer process is always preceded by two other procedures: a criminal trial and an expulsion process. A request for transfer has to be preceded by an arrest and a trial. For the process to be initiated there has to be a final sentence. That means that there is no more possibility to appeal the case. Then a person can be called “sentenced” or in Portuguese “transito em julgado.” As for the expulsion, every foreigner, that is convicted for a serious crime committed in Brazil is expelled from the country and will not be able to return for at least 30 years. The actual transfer can only be realized if the expulsion process is completed.

Not only can persons be transferred under the TTSP, but also the execution of the sentence of fled prisoners as imposed by the sentencing state can be transferred to the receiving state under article 14 of the Treaty. This means that e.g. if a Dutch person flees from Brazilian prison or leaves the country before the punishment was even imposed by the sentencing state, the sentence can be transferred to the Netherlands. In that case the fled convicted person will still have to serve the sentence, as imposed in Brazil, in a Dutch prison.

Motives for the establishment of the TTSP between countries are varied as will become clear in this paper. However, establishment of such a Treaty comes from raised attention on how countries should best deal with their sentenced citizens abroad as it is becoming more common that countries convict foreign persons to imprisonment or other forms of deprivation of liberty. This is logically a consequence of the increase in the total number of international travelers and migrants through-out the world.

The population of foreign prisoners in Brazilian prisons is very high. In December 2012 there were 3392 foreign prisoners in Brazil. This number has risen over the past years and is still rising. Therefore, several countries with prisoners in Brazil take measures such as negotiating bilateral TTSP's with Brazil to try to deal with the issue. Currently ten countries have a bilateral TTSP established with Brazil. Another 36 countries are negotiating a TTSP or they are awaiting their Treaty to be ratified by the president (Erhardt, T., Email Contact, 2013).

The Embassy of the Kingdom of the Netherlands in Brasília deemed it important to conduct a research to identify best practices and potential obstacles for the implementation of the recently signed Treaty. The paper aims to explore the experiences of Brazilian authorities with TTSP's and also the experiences of some foreign representations in Brazil which are Portugal, Spain and the United Kingdom (UK) who all have a bilateral TTSP with Brazil.

Since February 4, 2013, there have been several developments around the TTSP between Brazil and the Netherlands. It is e.g. now clear that the Dutch Embassy merely plays an informative role in the process of a transfer of a sentenced Dutch citizen. This means that they have to inform the prisoners on how to request a transfer and on how the procedure functions.

The process is the responsibility of the Minister of Safety and Justice and transfers are executed by the Department of International Transfer of Sentences (IOS) of the Ministry of Safety and Justice. It is therefore important to mention that the aim of this paper is not to function as a handbook for the Embassy, however it tends to explain:

- The background of the TTSP and motives for its establishment;
- How the bilateral agreements between Brazil and Portugal, Spain and the UK work in practice;
- How effective these treaties are (or could be) in practice;
- What best practices there are according to information obtained in interviews with foreign representatives and Brazilian authorities concerning the implementation of the Treaty;
- What obstacles are faced during the implementation of the TTSP by other countries and what the Netherlands could learn from these experiences;



Thus, the function of this paper is ideal for practical purposes in case the Dutch Embassy is instructed to assist the Ministry of Safety and Justice in the enforcement of the TTSP with Brazil. It can also function to shed light on how the transfer process will probably work. It is hoped that this paper will one day serve as a guideline to improve the efficiency of transfers between Brazil and the Netherlands.

## The research questions

Given the indicated importance of a proper implementation of a TTSP and the practical value which this paper could have in case the Embassy will become involved in the implementation of transfers, a central research question has been formulated. To help answering the research question it has subsequently been divided into four sub questions.

### *Research question:*

Which best practices and challenges exist in the implementation of a Treaty on the Transfer of Sentenced Persons and the execution of sentences imposed by judgments (TTSP) between the Netherlands and Brazil?

### *Sub questions:*

1. What is the background of the TTSP and what are motives for its establishment?
2. How do TTSP's between Brazil and Portugal, Spain and the UK work in practice?
3. How does the Netherlands want to implement their TTSP with Brazil?
4. What can be expected from the TTSP between Brazil and the Netherlands based on the current state of affairs and experiences from other countries?

## Methodology

The main aim of this report is to get an understanding of the functioning of the TTSP in practice, what is complicated about its enforcement and what could be improved. Therefore a combination of methods was selected. In order to obtain relevant information about its functioning in practice, qualitative in-depth interviews were conducted with representatives of embassies and consulates of the countries the Netherlands, Portugal, Spain and the UK that have a Treaty with Brazil. Furthermore, the relevant Brazilian authorities were interviewed about the functioning of the TTSP in practice. Furthermore desk-research was applied to obtain information about the countries' TTSP's to obtain background information on the Treaty.

In chapter 1 background information is given to get an understanding of the roots of the Treaty and possible motives for its establishment and other general information as a foundation for the understanding of its functioning in practice.

In chapter 2 the general workflow of a transfer procedure under a TTSP is presented and then the transfer process of each country is discussed in a case study. Besides the general workflow of a TTSP, the processes linked to a transfer procedure are also explained and imaged with a workflow. In the case studies the implementation of the countries' TTSP is described and faced complications are indicated.

Almost all case studies are concluded with a workflow which is based on the information about the implementation of the Treaty. Its purpose is to primarily obtain an image of the implementation on which the Netherlands is able to base its own workflow.

Chapter 3 explains the current state of affairs concerning the implementation of the TTSP between Brazil and the Netherlands. In the last chapter (chapter 4) an analysis is made and the potential benefits and complications for the Netherlands are identified based on the case studies and the current state of affairs. With this information a SWOT-analysis is drawn at the end of the chapter which is important for the formulation of recommendations. Then a conclusion is drawn and subsequently recommendations are presented.

### Desk-research

The main aim of using desk-research was to provide a better understanding of the functioning of the TTSP in order to understand its functioning in practice. In this report literature study was undertaken to explain the background of the TTSP, e.g. United Nations' (UN) reports and handbooks concerning prisoners and the TTSP. Other important sources were official correspondences between Brazilian authorities and the Dutch Embassy; email correspondences between Brazilian authorities and the Dutch Embassy; email correspondences between the Embassy and the Dutch Ministry of Justice; reports on telephone conferences; reports on European Union (EU) consular meetings in Brasília and São Paulo; the paper versions of the TTSP's between Brazil and the Netherlands, Portugal, Spain and the UK; information about the TTSP on the websites of ministries of justice and email correspondences between the United Nations Office on Drugs and Crime (UNODC) in Vienna and the Dutch Embassy.

The reason why the selection of literature is relatively limited is due to the fact that the implementation of a bilateral TTSP with Brazil had not yet been researched and there is relatively few information available on best practices for the implementation of a transfer.

However, the UNODC created a handbook on the Treaty on the Transfer of Sentenced Persons. It is a proper tool to get a universal understanding of the Treaty, though it mainly focusses on the Model Agreement on the Transfer of Foreign Prisoners, adopted in 1985 at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which can be used as a model when negotiating bilateral or multilateral TTSP's.

As for the few studies on the subject, besides the ones mentioned, the most important sources were therefore people directly involved with the TTSP in Brazil, which makes them primary sources.

### Qualitative in-depth interviews

Qualitative in-depth interviews with state officials from embassies and consulates are perhaps the most important sources used to conduct this research. Interviews were conducted with Brazilian authorities and state officials from Portugal, Spain and the UK. These three countries are all member states of the European Union and the only EU-countries that currently have a TTSP with Brazil.

Originally, the research's aim was to not only define best practices and complications that the EU-countries face, however also to define best practices from countries such as Argentina and Canada. The goal was also to define the frameworks of the TTSP's between Brazil and Argentina, a neighboring Latin-American country, and Canada, a North-American country. The Embassy considered these interesting choices, because this way one could also see how non EU-countries deal with their treaties in practice. These countries appeared not relevant as Canada has never realized a transfer and Argentina and Brazil established informal practices that substitute the necessity of their TTSP.

The final countries selected for this research, Portugal, Spain and the UK, turned out to be suitable in terms of defining best practices because their TTSP's are comparable with the Dutch TTSP. Firstly, because all countries are situated in Europe and face the same difficulties in terms of transportation during the actual transfer. Secondly, they face more or less the same costs (flight tickets, police escort, translations of documents). And lastly, all countries are part of the European Union and their representations in Brazil have initiatives to cooperate in this area on a local EU-level. That also means that it makes it easier to obtain information about their treaties and prisoners.

# 1. The Transfer of Sentenced Persons

---

As mentioned in the introduction, the TTSP between Brazil and the Netherlands is a bilateral Treaty which offers Brazilian and Dutch convicted persons the possibility to request a transfer of their sentence from the country where the crime was committed to the country of origin. This chapter serves to establish a foundation for the following chapters so that they can be properly understood. The first part of this chapter is to provide potential motives for the establishment of a TTSP. Then a historical background of the roots of a TTSP is drawn as it is important to understand where it came from. In the subchapter “bilateral versus multilateral” is explained that a multilateral Treaty tends to be more simplified to fit the needs of several participating countries. However, it explains why Brazil prefers bilateral treaties over multilateral treaties. This is important as it will exclude the future possibility of perhaps transferring prisoners under a multilateral Treaty. This chapter also shows how the sentence of a transferred person is recognized by the receiving state.

## 1.1. Possible motives for establishment of TTSP

In this section the various reasons and considerations for a TTSP are discussed. They have been categorized by topic. Humanitarian, political and diplomatic motives for the establishment of a TTSP are brought under attention.

### 1.1.1. Humanitarian motives for a TTSP

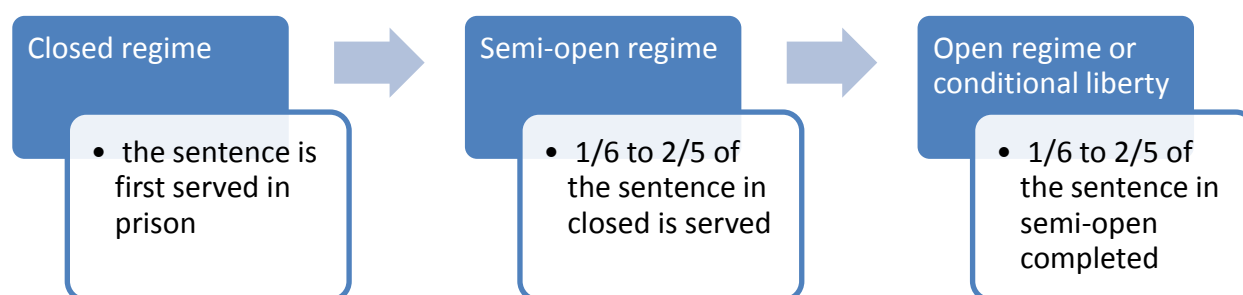
Humanitarian motives are probably the most important reasons for the establishment of a TTSP. Work visits and reports on visits to Dutch prisoners in Brazil show that prison conditions in Brazil are poor and are not in line with minimum International Human Rights standards. This is confirmed by the United Nations Working Group on Arbitrary Detention in Brazil. Therefore there are several reasons for the establishment of such a treaty. The most important reason is probably that this treaty offers the possibility for foreign prisoners to serve their sentence close to their family and friends (UN, Press Release, 2013).

A TTSP, from a humanitarian point of view, primarily serves to alleviate the punishment. The UNODC reports that ‘differences in language, culture and religion and being distant from family and friends may increase the difficulties of imprisonment and aggravate the impact of the sentence imposed.’ For that

reason, the Council of Europe says that ‘serving a sentence abroad can be considered as a double punishment’ (UNODC, p. 11, par. 5, 2012; COE, par. 3, 2001).

The division under the jurisdiction of the Foreigners Department of the Brazilian Ministry of Justice (Divisão de Medidas Compulsórias) responsible for the coordination of expulsions, transfers and extraditions, also believes that the humanitarian motive for the establishment of a TTSP is most important. They believe that sentenced foreigners should serve their sentence in their home country, close to their family, in an environment where they can speak their own language which will eventually lead to more effective reintegration and resocialization (DMC, Personal Communication, 2013).

They also mention that ‘the idea of punishing someone that committed a crime is in order to make sure the person will reintegrate properly in society after completing the sentence.’ In Brazil a system of progression in regime is implemented that tends to stimulate the process of resocialization and reintegration. If the person serves 1/6<sup>th</sup> to 2/5<sup>th</sup> of his or her sentence in a closed regime (in prison), complying with certain conditions such as good behavior, he or she will progress to a semi-open regime. In the semi-open regime the person will be allowed to leave the penitentiary to work during the day and spend the night in prison, or in other cases e.g. spend time with their family outside the penitentiary for



one weekend a month. Semi-open regimes sometimes do not provide the prisoner with any possibility of leaving the prison institution. Subsequently, after serving 1/6<sup>th</sup> to 2/5<sup>th</sup> of the remaining sentence in semi-open the person will be allowed to progress to an open regime or conditional liberty is applied, if he or she of course complied with all set conditions in the previous regime and also on other conditions such as having work. In practice, this would mean that he or she will not have to serve time in prison anymore and will be partially free complying with restrictions set by an execution judge.

Foreigners often go through this reintegration tool as well. ‘As foreign detainees are constitutionally treated equally to any other person, they also have the right to be progressed to lighter regimes by means of a system that is intended to reintegrate prisoners back into society. But why would a foreigner reintegrate into Brazilian society? He has nothing to return to here, there is no visible connection

between the foreigner and Brazil. That is why this Treaty is so important, and the humanitarian aspect is in first position' (DMC, Personal Communication, 2013).

### **1.1.2. Political motives and self-interests for a TTSP**

In email contact with Piera Barzano, from the UNODC in Vienna, it became clear that this form of international cooperation in criminal matters, 'which had a humanitarian aspect and whose main objective was to facilitate the rehabilitation of offenders,' has been increasingly modeled to fit the needs of the countries affected by a large prison population. This has been done by removing the need for the prisoner's consent to his or her transfer in the cases where he or she would otherwise be deported at the end of the sentence. She says that in some of the recently negotiated agreements, for example, the "no prisoner consent" agreement is considered the normal case and consent to transfer is only necessary where required by the relevant international arrangement. This is beneficial to countries with large prison populations because the receiving state will then be able to request more transfers as not all prisoners want to request a transfer, for instance, if they do not wish to be registered in the criminal record of their home country. The EU Framework Decision on the transfer of prisoners between member states of the EU is also moving in this direction (Barzano, Email Contact, 2013).

According to the European Parliament (EP) a TTSP 'reduces costs of providing consular services to nationals imprisoned overseas and of housing foreigners in national prison systems.' Both motives are reasonable and it will surely reduce the consular assistance costs if a transfer is successfully realized. However, a transfer of a sentenced person is an expensive procedure as Saskia de Reuver, former Head of the Department of International Transfers of Sentences of the Dutch Ministry of Justice, mentions in a telephone conference (European Parliament, p. 1 – 2, par. 4; Reuver, Personal Communication, 2013).

De Reuver says that the costs are especially high as three marshals have to be sent to collect a single prisoner and usually a doctor has to accompany the process because a prisoner is often sick. Furthermore, many work hours are dedicated to international transfers by the staff of the Ministry of Justice. Additionally, prisoners' housing costs in national prisons will also set in when a transfer is completed. That makes an actual realization of a transfer considerably unattractive in the short term, especially in these economically inconvenient times (Reuver, Personal Communication, 2013).

Although it is indicated that the costs of a transfer are generally high, it is widely believed that with effective rehabilitation, re-socialization and reintegration into free society, future crimes can be prevented. This may subsequently even diminish the overall costs and as mentioned, it can contribute to

public safety. However, further research has to be conducted in order to determine the actual costs and effects of a TTSP.

### 1.1.3 Diplomatic motives for a TTSP

According to the UNODC, the establishment of a TTSP between states ‘may also have diplomatic reasons.’ A TTSP establishes recognition of good international relations between states and it tends to improve international cooperation on the prevention of crime (UNODC, p. 14, par. 3., 2012).

The UNODC mentions that in practice ‘the transfer of prisoners are often accompanied by some level of degree of diplomatic pressure from the receiving state’ as will become clear in the following chapter in which the UK’s and Spain’s TTSP processes are presented (UNODC, p. 14, par. 4., 2012).

## 1.2. The TTSP’s roots

The first signs of bilateral cooperation in this specific field date back to a 1954 judicial convention between Lebanon and the Syrian Arab Republic in which the two states agreed to execute each other’s sentences. In their agreement, a transfer was not possible in the case of short sentences and the consent of both states and the sentenced person was required (UNODC, 2012, p. 17).

