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70.3. Problems with TBS Court Order for Aliens in the Netherlands

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There is great difficulty enforcing the TBS-measure involving aliens. At the centre of the debate is the fact that the criminal law system clashes with the Dutch Alien Act. An alien, without a residence permit, that has been sentenced to a TBS-measure is restricted from going on leave, as this person is not allowed to be on Dutch territory. As a consequence, the TBS-measure cannot be terminated and may therefore effectively result in a life sentence. In some cases however, the principle of proportionality demands the TBS-measure

to be terminated: the crime and the sanction should be proportional. Such a termination of the TBS-measure however, results in the delinquent being released without any proof that the delinquent no longer constitutes a danger to society. One of the primary goals of the TBS-measure being a safe reintegration in society of the delinquent, both termination of TBS-measures without leave and lifetime TBS sentences are therefore undesirable.

Thirty experts, all working in the field of criminal or alien law, have been interviewed about their experiences with aliens sentenced to TBS-measures and the deadlock at issue. Possible solutions are often the result of great efforts on the side of employees of TBS-clinics. The intent is to transfer the TBS-measure or the phase of resocialisation to the country of origin of the delinquent. However, in practice this often seems impossible due to the distinctiveness of the Dutch TBS-measure. Although not identical to the Dutch TBS-measure, many countries provide for comparable facilities for mentally disturbed delinquents. Through ad hoc cooperation between the TBS-clinic and a facility in the country of origin, it is intended to transfer the alien delinquent to the country of origin. More and better research in other countries with regard to this type of cooperation is required to successfully carry out more transfers. A second problem is constituted by the Convention on the transfer of sentenced persons which requires the alien delinquent's consent for the transfer. Indeed, this problem remains to be solved. However, the Additional Protocol that belongs to the Convention on the transfer of sentenced person's states that consent is not required in case the criminal sanction also leads to a measure of administrative law resulting in the denial of right of residence in the country where the sanction is carried out. Therefore, this AP will have to be signed by more countries in order to prevent the alien delinquent from frustrating the transfer.