

# Foreign National Prisoners

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The concept “foreign national prisoner” can be explained by adopting the definition furnished by the United Nations: “prisoners who do not carry the passport of the country in which they are imprisoned. This term therefore covers prisoners who have lived for extended periods in the country of imprisonment, but who have not been naturalized, as well as those who have recently arrived” (UNODC 2009). In addition, the United Nations identified three further categories of foreign offenders:

1. Persons traveling from one country to another with the specific aim of committing an offense (such as drug smuggling or trafficking of human beings).
2. Long-term residents in a country, who may even have been born there, but who have not been granted citizenship for various reasons.
3. Persons who are residing legally in a country for short periods, often for work, and who commit serious or minor crimes during their stay.

Essentially, there is also a fourth category, which is only relevant to countries where illegal immigration is a criminal offense. In this instance, foreign nationals share the same prison facilities with native inmates.

The sheer vulnerability of fundamental rights guaranteed to foreign national prisoners through existing ad hoc legal mechanisms implemented both at international and national level makes this group of inmates particularly helpless. To this liability one should add the fact of being incarcerated in a country far removed from home, which often results in foreign prisoners experiencing unfairness, bias, and prejudice from the moment

they come into contact with the legal system of the hosting country.

This situation becomes even more problematic when observing women imprisoned in a foreign country, particularly with regard to the relationship with and the psychophysical well-being of their children. It is worth noting that, although the percentage of women imprisoned does not exceed 8% of the whole number of those incarcerated worldwide, some countries are showing a significant increase in the total of female foreign prisoners. This trend is noticeable in Spain and Portugal when focusing on Europe and in Argentina when observing Latin America. Recent studies have indeed highlighted how socioeconomic factors combined with a challenging interaction between these and the legal system of the hosting country bring about an increase in the use of the custodial sentence for foreigners.

Imprisoned foreigners are overrepresented in Europe compared to inmates residing in European member states. The figure is steadily increasing, representing a significant percentage of the entire prison population – up to 70% in some countries (Switzerland, Luxembourg) and 20% on average. Concerning the risk of discrimination, direct consequences can be highlighted, for instance in the excessive use of preventive detention (a condition which often presupposes tougher custodial methods with respect to those faced by convicts, as the CPT – Committee for the Prevention of Torture – of the European Council has reminded us on more than one occasion) for foreigners, compared to natives.

The cases generally indicated for this punitive approach are attributable to the lack of legal residence in the hosting country with consequent identification of a higher risk of escape compared to that of persons deemed to be easy to reach, to the lack of a work permit, poor socioeconomic factors, inadequate level of or no cultural integration in the new context, and the absence of firm ties in the area (Wacquant 2006).

With reference to the nature of the offenses perpetrated, foreign nationals mostly commit crimes relating to drug smuggling. In this respect, it is not

unusual for cities with airports connecting South America and Europe to suffer a high proportion of foreign inmates incarcerated on charges connected to drug dealing.

The indirect consequences of the discriminatory approach can be noted especially in countries where foreigners are guaranteed by law the same treatment reserved to native citizens. In fact, rather than being an attempt to implement the fundamental principle of equality before the law, not providing particular treatment for a category of persons with distinguishing characteristics with respect to the citizen category risks turning out to be a disadvantage. An example of indirect discrimination can be highlighted by the evidence that it is less easy for foreigners to effectively access alternative measures to a custodial sentence, this being a privilege granted to those who can rely more on locally based resources.

There is also a so-called institutional form of discrimination in a number of countries, which is aimed at specific categories of foreigners (irregular migrants or persons who are unlikely to have their residence permit renewed) and which excludes them, by law, from certain alternative measures such as community service or electronic monitoring. Furthermore, one should take into account the discriminatory conduct based on ethnic and racial prejudices, which are typically aimed at persons who come from specific geographical areas or belong to cultures or religions that are not readily accepted in the country of detention (Bowling 2006). While this type of discrimination may take the form of verbal or physical abuse, it more frequently leads to conduct which is difficult to evaluate in terms of arbitrary breach of a foreigner's rights, amounting, for example, to uncritical application of the rules with respect to arranging prisoners in cells according to the level of security, frequent recourse to disciplinary measures, and more or less invasive body searches.

To this day, most prison establishments do not have the resources to take in prisoners who are unable to understand the language of the hosting country; their difficulty in being accepted for educational or vocational training courses and activities aimed at social reintegration illustrates this inadequacy. All this makes detention more distressing, as it makes it difficult (if not

impossible) to directly manage the main reintegration/treatment opportunities provided for by national laws.

It is worth noticing here that the majority of, if not all, recreation or rehabilitation activities organized in a prison setting take place in the official language of the country where the prison establishment is located. Furthermore, one should also consider the language barrier when observing the struggle foreign national prisoners undergo when coming into contact with legal and/or health care practitioners. These issues are of utmost importance for an individual deprived of liberty, and the lack of understanding of the prisoner often creates physical and emotional distress, leading to a greater sense of isolation. The president of the CPT clearly spoke out about this aspect during the 17th Council of Europe Conference of Directors of Prison Administration, advising member states to introduce literacy programs in the official language in order to help foreign prisoners overcome all obstacles generated by language barriers (Huseinov 2012).

Discrimination around entry into internal and external programs aimed at acquiring skills that will be useful for reintegration of the sentenced person in the future means that the foreigner is not ready when it is time for them to return to the outside community. Having not been provided with suitable tools that are instead afforded to prisoners able to speak in the country's official language during their time in prison, the foreign person will come across hardship when looking for employment, when trying to build steady relationships with others, and even when trying to obtain financial support guaranteed by the government for vulnerable subjects.