In the following years many other bilateral treaties were established between states. Subsequently, as described in the United Nations Office on Drugs and Crime (UNODC) handbook on the TTSP, in 1963 the first multilateral agreement emerged between Denmark, Finland, Iceland, Norway and Sweden. In this Treaty the states in question adopted identical laws that made it possible to enforce penal sentences. It also provided that sentenced persons of any of the countries could serve their sentences in their home country. The cooperating states Belgium, Netherlands and Luxemburg followed in 1968 with a multilateral TTSP (UNODC, 2012, p. 17, par. 2; Vervaele & Klip, 2002, p. 29).

Gradually, as emphasized in the report on the fifth UN Congress, by 1975 the process of international transfer was considerably accelerated by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (UNCPCTO). The aim of the Congress was to further facilitate the return to their home country of persons serving sentences in foreign states by ‘developing policies and practices by utilizing regional cooperation and by starting bilateral agreements’ as stressed in the Fifth UNCPCTO (Fifth UNCPCTO, chap. 1, par. 23).

One of the reasons for such an increase of attention for prison transfer matters at that time, according to the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders is that ‘in the past this state of affairs aroused little attention, since very few cases

were involved; but today there is so much coming and going between different countries of Europe that a more equitable system has become essential' (ETS No. 051, par. 18).

According to the UNODC, by the Sixth UNCPCTO which met in 1980 the recommendation of stimulating states to start bilateral agreements concerning the transfer of foreign prisoners was further elaborated. The goal of the Congress was to draft model guidelines for the transfer of foreign prisoners based on the approval of both the sentencing and receiving state and the prisoners consent. This was in order to facilitate the negotiating of both bilateral and multilateral agreements between member states of the UN so that 'social rehabilitation of persons convicted of crimes abroad is further advanced by facilitating their return to their home countries to serve their sentence.' Another aim of this facilitating model treaty initiative, in combination with a whole framework of initiatives, was to foster the prevention of organized crime, drug trafficking and corruption (UNODC, 2012, p. 18, par. 1 - 9).

In Milan in 1985, during the Seventh UNCPCTO the Model Agreement on the Transfer of Foreign Prisoners and the recommendations on the treatment of foreign prisoners was adopted to further advance this process. According to Ms. Piera Barzano of the UNODC in Vienna, the initiative was based on the European Convention on the Transfer of Sentenced Persons (1983). Barzano says that it is unclear how many treaties have been based on the model treaty, but she says that it has been often used as an example when negotiating a TTSP (Barzano, Email Contact, 2013).

### **1.3. Bilateral TTSP versus Multilateral TTSP**

A bilateral TTSP is a Treaty in which two countries establish an agreement to offer the possibility of a transfer from one country to another within the range of each of the countries' national legislation. The Netherlands has a specific law that regulates the transfer of sentenced persons from and to the country. It determines for a big part the way a TTSP is negotiated and executed. Brazil has a law that makes it possible for ratified treaties to become national legislation. A multilateral TTSP on the other hand is a treaty in which several countries agree to offer the possibility of a transfer of a sentenced national of one of the states to his or her country of origin. As there are at least more than three participating countries with different national legislations, the content of the Treaty has to be more simplified so that it can fit in the legislation of every country.

In 1985, the multilateral TTSP (also known as the European Convention on the Transfer of Sentenced Persons) between member states of the Council of Europe entered into force. It is also open to signatures from non-member states. This Treaty, as its name indicates, is specifically focused on transfers of sentenced persons (ETS No 051, 2013, par. 21, 24, 27; ETS No. 112, 2013, par. 1).



What is interesting is that this multilateral Treaty does not prevent countries from establishing bilateral TTSP's. This means that bilateral agreements can coexist with multilateral agreements, even though they deal with the same matters. For instance, both Venezuela and the Netherlands have signed for the multilateral TTSP of the Council of Europe. However, they also have a bilateral agreement and sentenced persons can be transferred under both treaties. The multilateral Treaty had its entry into force first and after it the bilateral agreement.

According to the UNODC's handbook on TTSP's, countries usually establish a bilateral TTSP with a neighboring country and then move on to a multilateral treaty. In the case of the TTSP between the Netherlands and Venezuela, a reason for establishing bilateral cooperation in this field may be e.g. that a crucial article is missing in the multilateral treaty. Besides, bilateral treaties often have the intention to fit in the particular needs of both countries and the agreements are often adapted to national legislation which makes them more complex. Multilateral agreements, as the paragraph below will demonstrate, tend to be more flexible (UNODC, 2012, p. 21, par. 4 – 5).

The UNODC states that having both multi- and bilateral agreements can be beneficial. They use Canada and the United States (US) as an example. They have three of such agreements: a bilateral Treaty and two multilateral Treaties about the transfer of sentenced persons. In the original bilateral Treaty, persons that are sentenced for immigration offences cannot be transferred back to their home country. However, the two multilateral Treaties make it possible to transfer sentenced persons for such offences (UNODC, 2012, p. 21, par. 4 – 5).

As shown in the table on the next page, if a Canadian citizen is sentenced in the US for human trafficking (which is an immigration offense), it will not be possible to transfer the person back to Canada under the Prisoner Transfer Treaty between Canada and the US. However, the transfer can be realized by means of both multilateral Treaties at the approval of both states and the consent of the sentenced person.

### TTSP's multi- and bilateral Canada United States

| Type of treaty             | Name of treaty  | Date entry into force | Transfer under immigration offences possible? |
|----------------------------|---|-----------------------|---|
| <b>Bilateral treaty</b>    | Prisoner transfer Canada - US                                       | 19-07-1978            | Not possible, see art. II, subarticle c       |
| <b>Multilateral treaty</b> | Council of Europe - Convention on the Transfer of Sentenced Persons | 01-09-1985            | Possible                                      |
| <b>Multilateral treaty</b> | Inter-American Convention on serving Criminal Sentences Abroad      | 25-05-2001            | Possible                                      |

Sources: Canada Prisoner Transfer, 2013; CETS No.: 112, 2013; Inter-American Convention on Serving Criminal Sentences Abroad, 2013.

In a group interview of the researcher with the director of the Foreigners Department, Izaura

Maria Soares, the director of the “Divisão de Medidas Compulsórias” (DMC), Carlos Eugênio Rezende e Silva, and four persons that work at that department, Tatiana Erhardt dos Santos, Samantha Bravim Eurich, Marcella Fernanda Siqueira Isobe and Audine Romano Cominetti Rossetto (whom are mentioned as DMC throughout this research) it became clear that Brazil prefers to establish bilateral treaties. They have ratified merely one multilateral Treaty, the Inter-American Convention on Serving Criminal Sentences Abroad. DMC says that ‘this multilateral Treaty is very generally coordinated and difficult to implement, even in its negotiation process it was difficult to come to a final agreement.’ They also say that they prefer bilateral agreements as they tend to take in account the legal peculiarities of both countries (DMC, Personal Communication, 2013).

In addition to what DMC says, Professor Masato Ninomiya, Professor in International Law at the University of São Paulo, states that it is easier for Brazil to negotiate bilateral treaties as they can take in account specific domestic juridical matters. Besides, ‘a multilateral convention is probably more simplified, but perhaps even too simplified for Brazil that it does not respond enough to its national interests.’

DMC’s data also shows that bilateral treaties are more effective in practice. Brazil has succeeded few transfers with Mexico and only one with the US over the past ten years under the Inter-American Convention. On the contrary, they have succeeded in transferring 165 Brazilians and foreigners under their bilateral agreements (DMC, Email Contact, 2013).

## 1.4. Continued enforcement versus conversion

Criminal law enforcement is usually different in each country. That makes the TTSP a complex judicial procedure. Therefore it is important to provide some general background in this section on the two modes at which a sentence can be recognized by a state when a sentenced person is transferred to his or her home country.

There are two ways of recognizing the sentence: continued enforcement or conversion of the sentence. Continued enforcement means that the sentence imposed by the sentencing state will be enforced by the receiving state, usually without any alteration. If, however, the sentence imposed by the sentencing state is in conflict with the execution law of the receiving state, the sentence will have to be altered. For instance, a Dutch person is convicted for international trafficking of 28 kilogram of cocaine in Brazil. He is convicted to the maximum sentence of fifteen years. In the Netherlands the maximum sentence for trafficking 28 kilogram of cocaine is twelve years. When the sentence is transferred to the Netherlands, his or her sentence will be lowered to twelve years. Might the maximum sentence in the receiving state be higher than that of the sentencing state, the sentence cannot be aggravated. This mode of sentence recognition is most commonly used. It is also applied by the Netherlands, Portugal, Spain and the UK in their TTSP with Brazil.

In the case of conversion, as its name suggests, the facts of a criminal process of the convicted foreigner are reanalyzed by the receiving state and a new sentence will be imposed. This sentence can never be more severe than the original sentence imposed by the sentencing state. Furthermore, when the sentencing state imposed a sentence which deprives the convicted foreigner from liberty, the sentence cannot be converted to a sentence that offers alternative punishment measures.

A reason why the Netherlands, Portugal, Spain and the UK have chosen for continued enforcement instead of conversion may be that conversion of a sentence could cause disagreement between the two states due to different interpretations of punishment which could then lead to disapproval of transfers. Besides that, according to Brazilian authorities, Brazil would not accept conversion of a sentence as it might look as if 'the sentence imposed in this country will lose its importance in the receiving state and that goes in conflict with Brazil's sovereignty' (DMC, Personal Communication, 2013).

## 1.5. Conclusion

The discovered pattern is that the principle motive for the establishment of a TTSP is humanitarian. Of course there are political interests to the establishment of this Treaty and there are indications that

future TTSP's will be more politically motivated to fit the needs of countries with large prison populations and to reduce the costs of consular assistance and services to prisoners. As De Reuver stated, the costs for a transfer are very high and the Dutch Ministry of Justice seems to give the procedure less importance due to the current economic crisis.

Most probably the contemporary TTSP is based on the Model Treaty of the 1985 UNODC convention as it is often used as an example when negotiating a TTSP. It is clear that Brazil prefers to establish bilateral agreements instead of multilateral treaties as they can then negotiate their national interests more effectively, which is far more difficult to achieve when negotiating multilateral agreements. The recognition of sentences in TTSP's between Brazil and other countries is only based on continued enforcement as Brazil wants the judicial system to be recognized in other states.

## 2. TTSP Brazil – Portugal, Spain and UK

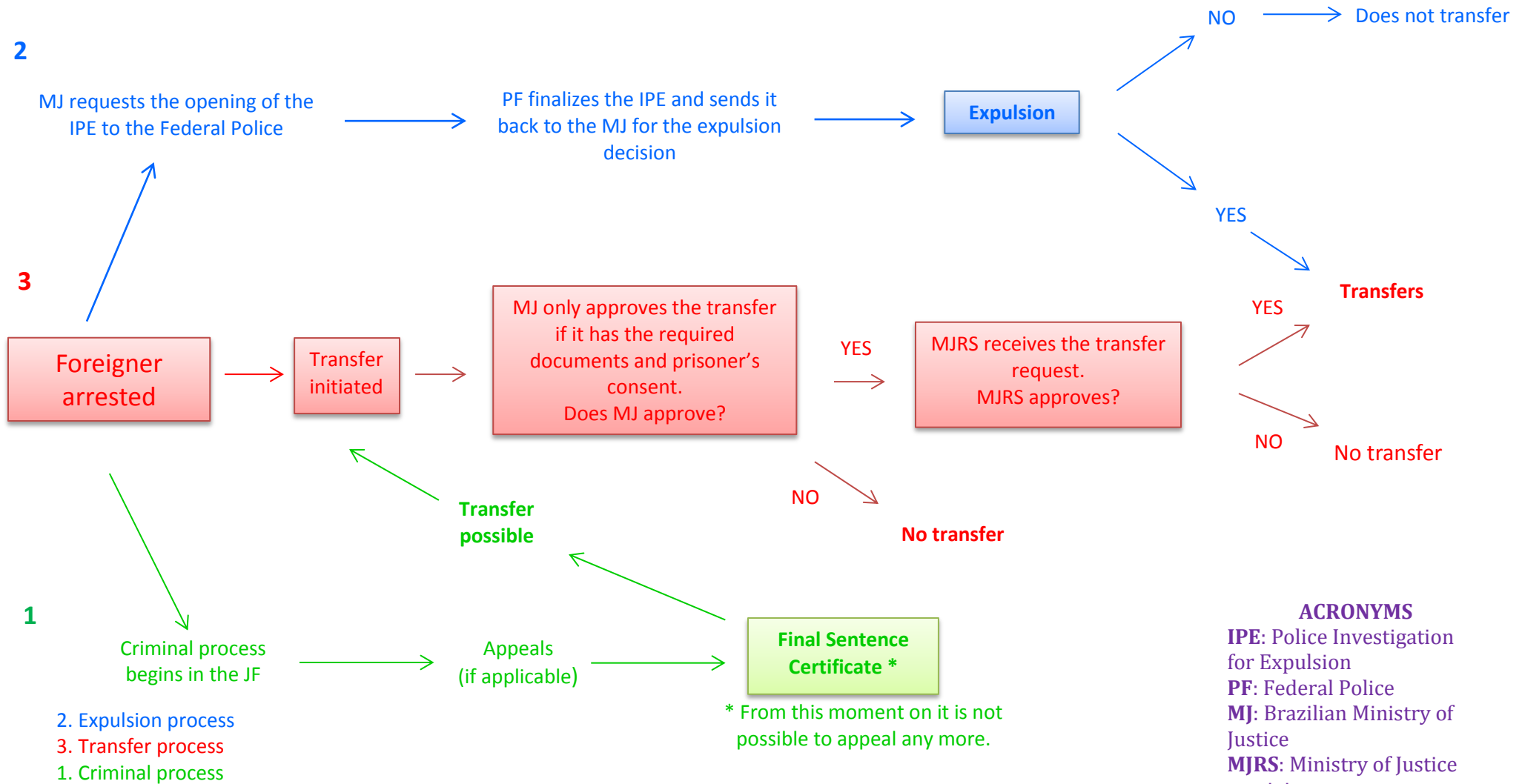
---

In this section of the paper the TTSP's of the countries Portugal, Spain and the UK will be discussed and visualized. This chapter is divided in one subchapter and three case studies. The subchapter explains the general workflow of a TTSP. The three case studies each present basic statistics about the Treaty and the basic requirements, the steps at which the Treaty is implemented and the complications they face in practice concerning their TTSP. This will give an overview on how their treaties are implemented. The general workflow is important because it explains the importance of a proper implementation and it provides general information on how a transfer works, from the criminal procedure and the expulsion process until the transfer. The case studies are important in order to understand the workflow of the TTSP's in practice and to later on identify best practices and potential obstacles in the implementation of the Treaty between Brazil and the Netherlands.

### 2.1. General Workflow

On the next page a general workflow of a transfer of a sentenced person can be found. It is applicable to the treaties between Brazil and the Netherlands, Portugal, Spain and the UK. As can be deduced from the schedule, there are three procedures sequencing each other: the criminal process, the expulsion process and the transfer process.

## Workflow TTSP Brazil to other countries

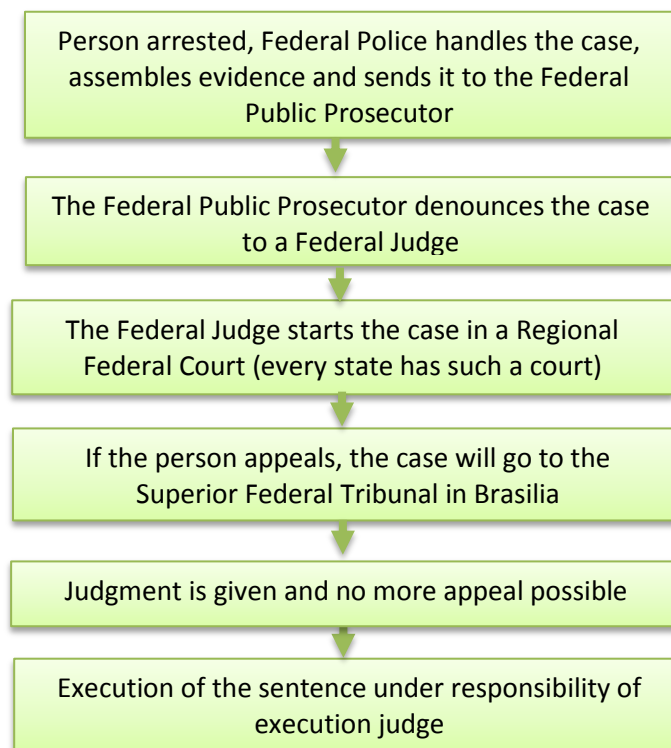


\*Workflow starts with number 1

All transfer procedures are preceded by an arrest. Normally, the person will be sent to a provisional prison awaiting the process. Depending on the case, this process can be treated by Federal Justice or State Justice. Based on interviews with state officials from Brazil, Portugal, Spain and the UK, most cases of foreign detainees involve international drug trafficking. In Brazil these cases are investigated by the Federal Police and treated primarily by the Regional Federal Court as it implies Federal Law (Motta, Personal Communication, 2013; DMC, Personal Communication, 2013).

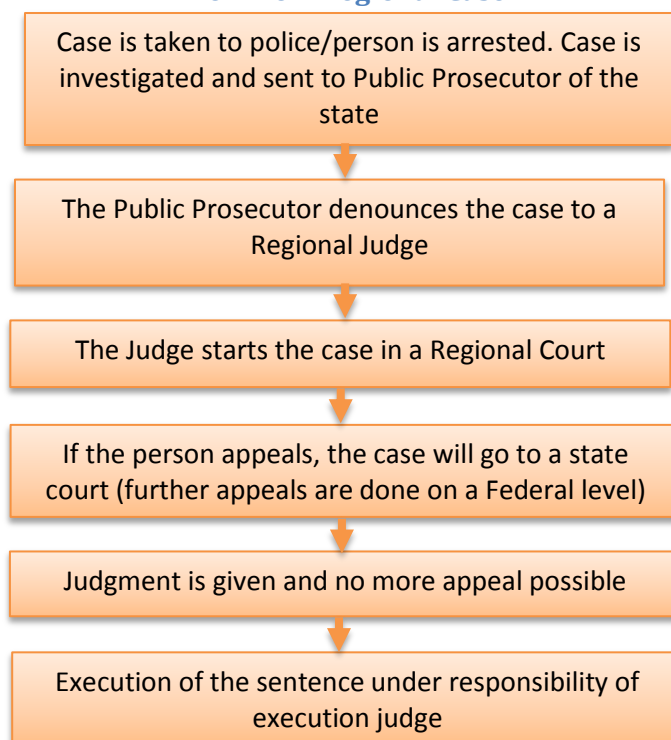
In a federal drug trafficking case the process functions as follows (also see workflow 1 of the schedule):

#### Workflow Federal Case



If it concerns a crime such as robbery or theft, the case is regional but the same principles apply, however on a state level:

#### Workflow Regional Case



Criminal cases can take more than 20 months. The reason for processes to delay so much is because according to the UN Working Group on Arbitrary Detention in Brazil many detainees do not have access to fair legal support and appeals are almost standard. This goes hand in hand with a shortage of judges to deal with the pending cases. Therefore 217.000 out of 550.000 detainees are awaiting trial in pre-trial detention (UN, 2013, Press Release).

When the entire criminal case is concluded, so there are no more possibilities left to appeal, he or she is officially declared “Transito em Julgado.” Then the expulsion process can officially be initiated. The expulsion process is the process in which a foreigner is eventually expelled from Brazil. It is determined by law that every convicted foreigner in the country is expelled after or while serving the sentence. According to Ana Carolina de Carvalho, a Federal Police Officer in Brasília, an expelled foreigner will not be admitted entrance to Brazil for thirty years after expulsion (Ana Carolina de Carvalho, Personal Communication, 2013).

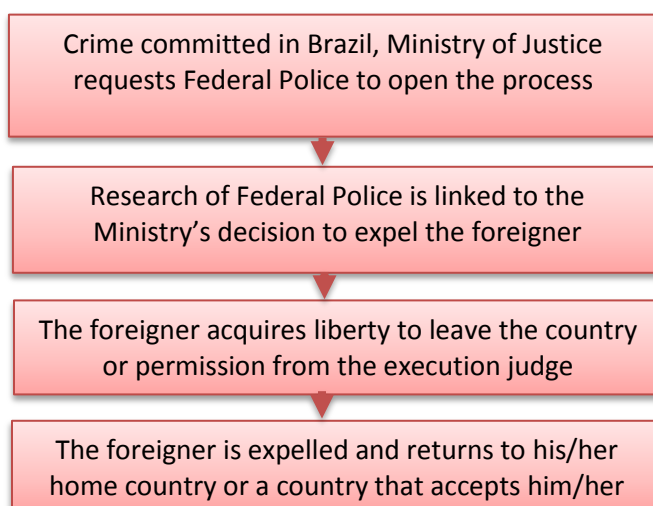
The expulsion process is initiated by the “Divisão de Medidas Compulsórias” of the Ministry of Justice, who requests the Federal police to conduct an inquiry to determine whether the convicted person has any family ties in Brazil. They do this by looking for any registered marriage or children. The



detainee is also interrogated to obtain a testimony in which is declared that the convicted person does not have any ties to Brazil and wishes to return to his or her home country. If the convicted foreigner claims to have other reasons to stay, he or she can defend this through a lawyer or a public defender.

If the foreigner does not wish to stay in the country, the expulsion process can be completed. If there is no transfer process pending however only the expulsion procedure, the foreigner would be expelled after completing the sentence or before with permission of the execution judge and the approval of the Ministry of Justice. He or she returns, on the expense of Brazil, to his or her home country or to a country where he or she is accepted. If the person is given permission from an execution judge to be expelled, it means that the expulsion from the country can occur before serving the entire sentence.

#### **Workflow Expulsion Process (without pending transfer process)**



It is important to mention that an expulsion process usually runs at the same time as a transfer process (see workflow number 3). That means that the initiation of a transfer process does not depend on the status of the expulsion process. However to successfully complete the transfer, the expulsion has to be completed as well. When the expulsion process is completed before the transfer process, preference is given to realize the transfer and the judge will not provide permission for the person to be expelled before the transfer process is completed.

A transfer is usually requested by the sentenced foreign citizen (see workflow 2). Not every foreigner can request a transfer. It can only be done if a bi- or multilateral treaty between Brazil and the country of origin exists. A request can be done at any moment during the prisoner's forced stay in the country, but can only be initiated when the person has a final sentence (*transito em julgado*).

If a sentenced person will request a transfer of the sentence it will be filed to the Department of Foreigners of the Brazilian Ministry of Justice (MJ). This can be done through a simple leaflet drafted by that same department, or by a written letter. The letter or leaflet will be sent from the penitentiary to the Department of Foreigners of the Ministry of Justice. It can also be filed at an Embassy, Consulate, lawyer or public defender who will subsequently forward it to the Brazilian MJ.

Then, the “Divisão de Medidas Compulsórias,” will analyze the request and initiate the transfer process. Primarily, they will formalize the request by having the sentenced person fill in another form in which he or she gives the consent to be transferred. Then a dialog starts between the DMC and the execution judge (the judge responsible for the execution of the sentence) and with the relevant penitentiary in order to obtain the adequate documents that are needed in order to realize a transfer.

These documents generally contain the entire and final sentence for which the person was convicted, a copy of the articles in the penal code concerning the committed crime on which the sentence is based, the time served in the penitentiary and the time that remains to be served in the country of origin. Some of the other required documents under the specific treaties will be indicated in the following case studies. After approval from DMC, the execution judge will be requested to officially liberate the foreigner for the transfer.

The documents serve as a tool for the Ministry of Justice for the approval of a transfer request of a foreign detainee. When the request is approved, DMC will translate the obtained documents and send them to the country to where the sentenced person will be transferred. In some cases the receiving state translates the documents at their own expense.

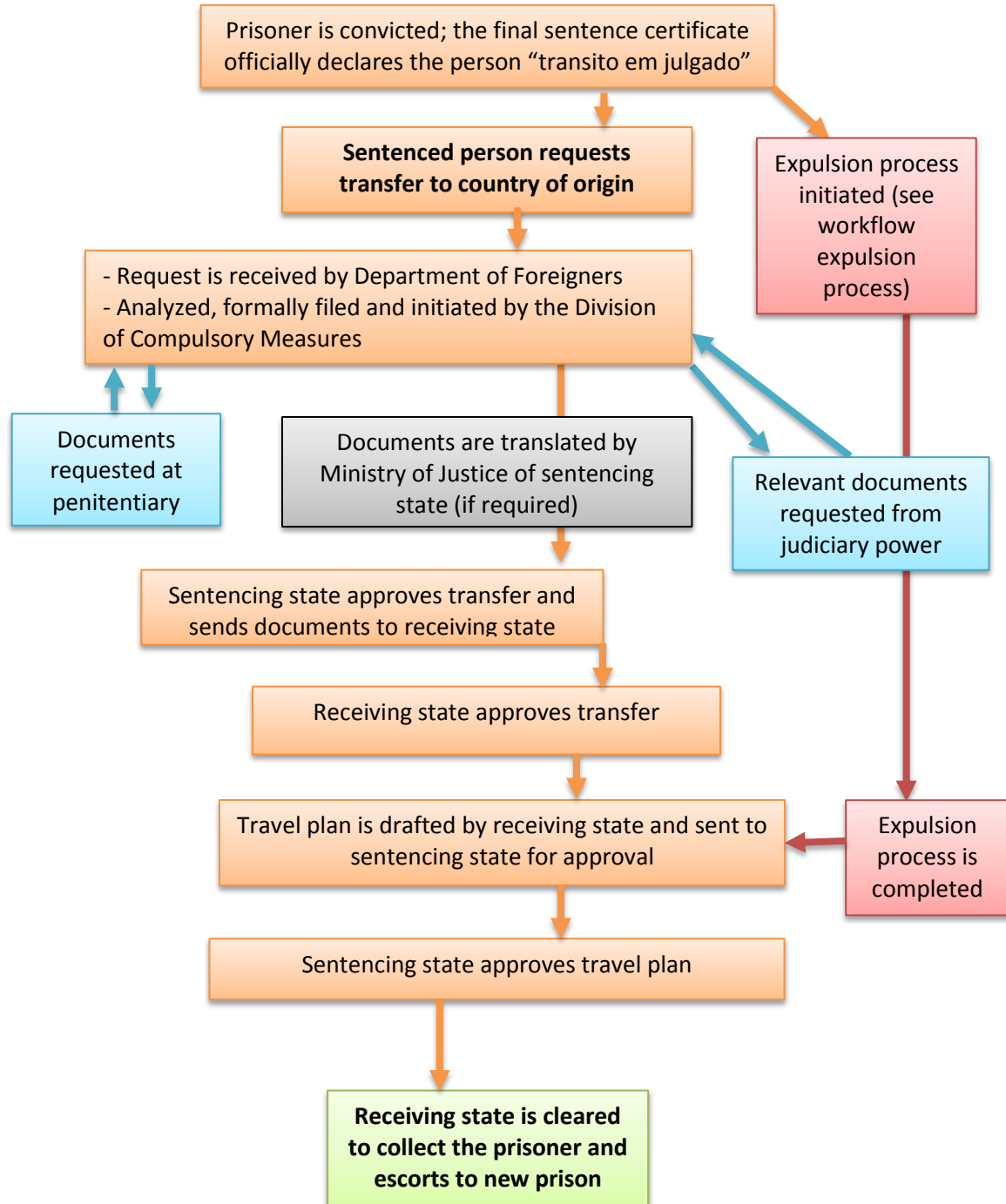
The receiving state will now also be able to determine whether the sentenced person complies with the set conditions and approves or disapproves the transfer. During this dialog, Brazil can also request the receiving state documents such as proof of the person’s nationality and a copy of the relevant law that indicates that the crime committed in Brazil is also considered a crime in the receiving state. If required, these documents will have to be translated at the expense of the receiving state.

When both states approve the transfer, a travel plan must be arranged by the receiving state. The plan contains information such as the date at which the sentenced person will be collected by the authorities of the receiving state and how many people will be present to collect the person. This way, Brazil can also plan ahead to transport the prisoner from the penitentiary to the relevant airport.

The travel plan is approved when the sentenced person is fully cleared to leave the country. That means that the expulsion process is also officially concluded. Then the person is allowed to be transferred in accordance to the travel plan. At arrival in the country of origin, the convicted detainee is

sometimes directly transferred to a penitentiary close to his or her family, or in some cases first housed in a central institution and later to an prison close to the family.

### Workflow general transfer process



## 2.2. Case Study I: TTSP Brazil – Portugal

### 2.2.1. Basic information TTSP Portugal

The TTSP between Brazil and Portugal was signed by the Brazilian Federal Senate in 2001 and ratified by the Brazilian president in 2006. The treaty has been in force ever since. According to Mr. Gonçalo Motta, Consul at the Embassy of Portugal, the reasons for the establishment of the TTSP is due to the ‘very extensive and important relationship between Brazil and Portugal, a cultural relationship and due to a lot of Portuguese coming to Brazil.’ He mentions that most of the Portuguese come here to do tourism or business, ‘but some come here to practice crimes and undertake illegal activities.’ He also states that ‘because of the amount of Portuguese prisoners, we thought it would be best to establish a Treaty with the Brazilian authorities in 2001’ (Motta, Personal Communication, 2013).

According to article 3 of the TTSP between Brazil and Portugal (2006) a transfer request can be realized on the following conditions:

- if the sentenced person of one of the states is a national or has his or her habitual residence (a place where an individual normally resides and routinely returns to after visiting other places) in one of the countries or has a personal tie with the other state;
- the sentence is final and enforceable; at the time of the receipt of the transfer request, there remain still at least six months of the sentence to be served;
- the crime committed is recognized and punishable in both countries;
- the transferred person consents to the transfer (except if the person is unable to, then a third person is authorized to speak on the sentenced persons behalf as provided for in article 14, paragraph 2);
- on the consent of the sentencing state and receiving state.

In article 4 of the TTSP the necessary documents that should be provided to the receiving state are given. These documents contain: an indication of the crime for which the person in question was convicted, the duration of the penalty or measure applied and the time that has already been served; an authenticated copy of the sentence; an authenticated copy of the text of the legal articles applied to convict the person; a behavioral report of the person in question and a declaration of the sentenced person in which is stated his or her consent for a transfer and other elements of interest for the execution of the sentence.

According to Motta, Portugal has approximately 140 detainees in entire Brazil (see table next page). Most of the prisoners are situated in São Paulo. As seen in the table below, Portugal has realized three transfers from Brazil to Portugal since the treaty entered into force. Motta says that the number of

qualified persons for a transfer is unknown, because neither the Brazilian Ministry of Foreign Affairs (Itamaraty) nor the Ministry of Justice (MJ) communicates all information about detainees to the Embassy or consulates (Motta, Personal Communication, 2013).

According to a representative of the Portuguese Consulate General, there have been a total of 12 requests since 2006. Nine transfers are currently in progress and three transfers have been concluded successfully. Concerning the total number of requests for a transfer, also here, Portugal is not completely sure whether there are not more requests due to the mentioned lack of communication between Brazilian authorities and the Portuguese representation (Motta, Personal Communication, 2013).

As for the duration of the transfer procedure, Motta says it can take up to three years. This timeframe is taken from the moment the person is declared *transito em julgado*. It is therefore important to mention that a transfer procedure can only be initiated when the sentence is firm. That means that there is no more possibility to appeal in court (Motta, Personal Communication, 2013).

#### TTSP Statistics Portugal between May 2006 and July 2013

| Date entry into force TTSP | # detainees | # qualified persons | Total # requests | # transfers in progress | # realized transfers | Duration procedure in months |
|----------------------------|-------------|---------------------|------------------|-------------------------|----------------------|------------------------------|
| 03-05-2006                 | <b>140</b>  | <b>Unknown</b>      | <b>12</b>        | <b>9</b>                | <b>3</b>             | <b>30 - 36</b>               |

[ Motta, Personal Communication, 2013 ]

Motta mentions that the costs of a transfer are kept to a minimum. He estimates that a transfer could cost between €10 000 to €15 000 euro. This includes three flight tickets, two police officers and, if required, medical support. Motta indicates that there is a special reimbursement plan which is supported by the family. If they do not have families or their families cannot pay for it, the Embassy engages the Portuguese Ministry of Foreign Affairs to apply an emergency fund for such situations. The money is provided in advance and when the detainee finished the sentence in Portugal, he or she will pay off the debt. The interest rate is determined by the Ministry based on the situation of the ex-detainee (Motta, Personal Communication, 2013).

In the table on the next page (statistics from the DMC) you can see the number of realized transfers per year since the treaty entered into force. What is especially interesting is that there are far more Brazilians transferred back to Brazil than the other way around.