What is more, foreigners often know nothing about the legal system of their country of detention and the entire national legislation that outlines the individual's rights and duties to maintain peaceful coexistence. Although this is no grounds for reducing or absolving the individual's responsibility to abide by the law, it may represent a limitation for foreigners as far as exercising the right of self-defense during criminal proceedings is concerned (Ravagnani and Romano 2013). Foreigners, in fact, who know only a bit about – or are completely unaware of – the possibilities offered by national laws and regulations are often unable to implement specific

guarantees in a timely manner. Moreover, precarious economic conditions, a lack of connections in the country, and – as shown above – the presence of discriminatory tendencies make it almost impossible to choose legal support based on personal trust and recognition of specific competence in the matters in hand.

It is easy to see how imprisonment in a place far from home can also abruptly cut relations with family members; this translates into not being able to receive visits or telephone calls and, therefore, having no news on what loved ones are doing, which can create anxiety, contributing to making it especially difficult to manage the prisoner in the prison facility. For physical and financial reasons, geographical isolation resulting from the distance from home may make it impossible for the foreign prisoner's family to travel to the place where the person is imprisoned.

The negative impact of geographical isolation has been evaluated by the magistrates of Canada, which is particularly hit by the problem due to the size of its territory. The Canadian magistrates, when passing a judgment (*R. v. Daniels*, 1990) in which the living conditions of a convict imprisoned far from home were evaluated, decided that the significant distance between the home and the prison amounted to *cruel and unusual punishment* (Arbour 1996).

In an attempt to offer solutions to lessen this sense of isolation, the CPT urges countries to be flexible when implementing rules regarding visits, correspondence, and telephone calls. Furthermore, with no chance of communication with their family, it is not feasible to prepare foreign nationals for their return to the family unit. Too often this reunion translates into a very traumatic experience for both former inmates and their families, after spending a long time apart and perhaps at a time when family members have already built a different life. These damaging effects could be avoided through close collaboration between the authorities of the sentencing country and those of the country that is supposed to welcome the offender at completion of their sentence. However, such partnerships can be considered largely nonexistent at the present time.

The circumstances of illegal immigrants are also difficult to manage. The situation of this

particular group of foreigners is complicated further by the fact that, in most countries, failure to have a valid residence permit to live in the country where the arrest takes place leads to forced deportation of the party concerned. In certain countries, this also applies to those who have been living there for a long time. This measure turns out to be particularly distressing if these people often no longer have any contact or relations with their country of origin, having completely rebuilt a life for themselves in the country where their arrest took place. Furthermore, if the country of origin does not declare itself willing to receive the convict, the procedure slows down and can give rise to an unjustified extension to the detention period, pending clear orders. The situation is even worse for prisoners who seek political asylum, as they can be forced to wait for the decision of the competent authorities for an indefinite length of time after the end of the prison sentence inflicted (but still living deprived of their freedom).

Similarly, information on the course of the procedure to adopt in order to obtain political refugee status is frequently not accessible to the applicant (for the reasons described above with regard to the language barrier and because the relevant legislation is often very complex, requiring the intervention of a lawyer or official who can grasp it in all its nuances). For this information to be correctly publicized, the prison administration would need to work directly with the officials responsible for actually implementing the current immigration regulations; however, this collaboration is inadequate in most European and non-European countries. Uncertainty about the future can provoke states of anxiety and depression in prisoners, often manifested in suicidal responses and episodes of self-harm with the intent of attracting attention to their distress or, worse still, of ending their existence.

The different cultures of origin of foreigners in prison often become clear through eating habits, routine personal hygiene, and use of clothing that are completely alien to the context into which they are introduced. Mixing individuals from strong community cultures, such as African or Asian cultures, with a markedly European-centered culture can give rise to many relational problems which need to be resolved with the adequate support of cultural mediators, often missing in prisons. There would be more

opportunities to protect cultural diversities if the prison administration worked directly with voluntary associations taking care of cultural integration or with foreign communities residing in the territory in question.

It should not be forgotten that, generally speaking, prison law of individual countries does not provide specific rules for managing the requirements stemming from the status of “foreign prisoner,” but rather stresses, above all, the aspect of non-discrimination with respect to race, sex, and political or religious beliefs of those imprisoned. Foreign prisoners therefore have to rely on a number of supranational legal instruments: international and regional treaties, conventions, guidelines, and regulations, even though supranational legislation is, in most cases, considered “soft” law.

Instead, effective post-sentence reintegration and reducing the number of foreign convicts in prison can only be achieved by correctly implementing these regulations at a national level, with close cooperation between the countries of imprisonment and those to which the foreigners will return in the future. Below, by way of example, are some of the main international legal instruments which could be the source of ad hoc regulations for the management of foreign convicts:

- United Nations Standard Minimum Rules for the Treatment of Prisoners
- Vienna Convention on Consular Relations
- UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries

For Europe:

- Council of Europe, Committee of Ministers, Recommendation No. R(84) 12 Concerning Foreign Prisoners

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (EAW) had to be implemented by December 31, 2003
- Council Framework Decision 2008/909/JHA of November 27, 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union had to be implemented by December 5, 2011 (Transfer of Prisoners)
- Council Framework Decision 2008/947/JHA of November 27, 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions had to be implemented by December 6, 2011
- Council Framework Decision 2009/829/JHA of October 23, 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order) had to be implemented by December 1, 2012

For the Americas:

- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

SEE ALSO: Prisoners’ Rights; Racial Conflict in Prison; Recidivism

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### Further Reading

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