## Transfers between Brazil and Portugal between May 2006 and July 2013

| Year                | 2006        | 2007        | 2008        | 2009        | 2010        | 2011     | 2012      | 2013            |
|---------------------|-------------|-------------|-------------|-------------|-------------|----------|-----------|-----------------|
| Brazil to Portugal: | <b>None</b> | <b>None</b> | <b>None</b> | <b>None</b> | <b>None</b> | <b>1</b> | <b>1</b>  | <b>1</b>        |
| Portugal to Brazil: | <b>None</b> | <b>8</b>    | <b>10</b>   | <b>9</b>    | <b>11</b>   | <b>5</b> | <b>14</b> | <b>None yet</b> |

[ DMC, Email Contact, 2013 ]

A Portuguese person arrested and convicted in Brazil will be included in the criminal register, if he or she decides to transfer back to Portugal. They are not registered in the criminal record in Portugal if they serve the entire sentence in Brazil (Motta, Personal Communication, 2013).

### 2.2.2. Implementation in practice TTSP Brazil – Portugal

All the information about the implementation of the TTSP between Brazil and Portugal are based on the interviews with a person from the Consulate General in São Paulo and Mr. Gonalo Motta, Consul at the Portuguese Embassy in Bras lia.

The transfer process starts with the arrest. Portugal says that they inform the prisoner about the possibility of a transfer at their first visit when the citizen was just arrested. They do not have specific information folders to inform detainees about a transfer. They depend on an information flyer which is distributed by MJ. The Consul, the consular assistant or the detainee’s lawyer also hands out a copy of the Treaty. ‘This way, Portuguese detainees are aware of the existence of the TTSP between Brazil and Portugal’ (Motta, Personal Communication, 2013).

Motta also mentions that ‘during this first visit, as stated in the Treaty of Vienna, the detainee is informed about the legal rights in Brazil. As for additional information about the TTSP, the Portuguese citizen is informed that he or she will have to undertake the process alone or with the assistance of a lawyer or public defender’ (Motta, Personal Communication, 2013).

The whole process starts with a request of the detainee. He or she requests the Brazilian justice to be transferred to Portugal under the agreement of the Treaty. Then the ministry of justice starts the process, ‘although it sometimes takes a long time before the process actually gets initiated. Besides, we usually get informed about a procedure in progress either by the detainee itself, or by his or her family’ (Motta, Personal Communication, 2013).

‘We would expect to get this information from Itamaraty, but they don’t do that, they don’t inform us that there was a request filed by a Portuguese citizen. It is therefore quite difficult for us to pinpoint

the exact number of transfers, or at least the number of transfers that are in progress, but it takes time and a lot of patience' (Motta, Personal Communication, 2013).

Subsequently, when the request is filed, the DMC initiates the process. According to the Consulate General in São Paulo (CG), they do not interfere in the process and the detainee is accompanied by a public defender or a lawyer. According to a public defender in São Paulo, who deals with transfers, expulsions and extraditions, he and his colleagues have generally 70 to 80 cases per person in progress at the same time (CG Portugal, Personal Communication, 2013; Defensor Publico, Personal Communication, 2013).

CG Portugal says that some requests are filed at MJ through a (public) lawyer, others through a NGO and some directly appointed to MJ. If the filed request is formalized by MJ, the transfer process is initiated by DMC and the documents as stated in article 4, paragraph 3 of the TTSP between Brazil and Portugal are collected at both the judiciary power and the penitentiary. He also mentions that this is usually done by a (public) lawyer. Contradicting this, DMC says that they are responsible for starting a dialog with judiciary power to obtain the required documents (CG Portugal, Personal Communication, 2013; DMC, personal Communication, 2013).

If all documents are collected, DMC will analyze the request and decides on approving it or not. According to Motta, obtaining the documents can take up to three months in Brazil, while it takes around three weeks in Portugal (Motta, Personal Communication, 2013).

After approval from DMC, the execution judge, responsible for the detainee's sentence, has to authorize his or her transfer. According to DMC, the judge does not have any competence or rule over the approbation of the prisoner's transfer as the Ministry of Justice is the central authority in the process. The judge has to simply liberate the foreign detainee from his or her jurisdiction so that the process can proceed (DMC, Personal Communication, 2013).

In the liberation process a problem once occurred with Portugal. Motta claims that 'sometimes the execution judges mess up. I recall a specific situation where a transfer was approved, and by the time the decision reached the execution judge in a Brazilian state, the judge of that state did not want to authorize the transfer. But in fact, he has no competence in the case of a transfer. But until you can prove that, you lose six months. We had to plea the ministry of foreign affairs to explain this to MJ for them to try to solve this' (Motta, Personal Communication, 2013).

By the time the detainee is liberated to proceed with his transfer, 'the bureaucratic process of the exchange of information between the Brazilian MJ and the respective MJ in Portugal begins and that is what takes some time.' According to CG Portugal, the exchange of documents between the respective

states is mainly done through the diplomatic channel (see the workflow in practice). It is important to mention that mainly formal communication is done through this channel. This contains the exchange of formal documents required as stated in article 4 of the Treaty. It follows this bureaucratic way merely because certain documents have to be authenticated as there is no article that indicates that documents are exempted from consular authentication. However, the detour in which information is exchanged can also be justified due to the fact that a detainee applicable for a transfer does not necessarily have to be a Portuguese national according the interpretation of the researcher of article 3a of the Treaty. This states that both Parties have to be absolutely sure of the ties of the detainee to the country it is transferred and exchange of information is therefore necessary (CG Portugal, Personal Communication, 2013; Departamento de Estrangeiros, 2010).

Not all contact has to be exercised through the diplomatic channel. According to article 5, paragraph 2 of the Treaty contact can be exercised both through the Diplomatic channel and directly between the two central authorities. The final steps of the workflow in practice are the same as the general workflow in the subchapter (Departamento de Estrangeiros, 2010).

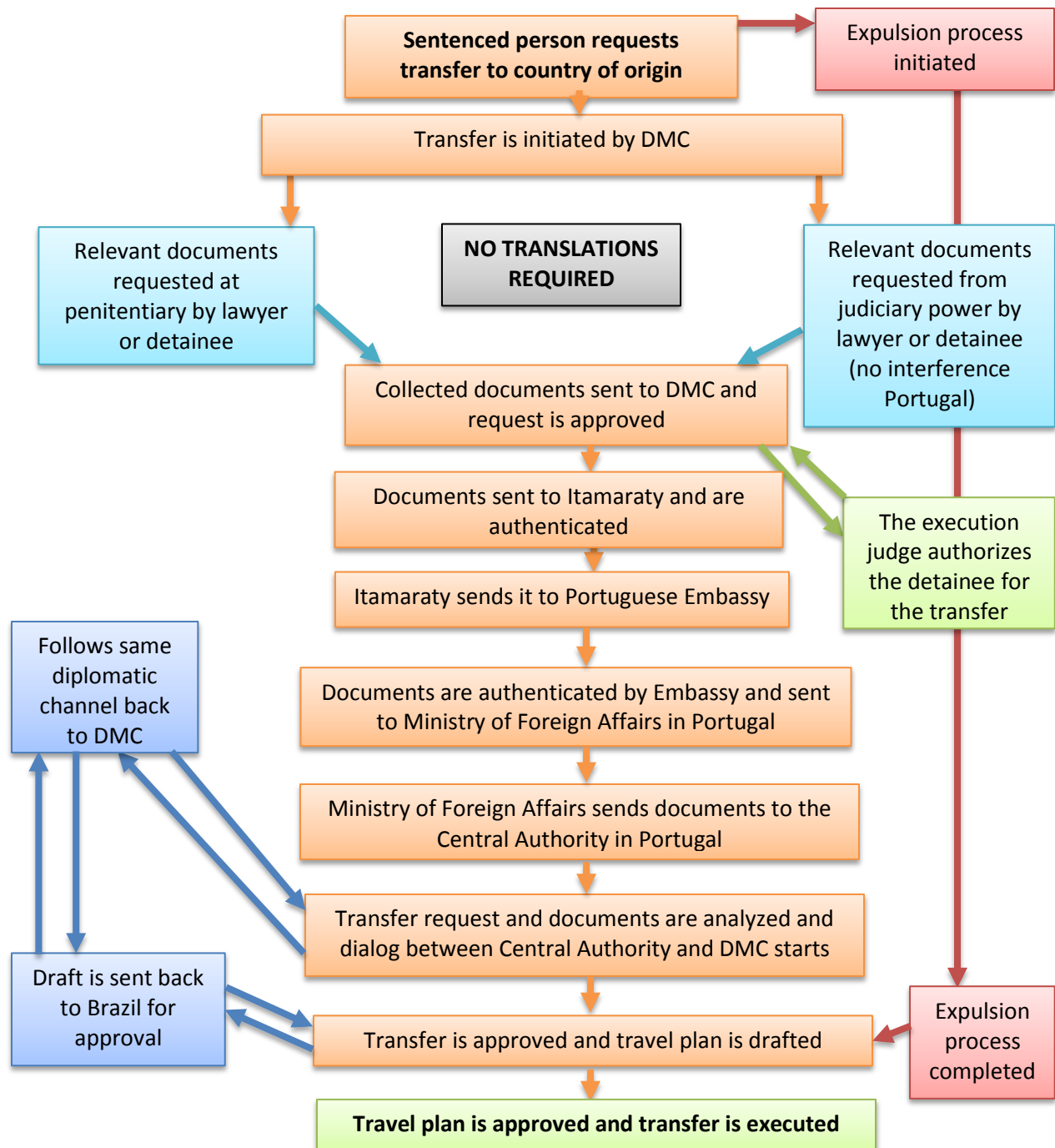
Motta sums up the greatest difficulties in the Treaty. 'One of the shortcomings of this agreement is that we should probably try to devise a more flexible, efficient or faster way to realize the procedure. As you can see, the process as it is now is very complicated and the length of the procedure is very cumbersome. However, it will be difficult to change it, as there are too many parties involved in the process, at least in Brazil's part of the procedure' (Motta, Personal Communication, 2013).

Motta also thinks that 'the process needs to be revised in order to be actually useful to the detainees. Right now a procedure takes generally three years and I think that is too long. If you have a sentence of three years, there is no use to the transfer at all' (Motta, Personal Communication, 2013).

CG Portugal agrees that the process takes too long. He thinks it is because there are no deadlines set at every department in which documents should be obtained or provided. Furthermore, he points out another major issue: 'the greatest difficulty is the time that it takes for a criminal process to be declared *transito em julgado* before a transfer procedure can finally be initiated.' Some persons have been waiting for a final sentence for up to three years due to appeals by the prosecutor or the detainee (CG Portugal, Personal Communication, 2013).



### Workflow TTSP Brazil – Portugal in practice



### 2.2.3. Conclusion

Portugal is unhappy with the current implementation of the Treaty as it takes around three years to successfully realize a transfer. Because of that, the Treaty cannot apply to many detainees. Portugal indicates that the reasons for this huge delay are mainly due to the Brazilian authorities, but they admit that they should also look into ways to improve its implementation. The delay is caused by the huge

detour in which communication is executed between the central authorities, due to the bureaucracy in Brazil (it takes very long to obtain documents), the necessity to authenticate documents, a judge that can act outside of his competence when the prisoner needs to be liberated from his jurisdiction and the slow rate at which information about the detainee is exchanged. Another external factor is the long duration of the criminal process which can be a reason why many detainees can get rejected or do not qualify for a transfer.

Another issue about which Portugal complains is that communication between Itamaraty, the Brazilian MJ and the Embassy of Portugal is very poor. They state that the Brazilian authorities do not inform Portugal about transfer requests as such. They often have to get that information from the detainee or from his or her family.

Portugal thinks that there should be a fixed timeframe or deadline for paperwork to be processed at every public division, department or Ministry. This way there would be a clear view on how long it takes for paperwork to be processed and when it can be forwarded to the next public institution. According to Portugal, this would considerably speed up the process.

## **2.3. Case study II: TTSP Brazil – UK**

### **2.3.1. Basic information TTSP UK**

The TTSP between Brazil and the UK was signed by the Brazilian Federal Senate in 1998 and ratified by the Brazilian president in 2002. The treaty has been in force ever since. According to Raphael Rachid, Pro-consul at the Consulate General in São Paulo (CG), the reason for the establishment of the TTSP is humanitarian. ‘They have the option to serve their sentence close to their families’ (Rachid, Personal Communication, 2013).

A UK detainee has to comply with more or less the same conditions as Portugal and Spain in order to qualify for a transfer. These conditions can be found in case study I: TTSP Brazil – Portugal. The only difference is that the person has to be a national of the UK.

There are approximately 40 British detainees in entire Brazil. Most of the prisoners are situated in São Paulo. Rachid confirms that there are 36 British detainees in São Paulo. Nineteen prisoners are on parole and seventeen are in a semi-open or closed regime. As seen in the table above, UK has successfully realized eight transfers of sentenced persons from Brazil to the UK since the treaty entered into force.

DMC confirmed that they have transferred two Brazilians back to Brazil. In the table below TTSP data can be found dating back from 2006 until now (Rachid, Personal Communication, 2013; DMC, Personal Communication, 2013).

| Transfers between Brazil and UK between January 2006 and July 2013 |             |             |             |             |             |             |          |                 |
|--|-------------|-------------|-------------|-------------|-------------|-------------|----------|-----------------|
| Year   | 2006        | 2007        | 2008        | 2009        | 2010        | 2011        | 2012     | 2013            |
| <b>Brazil to UK:</b>   | <b>None</b> | <b>None</b> | <b>None</b> | <b>None</b> | <b>2</b>    | <b>1</b>    | <b>4</b> | <b>1</b>        |
| <b>UK to Brazil:</b>   | <b>1</b>    | <b>None</b> | <b>None</b> | <b>None</b> | <b>None</b> | <b>None</b> | <b>1</b> | <b>None yet</b> |

Rachid, Personal Communication, 2013

He states that there are in total eight persons interested in a transfer, but they have not yet requested. Of the eleven requests, there are currently two procedures in progress. Furthermore, according to him the transfer procedure takes around one year. This timeframe is taken from the moment the person is declared *transito em julgado* (Rachid, Personal Communication, 2013).

| TTSP Statistics UK between January 2006 and July 2013 |             |                     |                  |                         |                      |                              |
|---|-------------|---------------------|------------------|-------------------------|----------------------|------------------------------|
| Date entry into force TTSP                            | # detainees | # qualified persons | Total # requests | # transfers in progress | # realized transfers | Duration procedure in months |
| 29-01-2002  | <b>40</b>   | <b>8</b>            | <b>11</b>        | <b>2</b>                | <b>8</b>             | <b>12</b>                    |

DMC, Email Contact, 2013

The Dutch Embassy has received very detailed information from the UK a calculation, in fact, Rachid calculates the duration of a transfer from the day the person was arrested until he or she was successfully transferred to the UK. He says that it takes generally eight to twelve months to obtain the first sentence, 'but if the person appeals, it could go on for years.' The UK tends to discourage detainees to appeal, but sometimes it is not their choice, and the public attorney appeals the case. The UK can then put light pressure so that the process will more or less take place within the set timeframe, although they cannot interfere with the justice. With light pressure is meant establishing a good relationship and according to Graham Wilkinson of the British Ministry of Foreign Affairs: 'the Brazilian authorities are very sensitive and chasing them up can be counter-productive' (Rachid, Personal Communication, 2013; Wilkinson, Email Contact, 2013).

From the experience of Levi Nietvelt, Consular Assistant at the Dutch Embassy in Brasília, a process in appeal can take around eight to twelve months as well, approximately as long as a process in the first degree. In order to calculate the duration of the process from *transito em julgado* until the transfer, it was necessary to make an estimation which was confirmed as accurate by Rachid (Nietvelt, Personal Communication, 2013; Rachid, Email Contact, 2013).

The estimation of the duration of a transfer from the day the person is declared transito em julgado until the day of the transfer is calculated as follows: Duration from arrest to transfer in months (39) - Duration of a process in the first degree in months (15) = Duration from transito em julgado to transfer in months (24). When the duration of the transfer process from arrest to transfer in months is shorter than 25 months, the calculation is as follows: Duration from arrest to transfer in months (24) - Duration of a process in the first degree in months (8) = Duration from transito em julgado to transfer in months (16). The table indicating the duration of a transfer can be found below.

The longest transfer (marked red in the table) took around twenty-four months and the shortest fourteen months (marked in blue). Thus, a transfer of a sentenced UK citizen takes sixteen months on average (or one year and four months). Furthermore, it is important to mention that it is unclear how many processes went in appeal, which also makes it difficult to calculate the exact time the process took.

| NAME         | ARREST                        | TRANSFER   | DURATION<br>FROM ARREST<br>TO TRANSFER<br>IN MONTHS | SENTENCE | DURATION<br>FROM<br>TRANSITO EM<br>JULGADO TO<br>TRANSFER IN<br>MONTHS |
|--------------|-------------------------------|------------|---|----------|--|
| <b>P E</b>   | 05-12-2006                    | 02-03-2010 | 39  | 4y 8mo   | 24   |
| <b>A Y</b>   | 21-09-2008                    | 29-06-2010 | 22  | 8y 10mo  | 14   |
| <b>N B</b>   | 08-12-2009                    | 13-12-2011 | 24  | 6y       | 16   |
| <b>P P</b>   | 16-03-2009                    | 29-05-2012 | 38  | 4y 10mo  | 23   |
| <b>A E H</b> | 07-04-2010                    | 08-11-2012 | 31  | 8y 4mo   | 16   |
| <b>O A</b>   | 04-06-2010                    | 15-11-2012 | 29  | 4y 3mo   | 14   |
| <b>M P*1</b> | 21/08/2008<br>/<br>23/03/2011 | 27-11-2012 | 24  | 6y       | 16   |
| <b>D K</b>   | 23-06-2010                    | 26-02-2013 | 32  | 5y 11mo  | 17   |
| <b>J C*2</b> | 10-03-2010                    | 18-06-2012 | 27  | 3y 10mo  | 12   |

Rachid, Email Contact, 2013 (\*1 person awaited firm sentence outside prison for 21 months, \*2 by the time the transfer was about to be realized the person cancelled the transfer)

Rachid was unable to give an indication of the costs. He says that the costs include one flight ticket and the translations, though the flight ticket is reimbursed. 'They have to pay their own ticket. So we buy the ticket from the budget of the Ministry of Justice, and then the person who's being transferred signs a document declaring that he's aware that we spent a certain amount of pounds on his flight and that he'll have to pay it back to the government when he's going to renew his passport. If he doesn't pay, he won't be able to renew his passport' (Rachid, Personal Communication, 2013).

A British person arrested and convicted in Brazil will be included in the criminal register, if he or she decides to transfer back to the UK. They are not registered in the criminal record in the UK if they serve the entire sentence in Brazil (Rachid, Personal Communication, 2013).

### **2.3.2. Implementation in practice TTSP Brazil – UK**

All the information about the implementation of the TTSP between Brazil and the UK are based on the interviews with Mr. Raphael Rachid, Pro-consul at the Consulate General in São Paulo (CG), email contact with Mr. Rachid and the TTSP between Brazil and the UK.

When the transfer procedure is initiated. Firstly, the British detainee will issue a written request for a transfer directly to the Pro-consul of the CG. Subsequently, Rachid would normally go to the relevant court of justice to get the copy of the final sentence, and 'I also get a behavioral report and a statement saying how much time he served and how much time he still needs to serve from the relevant prison institution. So then I have the sentence, the official request from the prisoner, the statement and his behavioral report from the prison facility and with these documents I submit the request to the Ministry of Justice' (Rachid, Personal Communication, 2013).

Rachid says that obtaining the documents can be a challenge but they are generally easy to obtain 'it just takes very long for the documents to be issued. The sentences can be found online, so it's easy to get that. You can print it from the internet. You also have to get the documents from the prison as well, which you have to request formally' (Rachid, Personal Communication, 2013).

He mentions that it is actually DMC's responsibility to gather all the required documents for a transfer and not the CG. 'But to gather all those documents, will take them ages as they deal with many other transfer procedures from different countries. So I send them the complete package with all the supporting documents.' This way the UK manages to considerably speed up the process (Rachid, Personal Communication, 2013).

DMC will subsequently take the request under consideration and approve it or not. Rachid receives written notification of the decision. Then the documents are forwarded to London and there they will be

translated on the costs of the receiving state. If translations were to be done by Brazilian authorities, 'it would probably take ages' according to Rachid (Rachid, Personal Communication, 2013).

Before 2010, translations were done by the sentencing state. They perceived that it was more an obstacle than a best practice, so they decided to translate all documents in London when it concerns the transfer of a British national. The UK thinks that 'doing the translations in London definitely helps, and another thing is to have good informal contacts with the Brazilian Ministry of Justice.' De Reuver also stresses that the Dutch MJ has decided to not borne the costs of translations. (Reuver, Personal Communication, 2013).

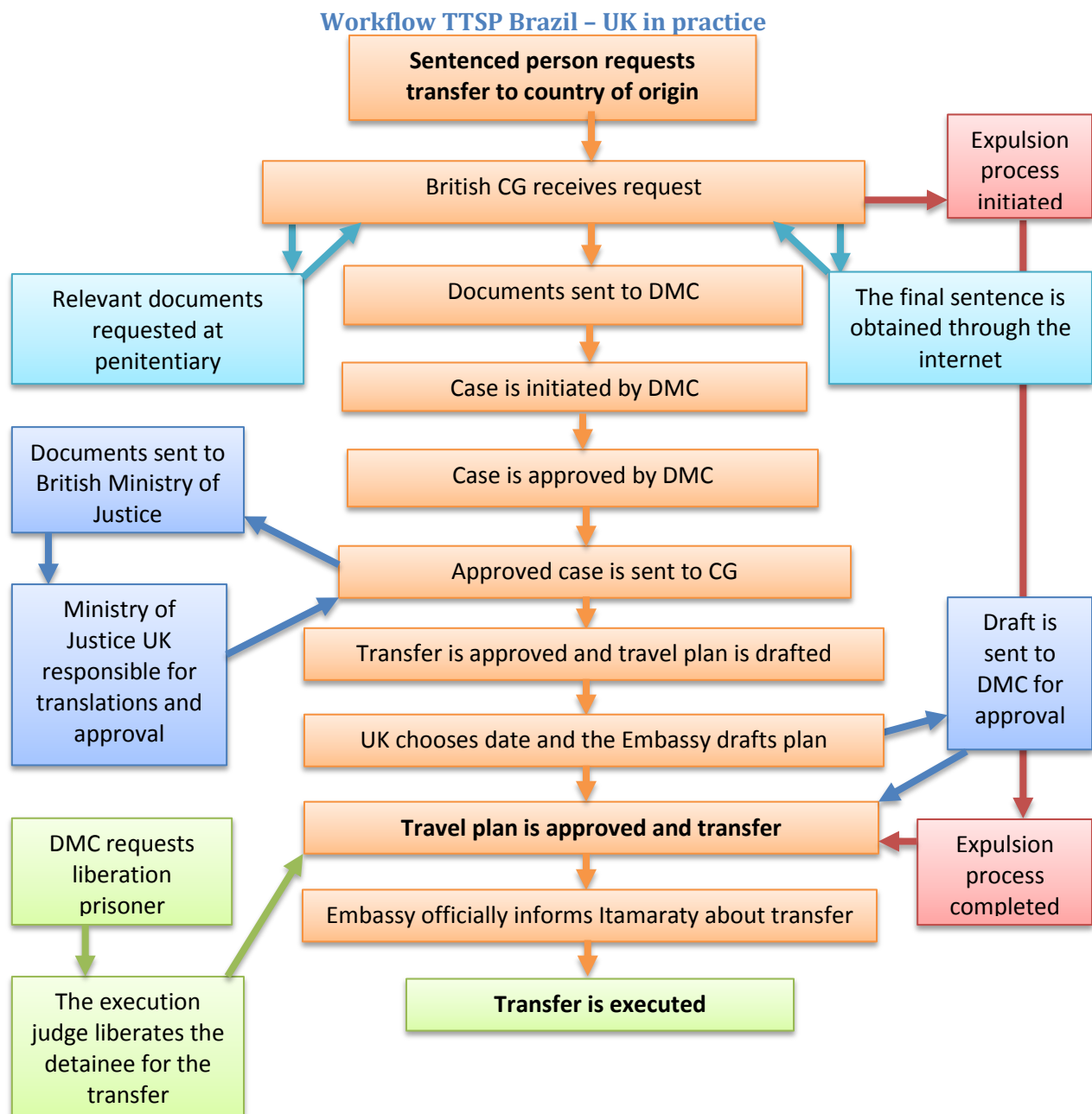
While the documents undergo translations to English in the UK, DMC will contact the British MJ both to officially inform that the transfer was approved and that they require the prisoner to sign some documents. The documents are that the detainee requires to sign, consist of: a declaration that the prisoner who applied for transference is a Citizen from the recipient state; a copy of the recipient country's law that defines that the same act, if it were to occur inside the recipient country, it is considered a crime there too; a declaration explaining how the rest of the penalty will be served, and assuring that the Brazilian sentence will be respected; an Undertaking to Repay (UTR), referring to the cost of flight tickets to the UK (PTA Guide, 2010; Departamento de Estrangeiros, 2010).

Rachid continues that 'after that the UK will also decide whether they agree or not. Once they approve it, the person will be transferred but the expulsion procedure has to be concluded as well. 'Sometimes I might have a transfer that already got approved, but then the person can't be transferred because the expulsion process still needs to be finalized. Usually the expulsion and transfer process are initiated at the same time. Though, I have currently two cases, in which the transfer is already approved, however, I still need to wait for the expulsion process to be completed' (Rachid, Personal Communication, 2013).

When the entire procedure is approved on both sides, the UK will have to draft a travel plan with the help of the Embassy. 'This has to be done well in advance because we have a small team to come here and collect the prisoners, besides, they do transfers all over the world' (Rachid, Personal Communication, 2013).

Then the execution judge approves the person to be removed from prison in order to be transferred. Important is to remember that 'the MJ here is the institution to actually ask for the person to be released from prison. However only on the day of the transfer the person will be released. The judge doesn't have any power to reject the request of DMC' (Rachid, Personal Communication, 2013).

When the prisoner is officially released from the execution judge's jurisdiction, the UK can decide on a date for the transfer and the Brazilian authorities approve it (or not). When approved, 'the Brazilian government will send the order to the Federal Police or INTERPOL to collect the prisoner from the prison on the agreed date and bring him or her to the Airport. Interpol handle all the release procedures and the paperwork, however the UK should do the follow up to make sure there is no delay. The prisoner is put into British Agents' custody at the international airport' (Rachid, Personal Communication, 2013; PTA guide, 2010).



### 2.3.3. Conclusion

The UK succeeds transfers in approximately one to two years and the UK provided the Dutch Embassy with clear evidence for their timeframe. They collect all relevant documents and they realize translations in London. To obtain the documents, Rachid has to formally request the penitentiary, but does not need to formally request anything at the execution judge. He mentions that the final sentence of the detainees and the articles of the laws on which it was based, can be found online. He prints them and then he gets the paperwork authenticated. Furthermore, doing the translations in London speeds up the process. Moreover, it is important to establish good informal contacts at the Brazilian Ministry of Justice.

Rachid indicates that they also face some problems. The expulsion process e.g. is sometimes not concluded although the detainee is ready to get transferred. The person has to wait for the official expulsion order and can only then be transferred.

What also delays the transfer procedure from being initiated, is the criminal process which takes approximately 8 to 12 months. An appeal makes the criminal process take even longer. However, the UK advises their detained citizens to not appeal when it concerns a drug case.

## 2.4. Case study III: TTSP Brazil – Spain

### 2.4.1. Basic information TTSP Spain

The TTSP between Brazil and Spain was signed by the Brazilian Federal Senate in 1996 and ratified by the Brazilian president in 1998. The Treaty has been in force ever since. According to Ramon Panes Calpe, Chancellor at the Spanish Embassy in Brasília, the reasons for the establishment of the TTSP is due to the poor conditions of prisons and ‘serving a sentence far away from your country and family is an additional punishment’ (Calpe, Personal Communication, 2013).

Like detainees from Portugal and the UK, they have to comply more or less with the same conditions to qualify for a transfer and somewhat the same supporting documents are required for the transfer of a prisoner.

In accordance with Eva Buendia, Consul at the Spanish Embassy, there are approximately 200 Spanish detainees in entire Brazil. Most of the prisoners are situated in São Paulo. Cristina Aquilar, Adjoint Consul at the Consulate General in São Paulo, confirms that there are 104 Spanish detainees in São Paulo. As seen in the table above, Spain has successfully realized twenty transfers of sentenced Spanish citizens from Brazil to Spain since the treaty entered into force. DMC confirmed that they have



transferred twenty-nine Brazilians back to Brazil. In the table below TTSP data can be found dating back from 2006 until now (EU Consular Meeting, Personal Communication, 2013; Aquilar, Personal Communication, 2013; Calpe, Personal Communication, 2013).

### Transfers between Brazil and Spain between January 2006 and July 2013

| Year                    | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013     |
|-------------------------|------|------|------|------|------|------|------|----------|
| <b>Brazil to Spain:</b> | None | 1    | None | 2    | None | 8    | 6    | 2        |
| <b>Spain to Brazil:</b> | 3    | 2    | None | 3    | 5    | 2    | 5    | None yet |

[ DMC, Email Contact, 2013 ]

She says that there are in total twenty-four persons qualified and all have requested a transfer. Of those requests, there are currently eighteen procedures in progress and the other six persons are still waiting to be declared *transito em julgado*. Furthermore, according to Aquilar and Calpe the transfer procedure can take up to two years. This timeframe is taken from the moment the person is declared *transito em julgado* (Aquilar, Personal Communication, 2013; Calpe, Personal Communication, 2013).

It is not clear what the costs are, however, they can be calculated when summing up the translation costs, the amount of work hours invested in per transfer, the flight tickets and perhaps additional medical costs (Daparte, Personal Communication, 2013).

### TTSP Statistics Spain between January 2006 and July 2013

| Date entry into force TTSP | # detainees | # qualified persons | Total # requests | # transfers in progress | # realized transfers | Duration procedure in months |
|----------------------------|-------------|---------------------|------------------|-------------------------|----------------------|------------------------------|
| 04-05-1998                 | 200         | 24                  | 44               | 18                      | 20                   | 18 – 24                      |

[ Aquilar, Personal Communication, 2013 ]

A Spanish person arrested and convicted in Brazil will be included in the criminal register, if he or she decides to transfer back to Spain. They are not included in the criminal record in Spain if they serve the entire sentence in Brazil (Aquilar, Personal Communication, 2013).

### 2.4.2. Implementation in practice TTSP Brazil – Spain

All the information about the implementation of the TTSP between Brazil and Spain are based on the interviews with Ms. Cristina Aquilar, Adjoint Consul at the Consulate General in São Paulo (CG), Rodrigo Santos Daparte, Administrative Officer at the CG in São Paulo, Mr. Ramon Panes Calpe,

Chancellor at the Spanish Embassy in Brasília and the TTSP between Brazil and Spain. Note that the Spanish and British workflow is much alike.

As all transfer procedures, the process precedes an arrest. Spain says that they inform the prisoner about the possibility of a transfer at their first visit when the citizen is just arrested. Daparte mentions that ‘the prisoner is often too shaken up to absorb any information, so we explain the procedure at a second visit.’ Spain uses their own information folders in Spanish and the available information from the Brazilian MJ to inform detainees about the possibilities of a transfer (Daparte, Personal Communication, 2013).

When the information of an arrest arrives at the CG, Aquilar and Daparte will directly forward the prisoner’s name to the DMC. They do this because there are more than 3000 expulsion processes pending over the entire country coordinated by DMC as a central authority. Therefore, the processes can sometimes take a long time before they are concluded. If the name of the prisoner is known at DMC (even though the sentence has not yet been imposed), it will directly go on the pile together with the other administrative procedures and it will slowly make its way up and probably be finalized before the sentence is completed or even by the time the transfer procedure is concluded (Aquilar, Personal Communication, 2013).

Then the judicial process starts. CG Spain comments that the criminal process is one of the biggest obstacles before the initiation of a transfer, as there can only be a procedure if the sentence is final. ‘The majority of our detained citizens are in prison for drug related crimes. In these cases they get caught in the act and their sentence is almost fixed and will in most cases lead to imprisonment. We try to inform the detainees to not appeal their cases as they generally won’t obtain any results. Most of them still try and still think they stand a chance. Furthermore, a decision for an appeal can take up to two or three years before the person can be declared *transito em julgado*. A lot of our detainees have a sentence shorter than four years. What happens is that by the time the person is declared *transito em julgado*, the TTSP doesn’t serve, as the sentence is almost or already served.’

If a transfer is applicable to the detainee, the administrative procedure can start on his or her request. He or she requests the Brazilian justice to be transferred to Spain under the agreement of the Treaty. Normally, the request is filed to the CG and they will start collecting the documents which are stated in article 5, paragraph 8 of the TTSP (Daparte, Personal Communication, 2013).

These documents are requested at the penitentiary and the execution judge. After obtaining all documents from the judiciary power, the execution judge, responsible for the detainee’s sentence, has to liberate the detainee in question (Daparte, Personal Communication, 2013).

Subsequently, when all documents are assembled, CG will deliver the detainee's request and the paperwork to the Spanish Embassy in Brasília, where the documents are authenticated. They will then send it to Itamaraty where the documents will also be authenticated. They will then forward it to DMC where the process is initiated and approved or not. They will also make sure that the prisoner fills in a form in which his or her consent is officially registered and that the person is aware of the legal consequences of the transfer.

Itamaraty then sends the documents and the official consent to Madrid where they are translated. According to Daparte, 'it has happened that we had sent the documents to Itamaraty, but we received notice that it was incomplete, even though we were sure that we had everything. Then we had to contact the same organizations to collect everything all over again, this can take another three to six months' (Daparte, Personal Communication, 2013).

The reason why CG collects all the documents is to speed the process. They say that 'if we don't collect the required documents and deliver them to the relevant authorities, it will take much longer due to a slow bureaucratic process. While collecting, we proactively put "light" pressure on the authorities. This way we managed to speed up the process considerably' (Daparte, Personal Communication, 2013).

Aquilar declares that the translations are done in Madrid with the same objective to speed up the procedure. In the Treaty there are no agreements on which party covers the costs, merely in article 6 paragraph 4, which states that the receiving state is responsible for all costs related to the prisoner by the time he or she is in their custody. This means that it provides flexibility to make agreements on translations and other occurrences during the procedure (Aquilar, Personal Communication, 2013).

When the process is pending in the receiving state, complementary information can still be requested from Brazil according to article 5, paragraph 9 and the state can also still verify whether the transfer is on the prisoner's consent. This means that, when required, a dialog between both states can occur through the diplomatic channel (Departamento de Estrangeiros, 2010).

By the time both parties have agreed on the transfer, Spain has to draft a travel plan. According to the CG, Interpol deals with Spain's paperwork for the travel. Subsequently, the draft is sent to Brazil, through the diplomatic channel, to be approved. According to Daparte, 'the plan is drafted well in advance to make sure it can be sent as quick as possible. Though, it has happened that one does not take into account the national holidays in Brazil and then the date in the travel plan is rejected by the authorities here' (Daparte, Personal Communication, 2013).

When the travel plan is approved, the two marshals will come to pick up the person in question. He or she is then transferred to a central penitentiary and then the person is usually transferred to an institution close to the family. What is interesting is that the location to where the detainee is transferred, has to be in consultation with the sentencing state (Departamento de Estrangeiros, 2013, Art 6, Par. 1).

There is no workflow for Spain's TTSP as it is very similar to the UK's schedule. Therefore the schedule of the UK in case study II can be read as if it were the Spanish workflow.

### 2.4.3. Conclusion

Spain succeeds their transfers relatively quick in comparison to Portugal. It takes them generally one to two years to transfer a national. This is due to the fact that they proactively try to speed up the process by collecting the relevant documents and by doing the translations in Madrid. However, they face problems as well.

When all documents are collected and ready to be sent to Itamaraty, it has occurred that the respective Ministry rejects a request due to a lack of documentation. When that happens, the CG has to collect all relevant documents all over again.

Spain also says that the expulsion process sometimes takes longer than the transfer process and then the transfer cannot be realized. To prevent this from happening, they contact DMC straight away when there has been a new arrest and they request them to start the expulsion process directly. This way the procedure is done before the sentence is served or before the transfer procedure is concluded.

### 3. TTSP Brazil – Netherlands

In this section of the paper the recently signed TTSP between Brazil and the Netherlands will be discussed. The first subchapter provides basic information on the TTSP. The second subchapter discusses the motives for the establishment of the Treaty, the recent developments and the status quo of the implementation of the Treaty. This is important in order to determine complications faced when implementing the Treaty and the formulation of recommendations.

#### 3.1. Basic information about detainees and TTSP

The TTSP between Brazil and the Netherlands was signed by the Brazilian Federal Senate in 2010 and ratified by the Brazilian president in 2013. According to Jan van Hoorn, Consul at the Dutch Embassy, there are approximately 70 Dutch detainees in entire Brazil. Most of the prisoners are situated in São Paulo. There are around 40 detainees in São Paulo, 10 in Rio de Janeiro and 20 under the Embassy's jurisdiction. As seen in the table below, the Netherlands has not yet realized any transfer of a sentenced citizen from Brazil to the Netherlands since the treaty only recently entered into force.

The conditions that determine the qualification of a detainee are set in article 3 of the Treaty. They are much alike those of Portugal, Spain and the UK.

TTSP Statistics between Brazil and the Netherlands January 2006 and July 2013

| <b>Date entry into force TTSP</b> | <b># detainees</b> | <b># qualified persons</b> | <b>Total # requests</b> | <b># transfers in progress</b> | <b># realized transfers</b> | <b>Duration procedure in months</b> |
|-----------------------------------|--------------------|----------------------------|-------------------------|--------------------------------|-----------------------------|-------------------------------------|
| 04-02-2013                        | <b>70</b>          | <b>Unknown</b>             | <b>2</b>                | <b>1</b>                       | <b>None</b>                 | <b>24 - 36</b>                      |

It is unknown how many detainees are qualified in entire Brazil. According to the current state of affairs, none of the 20 detainees under Brasília jurisdiction qualify for a transfer. Its jurisdiction covers the Federal District, the North and Northeast supported by Honorary Consulates. In São Paulo there have been two transfer requests of which one is currently pending. The other request will start when the person is declared *transito em julgado*. Two other persons have shown interest in a transfer, but as they are in open regimes, the transfer will probably be rejected (see the discussion under subchapter “recent developments”). Furthermore, it is estimated that the duration of the process is between 24 to 36 months. The reasons for the given timeframe will be provided in the conclusion.

It is unclear what the costs are. However, Saskia de Reuver, former Head of the Division for International Transfer of Sentences says that ‘they can be calculated by summing up the translation costs, the amount of work hours of personnel per transfer, the flight tickets for three marshals that will pick up the detainee and perhaps additional medical costs and a flight ticket for a doctor in the case the detainee is sick (Reuver, Personal Communication, 2013).

In the Netherlands there are approximately ten Brazilian detainees. It is unclear whether they are qualified for a transfer. According to professor Ninomiya, it is very unlikely that a Brazilian citizen would want to come back to Brazil to complete his or her sentence ‘in overcrowded and inhumane prison conditions, while prisons in the Netherlands aren’t even on half occupancy’ (Ninomiya, Personal Communication, 2013).

A Dutch person arrested and convicted in Brazil will be included in the Dutch criminal register, if he or she decides to transfer back to the Netherlands. They are not registered in the criminal record in the Netherlands if they serve the entire sentence in Brazil (Brok, Personal Communication, 2013).

## **3.2. Motives for establishment and recent developments**

### **3.2.1. Motives for TTSP Brazil – the Netherlands**

According to Jan van Hoorn, Consul at the Dutch Embassy in Brasília, reasons for the establishment of the Treaty are primarily humanitarian. With this is meant poor conditions in Brazilian prisons and the fact that citizens are serving a sentence out of reach of family and a familiar environment. Other reasons for this bilateral agreement are linked to the amount of Dutch prisoners in Brazil. He also mentions that the establishment of this specific Treaty has a broad focus on bilateral cooperation concerning the prevention of crime (Hoorn, Personal Communication, 2013).

According to the assistant of the police attaché at the Dutch Embassy, this broad focus is linked to article 14 of the Treaty with which judicial cooperation and the prevention of crime are effectively advanced. It concerns a rather unique article which has been included for the first time in a bilateral agreement of this kind between Brazil and another country. The article makes it possible to execute the sentence in the home country of citizens that have fled from prison in the sentencing state or that simply returned to their home country before the sentence was imposed (Police attaché, Personal Communication, 2013; Tractatenblad, 2009).

The article further stresses that in the transfer of the execution of the sentence, the consent of the person is logically not required though with a regular transfer, it is necessary. Furthermore, the state

(Brazil or the Netherlands) to which the convicted person fled or returned, can arrest him or her or take measures to make sure that he or she does not leave the territory. This can be done upon arrival of the request accompanied with the relevant documents or upon the decision to execute the sentence in the receiving state (TTSP Brasil – the Netherlands, 2013, art 14, par. 4).

The assistant police attaché stresses that ‘the establishment of such an article is mainly due to previous fled prisoners or persons that returned to the Netherlands while they were on trial in Brazil. This inflicted some diplomatic friction. ‘We are not talking about drug trafficking, it’s about serious crimes of a sensitive content.’ On four or five cases article 14 could be applied (Police attaché, Personal Communication, 2013).

### 3.2.2. Recent developments

Since the Treaty entered into force, steps were taken in both countries to apply article 14. Van Hoorn thinks that ‘the transfer of the execution of sentences for serious crimes under article 14 has a higher priority than transferring a mule that was convicted for drug trafficking.’ In the experience of the researcher both Brazil and the Netherlands undertook action as soon as the TTSP entered into force regarding article 14, while it took some months before the Dutch MJ had information available to inform detainees about the possibility of a transfer under TTSP (Hoorn, Personal Communication, 2013).

Some of the cases that apply for article 14 are quite complicated and sensitive, and considering the amount of documents that need to be translated it will probably take some time. The assistant police attaché says that ‘if a simple rogatory already takes around 250 days, we can expect this procedure to take even longer. The assistant also stresses that they have established direct contact between the Public Attorneys in the Netherlands and Brazil requiring only the minimum of interference by the police section, neither at the Embassy nor at the Brazilian Embassy in The Hague, in order to speed up the process’ (Assistant police attaché, Personal Communication, 2013).

In a regular transfer of a sentenced person, the central coordination is the responsibility of the Ministry of Justice in The Hague. Based on recent decisions, the Embassy will not, unlike Spain and the UK, proactively interfere in the process in order to speed it up, because there is simply no budget nor manpower to do that. The Embassy’s task is to merely inform prisoners about the existence of the TTSP.

De Reuver questions whether an Embassy or Consulate should even proactively interfere in the procedure: ‘I don’t think we should interfere with Brazilian affairs.’ Although, DMC encourages a proactive attitude from consulates or embassies as they know it has beneficial effects and will

determine how agile the procedure will be (Reuver, Personal Communication, 2013; DMC, Personal Communication, 2013).

The following case could serve as an estimate of the time a transfer might take in the future: After an Embassy's visit of the researcher to DMC at the Brazilian MJ in the end of May, they were informed, off the record, that there had been two requests in São Paulo for a transfer to the Netherlands. The person, whom requested a transfer on 25 February, sent a letter to the Department of Foreigners. They then forwarded the letter to DMC. This division subsequently sent a form on which the prisoner or prison gives the basic information conform article 4, paragraph 3. It was signed by the prisoner on March 11 and then it was most likely sent back to the Department of Foreigners and handed over to DMC. From there it was passed on to Itamaraty and subsequently forwarded to the Embassy on May 28. The form states that the prisoner's criminal process is still in appeal and that the transfer procedure officially initiates after the case is declared *transito em julgado*. The Embassy directly forwarded the documents to the Ministry of Justice. This is an indication of how this process is first treated internally before reaching the Netherlands. Though, the Ministry cannot initiate the process as the case of the person is still in appeal. This means that it took three months to inform the Netherlands that a request is filed although it will not yet be initiated (DMC, Personal Communication, 2013; DMC, Email Contact, 2013).

The fact that the Embassy was informed through Itamaraty is a sign that both ministries of justice are not (yet) contacting each other directly, but instead through the diplomatic channel. This was confirmed by Luiz Costa, Brazilian diplomat at Itamaraty. He says that 'Itamaraty will always act as an intermediary, especially when it comes to cases linked to judicial cooperation. This way we can keep track of the quantity of procedures. If we wouldn't do that, it could become difficult to accompany in- and outgoing procedures.' According to the assistant police attaché, that Itamaraty has an intermediary function is mainly due to the language barrier, 'they often don't speak English at the ministries here nor Portuguese there (Costa, Email Contact, 2013; Assistant police attaché, Personal Communication, 2013).

The second transfer request filed to the Department of Foreigners by letter on 24 March is yet to be expected. This person was sentenced to 21 years and 10 months and still has around 15 years to serve. Though, the Embassy was unofficially notified by DMC that the process is pending and currently awaiting documents (which are stated in article 6 of the TTSP) from the execution judge and the penitentiary. If all documents are collected, they will analyze the case and most likely approve it. Then the documents will be translated. Other than the translations concerning transfers under article 14, these can be translated to English, even though article 13, paragraph 1 of the Treaty says it has to be done in the



language of the receiving state. This was agreed on by both ministries to slightly accelerate the process according to Saskia de Reuver, former Head of the Division for International Transfer of Sentences of the Dutch MJ. (Tractatenblad, 2009; Reuver, Personal Communication, 2013).

De Reuver also stresses that the Dutch MJ has decided to not bear the costs of translations, ‘as there isn’t any budget for that.’ She also claims that it is their experience that translations generally take long in South-America and that the family of the detainees can be suggested, though not advised, to cover those costs. Based on the necessary consent of the person, a transfer is not an obligation, it is merely an extra service for which there isn’t a lot of money available’ (Reuver, Personal Communication, 2013).

Professor Ninomiya of the Law Faculty at the University of São Paulo, who is also a sworn translator, says that the Brazilian MJ offers the minimum price for translations. ‘Many sworn translators do not accept assignments for the lowest price and they have the freedom to refuse jobs. By the time they find someone, it will be a question of many months before the translations are ready. Although I think it is positive that the translations will be done to English’ (Ninomiya, Personal Communication, 2013).

DMC confirms that translations can complicate the transfer process. ‘It generally takes about two months to complete translations from Portuguese to English. We do have to admit that the Ministry is facing difficulties to contract translators. We are currently trying to contract translators and when we have them, the process will considerably speed up’ (DMC, Personal Communication, 2013).

When translations are realized by the Brazilian MJ, all supporting documents are exempted from consular authentication and they do not have to be certified except for the final sentence of the person. That means that the documents (except for the final sentence) do not have to pass through Itamaraty and the Embassy for authentication, Itamaraty will merely pass them through to the Netherlands (Tractatenblad, 2009).

The documents will then be sent to the Dutch MJ where the transfer request will be analyzed. According to Fred Stijnman, the new Head of the Division for International Transfer of Sentences of the Dutch MJ, transfers of sentenced persons of whom the conviction is drug related, are most likely approved by Brazil and the Netherlands if the persons in question complies with the set conditions in article 3 of the TTSP. More sensitive cases that are related to murder, rape, pedophilia or other serious crimes are in all probability not approved by the states in respect to the victims and, or their relatives. But these cases will be approved if article 14 is applicable (Stijnman, Personal Communication, 2013).

Moreover, Fred Stijnman continues that the MJ is currently discussing on whether Dutch detainees in a semi-open or open regime can also be transferred. He says that ‘the semi-open and open regime is considered as a reintegration policy and can therefore not be considered as a measure of deprivation of

liberty. For us, a prisoner has to be in a closed regime in order to be qualified for a transfer.’ According to the Dutch Ministry of Foreign Affairs ‘people in semi-open are still considered as detainees by us.’ It is yet to be decided formally by the MJ whether they will accept or reject prisoners in such regimes (Stijnman, Personal Communication, 2013; Zee, Email Contact, 2013).

DMC, on the other hand, says that ‘there are no articles in the Treaty that should make the transfer of a person in semi-open or open an issue. It does not specifically state that a transfer can only happen when a person is serving a sentence in a closed regime. Besides, the progression of regime is simply a consequence of serving the sentence. It continues being a punishment and it still deprives the detainee’s freedom’ (DMC, Personal Communication, 2013).

They explain that the Netherlands could decide to approve detainees in semi- or open and put them in a closed regime, making sure that they are fully conscious of such consequences. ‘At the end, it should be the prisoner that decides whether he or she wants to transfer back to the Netherlands or not’ (DMC, Personal Communication, 2013).

According to DMC, transferring Dutch detainees in São Paulo should not be difficult. ‘In São Paulo, the biggest concentration of foreign prisoners in Brazil is kept centralized in one prison. We have established quick contact with this penitentiary. All exchange of information is done electronically. What would probably take long, from our experience, is to obtain documents from the judiciary power. What is also unfortunate is that some of the Federal states in for example the Northeast are not very interested in actively collaborating with a transfer procedure which makes the process take longer.’

As for the duration of the procedure, De Reuver thinks it will take around two years based on her experiences with other Latin American countries with which the Netherlands has a TTSP (Panama and Venezuela).

The Embassy on the other hand thinks that a transfer procedure will take approximately two years when it concerns a prisoner in São Paulo where there is more cooperation between DMC and the state. When it concerns a person in a prison under Brasília jurisdiction, it will most likely take around three years to get the person transferred due to the fact that there is less interest in the TTSP measure in states in the Northeast of Brazil and furthermore it is because of the bureaucracy that will make the process take long as seen from the procedures of the other countries.

None of the prisoners under Brasília jurisdiction, based on the current state of affairs, are qualified for a transfer or will ask for a transfer. This is because some detainees that received high sentences are subjected to early expulsion (see subchapter “Early expulsion”), some are almost completing their

sentence, most of the detainees serve a sentence between three and six years and because most prisoners are currently in an open or semi-open regime.

### 3.3. Early expulsion trend

The number of foreign prisoners in Brazil has risen over the past years and is still rising according to the Department of Foreigners of the Brazilian Ministry of Justice. Therefore, several countries with prisoners in Brazil take measures such as negotiating bilateral TTSP's with Brazil to try to deal with the issue. Currently ten countries have a bilateral TTSP established with Brazil. Another 36 countries are negotiating a TTSP or they are awaiting their Treaty to be ratified by the president (Departamento de Estrangeiros, Personal Communication, 2013; Erhardt, Email Contact, 2013).

The judicial power in Brazil deals with the problem in its own way. It is by law compulsory that foreign prisoners are expelled from the country after serving the sentence and they will not be able to return to Brazil anymore for at least 30 years. According to information collected in 2012 by a legal online magazine ConJur, 1511 foreigners have been expelled since 2008. As experienced by the Dutch Embassy, two prisoners have been expelled between April and July even before they had served half of their sentence. The expulsion processes of two other persons have recently been completed and they are currently awaiting their early expulsion. This means that they will be expelled before completing the entire sentence. According to other EU-countries, also their prisoners occasionally get expelled before serving the entire sentence (Conjur, par. 1, 2012; Policia Federal, Personal Communication, 2013; HC Fortaleza, Personal Communication, 2013; UNODC, 2012, p. 1, par. 2; EU consular meeting, Personal Communication, 2013).

The simple solution of expulsion also influenced the opinions of representations of EU-countries in Brazil. They mentioned in an EU consular meeting in Brasília that 'the acceleration of the expulsion of prisoners must be encouraged.' What is often forgotten is that early expulsions commonly go hand in hand with challenges and complications. Expulsion does not necessarily solve the high cost problem. Although the Dutch Embassy embraces early expulsion as, firstly, they think that this is very beneficial on the short term, and secondly, early expulsion is a cheap solution for both Brazil and the Netherlands 'which makes it a win-win situation.' In the section "potential complications" some of the potential threats of this trend will be presented under "early expulsion" (Reuver, Personal Communication, 2013; Brok, Personal Communication, 2013; EU consular meeting, Personal Communication, 2013; Nietvelt, Personal Communication, 2013).

## 4. Benefits and Challenges

---

### 4.1. Potential benefits TTSP

In this section of the paper potential benefits of the TTSP between Brazil and the Netherlands will be discussed in contrast to the Treaties of the countries Portugal, Spain and the UK and concerning decisions that were made recently as described in the recent developments. From the information throughout the paper some aspects could be identified as potential benefits in contrast to other TTSP's.

These are: authentication of documents, translations, article 14 of the TTSP and early expulsion. This is important as it will analyze discussed matter in the previous chapters and it will show the strong points of the Treaty which will subsequently help making the SWOT-analysis which is presented in chapter 5.

#### 4.1.1. Authentication of documents

The information that is collected in Brazil about the detainees from Portugal, Spain and the UK for a transfer, all has to be certified and authenticated by Itamaraty and the relevant Embassy before sending it to the receiving state for approval.

The Netherlands has negotiated in their Treaty that documents, except for the final sentence and the articles of the relevant law on which the sentence is based, are exempted from consular authentication and certification. This means that the process can be considerably faster. According to Mark Adriaenssen, former Consular Officer who is responsible for visa and authentication concerns, it is estimated that authentication of documents takes around one day at the Embassy, and at Itamaraty, if it arrives there by mail, it can take months. He also mentions that 'if you go to Itamaraty yourself to authenticate the documents, it can be done in a day.' Most countries are probably aware of that, however in order to authenticate the documents concerning the transfer of a Portuguese detainee, the information is most likely sent to Itamaraty by mail and then it becomes a problem (Adriaenssen, Personal Communication, 2013).

The Netherlands merely has to certify an extract of the final sentence and the articles from the relevant law which applies on which the sentence is based. That means that there is less work involved compared to other countries in terms of authentication which could diminish the duration of the procedure with some months. But if it is sent to Itamaraty for authentication by mail 'it will probably still

take months, I think we should just go to Itamaraty to authenticate the documents at the help desk, there it takes only one day, and then we should take it back the Embassy and send it to the Netherlands ourselves, this would be the quickest way.’

#### 4.1.2. Translations

There are a few positive aspects to the translation’s procedure of the documents. Portugal does not require any translations due to the fact that the official language in both states is Portuguese. Spain and the UK do the translations in their own country at their own expense. What is beneficial about that will be explained in the section “complications” in contrast to how the Netherlands implements the Treaty.

What is beneficial about the translation’s procedure (when it does not concern transfers under article 14) is that they can be done from Portuguese to English, instead of Portuguese to Dutch. There are very few translators in Brazil that would be able to officially translate documents to Dutch. The ones that exist are most likely expensive and would not accept jobs at minimum price from the Ministry as Ninomiya mentioned. Translations of Portuguese to English are much more common in Brazil, and even though it will be hard for the Ministry to contract a translator, translations will be done relatively quickly.

#### 4.1.3. Article 14

Article 14 is perhaps the most positive aspect about the Treaty. The reasons for its establishment are purely political and humanitarian concerns are left out. It simply has to do with bilateral judicial cooperation and bilateral cooperation on the prevention of crime. Fled prisoners can now be put to justice in their home country.

Since the beginning of the Treaty, it has become clear that both Brazil and the Netherlands deem the implementation of this article on past cases very important. It has been shown that there is budget on the Brazilian side for the realization of cases that apply for article 14. Also the Netherlands considers it important that fled persons serve the imposed sentence. It is expected that Dutch drug mules, that fled back to the Netherlands and did not complete the sentence, will probably not be followed up under article 14 by Brazilian justice (Nietvelt, Personal Communication, 2013).

#### 4.1.4. Early expulsion

It is primarily a benefit as it could save the Dutch and Brazilian government a lot of costs. The sentencing state has a prisoner less and the receiving state will not have any consular expenses or costs with the bureaucratic process when transferring a prisoner through a TTSP in these rather economically

inconvenient times. The benefit for the prisoner is that he or she is allowed to leave the country without serving the entire sentence. Dutch, British, Portuguese and Spanish prisoners that are expelled are not entered into the criminal records upon returning to their home countries.

## **4.2. Potential complications TTSP**

In this section of the paper potential complications of the TTSP between Brazil and the Netherlands will be discussed in contrast to the Treaties of the countries Portugal, Spain and the UK and concerning decisions that were made recently as described in the section “recent developments.” From the information throughout the paper some aspects could be identified as potential complications in contrast to or which are the same as the other TTSP’s.

These are: no proactive attitude, semi-open and open issue, translations, remaining time of sentence to serve, criminal record, low budget and expulsion. This is important as it will analyze discussed matter in the previous chapters and it will determine the weaknesses of the Treaty which will subsequently help making the SWOT-analysis. This section is also important because the recommendations will be based on this subchapter.

### **4.2.1. No proactive attitude from Consulate or Embassy**

Spain and the UK have a proactive approach towards their TTSP procedures. The requests of the detainees of both states go through the Embassy in Brasília or consulates general in São Paulo. They both collect all necessary documents for the transfer and the procedure is regularly monitored. Even though Spain and the UK proactively follow-up the procedure, complications might occur.

Portugal does not follow this same procedure and recommends its citizens to contract a lawyer or to contact a public defender to do the same work. The consequences are that procedures end up taking approximately one year longer than Spain and the UK.

To have a public defender or a private lawyer to follow-up the process is not very ideal. In the case of a private lawyer, they often do not have experience with such procedures and they go to the Embassy to request information about the process. A public defender has simply no time to focus on a procedure due to the high quantity of cases per defender. It would be ideal to have a full-time consular worker who specializes in detainee matters, just as Spain and the UK have their own specialized person.

The Netherlands has decided that the Embassy will not proactively follow-up transfer processes in order to speed up the procedure. The Embassy’s task contains informing prisoners about the existence of a TTSP. They will most likely, just as Portugal, advice their detainees to contract a lawyer to follow-up

the process or to approach a public defender to do this work. Without a proactive attitude it is assumable that the Netherlands will face equal complications as Portugal.

#### **4.2.2. Semi-open and open regime issue**

Spain and Portugal also transfer their citizens despite their stay in a semi-open or open regime. They both say that they have a similar way of executing a sentence. If the Netherlands decides to proceed with their policy to reject detainees in semi- or open regimes a transfer procedure can become quite challenging. This is because Brazil will accept requests from prisoners in such regimes which the Netherlands will then subsequently reject. There will be no prisoner left under Brasília jurisdiction qualified for a transfer. In São Paulo two requests for a transfer were filed. One of the applicants has a sentence of 5 years and 10 months to serve, but is still in appeal. It is unknown when the final sentence will arrive. Another person already has his final sentence of 21 years and 10 months and still has 15 years to serve. It is most likely that only the person with the highest sentence will succeed to return home under the TTSP.

#### **4.2.3. Translations**

Among the four countries participating in this research, Spain and the UK do the translations of documents at their own expense and in their capitals. Portugal does not require any translations and the Netherlands and Brazil agreed to translate all required documents on the expense and on the territory of the sentencing state.

As the Netherlands does not have the budget for translations on their own expense, the transfer process will take considerably longer. The question remains whether the procedure will not take even longer than that of Portugal considering the fact that they do not even need translations. However, that is difficult to estimate as both treaties are slightly different from each other.

#### **4.2.4. Remaining time of sentence to serve**

Between Brazil and all countries (except with the Netherlands) was agreed to a period of six months left to serve as a condition for a detainee to be qualified for a transfer. This is counted from the moment that the receiving state receives the complete request, ready for analysis. As a Dutch detainee needs at least one year to serve, the number of people qualifying for a transfer is reduced.

#### 4.2.5. Criminal record

None of the detainees of the relevant countries discussed in this paper are registered in the criminal record upon arrival in the country of origin, after serving the entire sentence in Brazil. When they transfer back to their home country under the applicable TTSP, they will be entered into the criminal record of their countries.

It will make a transfer less attractive. However, also with detainees from other countries, it has occurred that prisoners considered a transfer as it was more important for them to serve the sentence close to their families and in a familiar environment, or perhaps because they already have a criminal record in their home country.

#### 4.2.6. Expulsion process

The expulsion process could turn out to be a complication that delays the transfer process. However, it can be overcome by dealing with it on an informal way (like Spain) with which the expulsion procedure can become more agile.

#### 4.2.7. Early expulsion

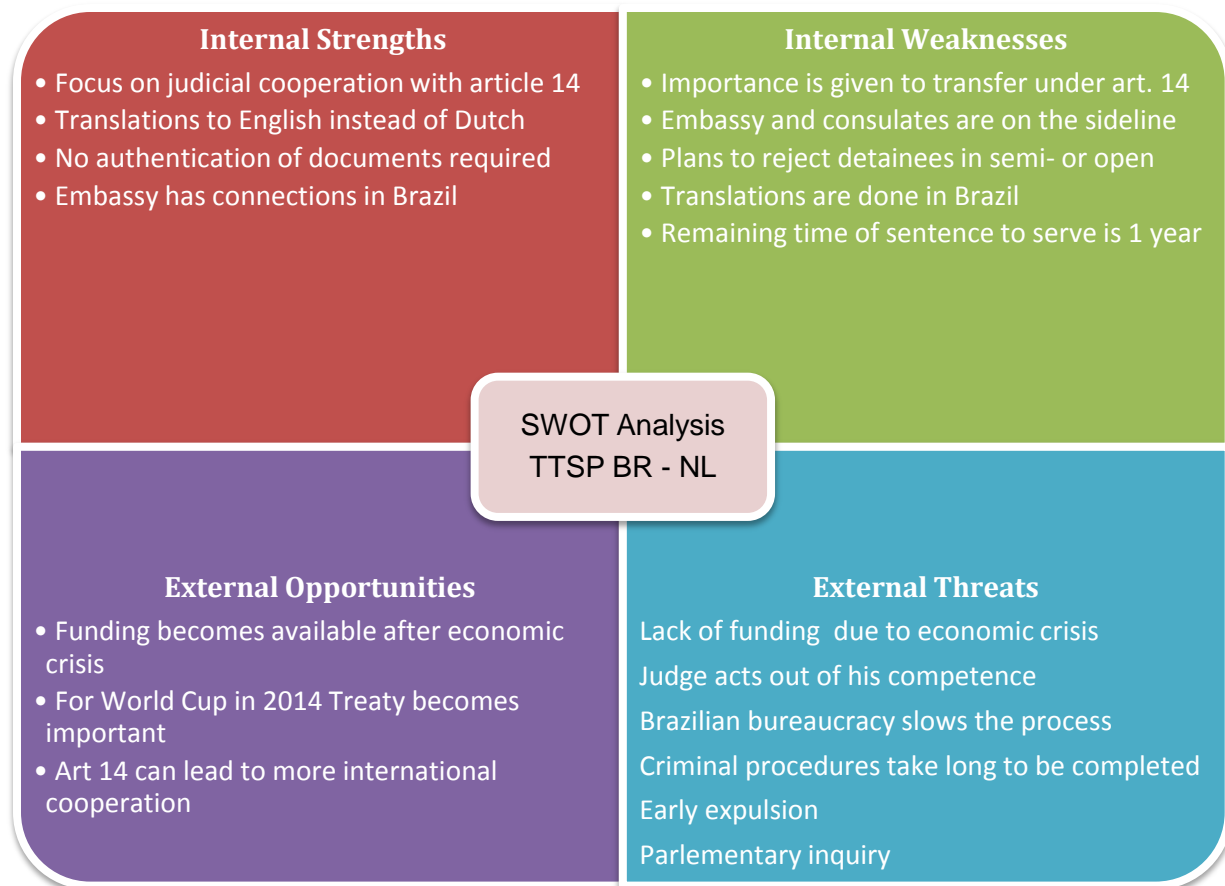
Early expulsion could also create complications for the sentencing state. For instance, if a foreign prisoner is supposed to serve a six year sentence in Brazil, but the judge decides to expel him or her before even serving half of the sentence, drug trafficking in Brazil might increase. It could e.g. become more attractive to traffic drugs from Brazil to Europe due to the fact that sentences appear to be lower because of the early expulsion trend, something which might not occur in e.g. Bolivia where the sentences are then higher. It could also be a threat to the resocialization, reintegration and rehabilitation of prisoners. A successful implementation of the Treaty could lead to prevention of crime.

These reasons, and many others, indicate the importance of the existence of such a treaty and that it is to be implemented properly in order to make it attractive for a foreign sentenced person to request a transfer.

#### 4.2.8. SWOT-analysis

Based on the analyzed potential strengths and potential complications for the implementation of the TTSP a SWOT-analysis could be drafted to indicate what the strengths, weaknesses, opportunities and threats are of the TTSP between Brazil and the Netherlands. The analysis will be shortly illustrated where required.





### Internal Strengths

Based on what the assistant of the Police Attaché mentioned, the frequent contact between Dutch and Brazilian authorities, the seriousness of the cases that will be transferred under article 14 and the current stage in which some of the pending cases are currently in, indicates that the transfer of the execution of sentences under article 14 is considered very important. It is an article that no other state adopted in its Treaty with Brazil and it is focused on judicial cooperation and the prevention of crime. It makes it a strength because with the article threats to society can be put to justice. The translations of documents under this article are done to Dutch and are currently being translated in Brazil, on their expense. This is another indication of how transfers under this article are considered important.

The fact that the Netherlands also accept translations in English, when it does not concern a transfer under article 14, is a strength of the implementation of the Treaty. This is because there are more translators in Brazil available that can do translations from Portuguese to English for the minimum price. Transfers of sentenced persons are no top priority at all, maybe because a transfer can only be realized

with the consent of the prisoner. If the consent would be taken away, it could become more beneficial to Brazil, which is suffering from overcrowded prisons.

Except for the final sentence of the prisoner and the laws to which it applies, documents are exempted from consular authentication. This will considerably speed up the process and can therefore be considered as a strength.

### *Internal Weaknesses*

The given importance to article 14 is also the biggest internal weakness of the Treaty. Though it cannot be clearly proven whether the transfer of a sentenced person is given the same priority as a regular transfer, there are indications (previously presented) that make it seem as if the importance given to article 14 is at the expense of a regular transfer. It is quite understandable from a political point of view, because the potential persons that will request a transfer to the Netherlands have committed small crimes or were used by organizations or individuals as drug mules. The cases that apply for article 14 are cases of a sensitive content which caused some diplomatic friction. Though, that should not mean that less serious criminals should not be transferred back to the Netherlands. While serving time in Brazilian prison, they disintegrate from their home society and will not get the chance to properly reintegrate, resocialize and rehabilitate. Upon return to the Netherlands, this person could return to committing crimes and might cost the state more money than if the TTSP was successfully implemented.

As for the role of the Embassy, they merely fulfill an informative role. This means that they only inform detainees about the content of the TTSP. They will not follow-up the process to make the procedure more agile. This is a great weakness, as the Embassy and consulates are in the field, they have the connections and can put light diplomatic pressure on the procedures in order to speed them up and make the TTSP more useful instead of putting the main focus primarily on article 14.

Another weakness is the decision to realize translations in Brazil. The arguments for the decision are understandable as there is simply no budget for it due to the economic crisis. But, in the experience of the UK became clear that procedures were not able to be successfully executed due to the fact that translations would take very long. Even though the Netherlands has decided to accept translations concerning regular transfers in English, it might still take a long time due to the indicated difficulty of contracting translators which are, according to Ninomiya, contracted for the minimum price.

### *External Opportunities*

In 2014 the FIFA World Cup will be held in Brazil. One might expect a higher flow of criminal activities to the country. Obviously, all participating countries are taking provisional measures to prevent

this. However, it cannot be excluded that Dutch citizens will be arrested for (drug related) crimes for which a high sentence can be imposed. Such arrests could gain more media attention than normally and solutions for detainees to serve the sentence in the Netherlands would be a TTSP. If the Treaty turns out not to work properly in practice, critical questions from the parliament about the TTSP could be submitted to the Ministry of Justice which would cause them to take steps to improve the implementation.

### *External Threats*

Brazilian bureaucracy and the criminal processes are of a very delaying nature. These are the principle threats that slow down the process. It is also where the Netherlands can put few diplomatic pressure, only if it were to assist the central authority by e.g. obtaining documents and by doing the translations like Spain and the UK.

Another threat (but also an opportunity) is early expulsion. In the experience of the Embassy, many Dutch prisoners have been expelled from the country before serving the entire sentence. As it is known that a transfer procedure comes with a lot of bureaucracy and costs, Embassy's might try to put diplomatic pressure on authorities in order to expel them from the country which can be considered as a 'win-win situation.' The Brazilian government expels a foreign prisoner that only provokes costs for the state and occupies overcrowded prisons and the Netherlands does not have any more consular expenses on the detainee. Though, at the same time, the person will not properly reintegrate after facing harsh and sometimes violent experiences in Brazilian prisons. Although, it has to be said that there are also Dutch persons that are convicted to deprivation of liberty in the Netherlands and neither resocialize. Though studies have shown that reintegration in the Netherlands is more active than in Brazil.

The last mentioned external threat can be that if the TTSP is not properly implemented, the Dutch parliament could start questioning the Ministry of Justice, this will have consequences for the communication.

# Conclusion

---

Based on the discussed matter in the previous chapters, one can conclude the following. Firstly, the execution of sentences under article 14 of the TTSP between Brazil and the Netherlands is most likely given a higher priority than a regular transfer of a sentenced person. This is based on the issue that there are clear indications that both MJ's deemed it important to directly start realizing processes under article 14 as soon as the TTSP was ratified and it has become clear that there is budget for its realization.

The fact that it is taken so serious is because the public opinion was affected due to considerable media attention on fled criminals that had committed serious crimes in Brazil. This put pressure on the states' justice. Therefore, if they succeed in completing pending cases, it can be expected that positive results will provoke a positive reaction from the public through the press. This will subsequently place both judicial systems in good daylight. The above also indicates that the motives for the establishment of the Treaty are considerably more political than humanitarian. Thus, the TTSP between Brazil and the Netherlands has a more political approximation while the Treaties of the other countries have a more humanitarian approach.

Secondly, as presented in this paper, the regular transfer procedure is a slow and bureaucratic process. If you assume that the first sentence is only imposed after 12 months and a case in appeal will take another 12 months, the entire criminal process will take around two years. Subsequently, the complications faced in the transfer procedure mentioned in chapter 4 have to be summed up to the length of the criminal process, as the criminal process is preceded by the transfer procedure.

The mentioned complications in chapter 4 are: no proactive attitude because of a low-budget; translations; authentication of documents; criminal record; the expulsion process, however it is important exclude the possibility that persons in semi- and open regimes will not qualify for a transfer as there is no formal decision yet. Based on these complications it is estimated that the transfer procedure will take approximately three years outside of São Paulo.

By adding the duration of a transfer procedure to the length of the criminal process ( $2+3=5$ ) means that it will take five years from arrest to return to the Netherlands. Then it is important to also consider the fact that a person requires a minimum of one year left to serve in the receiving state. This would mean that the person would need a sentence higher than six years in order to qualify for a transfer.

Lastly, the Brazilian Ministry of Justice indicated that they would approve a transfer of a person in a semi- or open regime. If the Dutch Ministry of Justice formally decides not to qualify persons in a semi-

or open regime for a transfer, a person would need a sentence of at least 15 years in order to qualify for the TTSP. This is based on the fact that in order to be applicable for semi-open, as explained in chapter 1 under “humanitarian motives,” you need to have served  $1/6^{\text{th}}$  to  $2/5^{\text{th}}$  of your sentence. If the person will have to serve  $2/5^{\text{th}}$  of that sentence in order to progress to semi-open, it will take around six years ( $15/5 \times 2 = 6$ ). This would mean that he or she could only then qualify for a transfer taking into account the five years that a criminal process and transfer procedure are estimated to take. If the person merely has to serve  $1/6^{\text{th}}$  (2.5 years) of the sentence of 15 years in order to progress, he or she will not qualify. It is calculated that an unlikely high sentence of 36 years is needed in order to qualify ( $\text{term} \times 1/6^{\text{th}} = 6 \text{ years needed}$ ;  $\text{term} = 6 \times 6/1 = 36 \text{ years}$ ).

Based on the above mentioned complications, the TTSP will most likely be a very long and bureaucratic procedure and its enforcement will be a great challenge. It is expected that this TTSP will be applicable to few persons. However, there is a possibility to implement the same practices as the countries Spain and the UK in order to accelerate the process, this way more success can be expected. The procedures under article 14 will also face a long duration, though due to its higher priority it is expected that these will obtain more positive results.

# Recommendations

---

One of the aims of this paper is to establish best practices for the implementation of the TTSP between Brazil and the Netherlands. In this section such recommendations for the implementation of the Treaty are given. Based upon the case studies, the current state of affairs and the identified complications drawn from them, best practices have been established. It is important to mention that the recommendations are focused on the implementation of a regular transfer and not that of a transfer under article 14. The best practices have led to the following recommendations which are intended for both the Dutch MJ and the Embassy.

## Proactive attitude

- It is highly recommendable that the Dutch MJ and the Ministry of Foreign Affairs consider assigning Embassies and Consulates to proactively follow-up transfer procedures under the TTSP in order to accelerate the processes.

This would accelerate the process and improve the quality of this consular service. This could avoid requests from being rejected in the Netherlands. Rejected cases can lead negative media coverage which may lead to questions from the parliament to the Minister of Justice. This could have a negative effect on the Ministry's communication.

## Semi-open and open regime

- It is outmost important that the Ministry of Justice should make it possible for detainees in semi- or open regimes to qualify for a transfer.

This in order to assure that the consular service provided with the TTSP will not only be applicable to persons with unlikely high sentences. This way the TTSP will become accessible to more detainees than what is currently expected.

## Translations

- The Netherlands should consider doing the translations of documents on their own expense, on their own territory or even in Brazil or assist the Brazilian government to finding solutions.

This would diminish the length of the procedure. The Netherlands could also assist the Brazilian government to find a solution for their contracting complications. This could not only be beneficial to

the TTSP procedure, however also to other judicial affairs between Brazil and the Netherlands in which translations are required. It could considerably improve bilateral (judicial) cooperation.

### Low-budget solutions

- Implement budget cutting measures.

If the Dutch MJ is to implement the mentioned best practices, they could compensate the transfer expenses with several measures. The costs for a transfer, or some of the costs, could e.g. turn into a loan for the prisoner, which he or she will have to pay off after the sentence is served. The loan would be based on the financial situation of the ex-detainee.

Another option could be to turn the costs of the flight ticket (or even all the costs) into a loan which only has to be paid back when the person decides to renew his or her passport. This does not directly help the procedure from being cheaper, but it also makes it less attractive to renew the passport which could subsequently prevent the person from (being forced to) committing the same crime.

The Netherlands should also try to involve Interpol as much as possible at setting up the travel plan and realizing the actual transfer. This will surely cut back some hours of work and especially costs.

### Remaining time of sentence to serve in receiving state

- It is recommended that the Dutch MJ will try to lower the required remaining time to serve from one year to six months.

With this measure the number of qualified detainees would undoubtedly increase. According to article 3, paragraph 2 of the Treaty, both states can agree to transfer a person even if the time to be served is less than one year. Such an exception would normally be made for persons in humanitarian circumstances, for instance, when he or she is severely sick. However, the Netherlands could try to agree with Brazil to simply consider all transfer cases as exceptionable cases.

### Criminal record

- Renegotiate with Brazil about removing the need for the prisoner's consent.

As Dutch prisoners are not registered in the criminal record if they complete the sentence in Brazil it might cause the Treaty to not be very unattractive to a Dutch detainee. Considering the importance of effective resocialization, the prisoner consent should be removed. This way, a transfer for a person can be requested by either the Netherlands or Brazil. This can be considered a win-win situation. Though, the already politically motivated TTSP between Brazil and the Netherlands would lose its humanitarian foundation which was primarily based on the prisoner's consent.

## Consular authentication of final sentence

- The Embassy should arrange the authentication of the final sentence at Itamaraty and send the paperwork directly to the Dutch MJ.

As Adriaenssen mentioned in chapter three, under “potential benefits,” the final sentence and the relevant articles of the laws on which it is based will most likely be sent from the Brazilian MJ to Itamaraty for authentication by mail. This will take months. Doing the authentication personally at the visa-office of Itamaraty, it will considerably accelerate the procedure.

## Expulsion process

- The Dutch Embassy should, like Spain, directly report new arrests to DMC and request them to initiate the expulsion process as soon as possible.

This would prevent the expulsion process from not being completed whilst the transfer process is already finalized.

## Early expulsion

- It is extremely important that the Embassy, together with other EU countries encourage early expulsion if the above recommendations are not deemed possible to implement.

It will make sure that detainees, ‘subject to a double punishment,’ will be able to return to the Netherlands to be close to family and they will spend less time in inhumane conditions in prison. Though, this measure will not stimulate resocialization, reintegration and rehabilitation and it might cause an increase of drug trafficking in Brazil which goes hand in hand with an increasing foreign prison population in Brazil.



# Literature

---

British Consular Network Brazil (2010). Prisoner transfer guide Brazil - UK. Retrieved on March 14, 2013 from British Consulate-General in São Paulo.

Consultor Jurídico (2012, July 3). *Brasil expulsou 1.511 estrangeiros entre janeiro de 2008 e junho de 2012*. Retrieved on June 02, 2013 from ConJur from website: <http://www.conjur.com.br/2012-jul-03/brasil-expulsou-1511-estrangeiros-entre-janeiro-2008-junho-2012>

Council of Europe (2001, June 25). *Operation of the Council of Europe on the Transfer of Sentenced Persons*: Critical analysis and recommendations. Retrieved on May 29, 2013 from European Council website: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9363&Language=EN>

Council of Europe (2013). *Convention on the Transfer of Sentenced Persons*: CETS No.:112. Retrieved on May 29, 2013 from Council of Europe website: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG>

Council of Europe (2013). *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. Overview CETS No.: 051. Retrieved on May 30, 2013 from Council of Europe website: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=051&CM=1&CL=ENG>

Council of Europe. (2013) *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. Summary ETS No. 051. Retrieved on May 30, 2013 from Council of Europe website: <http://conventions.coe.int/Treaty/en/Summaries/Html/051.htm>

Council of Europe. (2013) *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. Treaty ETS No. 051. Retrieved on May 30, 2013 from Council of Europe website: <http://conventions.coe.int/Treaty/en/Summaries/Html/051.htm>

EU Consular Meeting (2013, April 10). *EU consular meeting on detainees and Schengen*. Location: Irish Embassy, Brasília, Brazil.

EU Consular Meeting (2013, May 23). *EU consular meeting on detainees and Schengen*. Location: Dutch Consulate-General in São Paulo.

European Parliament. (2013, January 28) Library briefing: *EU rules on transfer of sentenced persons*.

Retrieved on May 29, 2013 from European Parliament website:

[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130411/LDM\\_BRI\(2013\)130411\\_REV2\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130411/LDM_BRI(2013)130411_REV2_EN.pdf)

Klip, A.H., Vervaele, J.A.E. (2013). Supranational rules governing cooperation in administrative and criminal matters: *European Cooperation between tax, customs and judicial authorities*. The Hague: Kluwer law international, 2002. 29-30. Print.

Lawyer of Netherlands Embassy Brasília (2008, August 19). *Explanation progression of regimes as explained in the penal execution law*.

Reuver, S. de, Nietvelt, L., Hoorn, J. van, Bos, M.H. (2013). WOTS. *Informatieblad voor Nederlandse gevangenen in Brazilië*.

Transferência de pessoas condenadas, 2010. (CDD.341.14). *Brazil and other international agreements* Vol. 2.

Treaty on the Transfer of Sentenced Persons and the execution of sentences imposed by judgements between the Kingdom of the Netherlands and the Federative Republic of Brazil. (2009, January 23). (TRB4899). *The Netherlands and other international agreements*. Vol. 1 (ISBN 0920 – 2218).

UNODC (2013). *International Transfer of Sentenced Persons*. Retrieved on May 29, 2013 from UNODC website: <http://www.unodc.org/unodc/en/organized-crime/transfer-of-sentenced-persons.html>

UNODC (2012). *Handbook on the international transfer of sentenced persons*. 11 ed. Vienna: UNODC,

2012.

UN (2013, March 28) Press release Working group on arbitrary detention: *Statement upon conclusion of its visit to Brazil*. Location: Sergio Viera de Mello United Nations Complex, Brasilia.

## Other sources

---

Aquilar, C., Daparte, R.S. (2013, May 23). Personal interview.

Barzano, P. (2013, May 16). Email interview.

Brok, M. (2013, March 26). Email contact.

Calpe, R.P. (2013, February 22). Personal Interview.

Consulate-General of Portugal in São Paulo. (2013, May 23). Personal Interview.

Costa, L.M. (2013, May 31). Email interview.

Departamento de Estrangeiros (2013, March 19). Email interview.

Divisão de Medidas Compulsórias: Soares, I.M., Silva, C.E.R., Santos, dos T.E., Eurich, S.B., Isobe, M.F.S.  
(2013, May 21) Personal interview.

Erhardt, T. (2013, February 15). Email interview.

Halvax, I. (2013, March 25). Email contact.

Heleno, M. (2013, May 24). Personal interview.

Kersten, M. (2013, June 24). Email contact.

Martens, T. (2013, February 19). Email contact.

Motta, G. (2013, February 19). Personal interview.

Ninomiya, M., Oliveira, E.L. (2013, May 25). Personal interview.

Rachid, R. (2013, February 19). Personal interview.

Rachid, R. (2013, June 19). Email contact.

Rachid, R. (2013, February 21). Email contact.

Reuver, de S. (2013, April 9). Telephone interview.

Tatiana, Erhardt. (2013, May 23). Email contact.

Reuver, S. de (2013, February 26). Email contact with Wilkinson, G.

Zee, A. van der (2013, May 14). Email contact.

Zee, A. van der (2013, May 15). Email contact.

Zee, A. van der (2013, May 27). Email contact.

# List of acronyms

---

DMC – Divisão de Medidas Compulsórias is a division under the jurisdiction of the Foreigners

Department of the Brazilian Ministry of Justice.

EP – The European Parliament, an organ of the European Union.

EU – European Union.

MJ – Ministry of Justice.

TTSP – The Treaty on the Transfer of Sentenced Persons.

UK – United Kingdom.

UN – United Nations.

UNCPC - United Nations Congress on the Prevention of Crime and the Treatment of Offenders was a series of conventions during the 1970's and 1980's in which international judicial cooperation and the prevention of crime stood central.

UNODC – United Nations Office on Drugs and Crime is a UN organ that focusses on drugs and the prevention of crime.