

The Ugandan Transfer of Convicted Offenders Act, 2012 : A commentary

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Summary

Like many countries, Uganda is home to foreign nationals. The presence of foreign nationals in the prison of a country raises questions regarding their treatment. Countries are increasingly enacting legislation, ratifying or acceding to treaties, or signing agreements governing the transfer of such offenders to serve the last part of their sentences in their countries of nationality, citizenship or domicile. On 17 May 2012, the Ugandan Parliament passed the Transfer of Convicted Offenders Bill, 2007 into law. The Transfer of Convicted Offenders Act was assented to by the President of Uganda on 27 July 2012 and, once it comes into force, will regulate the transfer of convicted offenders between Uganda and other countries. The purpose of the article is to highlight the debates surrounding some provisions of the Bill, including the purpose of the Act; human rights issues, consent of offenders to transfer; the costs of the transfer; and pardon and amnesty.

1 Introduction

Like many countries, Uganda has foreign nationals in its prisons.¹ Ugandan nationals also serve prison sentences in countries such

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¹ It is estimated that close to 1% of the prisoners in Ugandan prisons are foreign nationals. See International Centre for Prison Studies http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=51 (accessed 31 October 2012).

as China, Iran, Pakistan and Malaysia.² In July 2007, the Ugandan government published the Transfer of Convicted Offenders Bill in the *Government Gazette*.³ As the name suggests, the Bill deals with the transfer of convicted offenders between Uganda and other countries. Between 2007 and early 2012, the process to enact the Transfer of Convicted Offenders Bill into law 'froze' for unclear reasons. During this period, however, Uganda signed a prisoner transfer agreement with the United Kingdom (UK) to regulate the transfer of convicted offenders between the two countries.⁴ It also signed an agreement with Mauritius on the transfer of prisoners.⁵

In May 2012, the Ugandan Parliament debated and passed the Transfer of Offenders Bill into law in one day.⁶ On 27 July 2012 the Transfer of Convicted Offenders Act⁷ was assented to by the Ugandan President, Yoweri Kaguta Museveni.⁸

Uganda is not the only African country with legislation or mechanisms for the transfer of offenders from other countries. African countries have taken three different approaches on the question of the transfer of convicted offenders. The first approach is for countries to enact prisoner transfer legislation. Countries that have taken this approach include Nigeria;⁹ Ghana;¹⁰ Namibia;¹¹ Tanzania;¹²

2 See M Walubiri 'Ugandans in foreign jails to be brought home' *The New Vision* 22 May 2012 <http://www.newvision.co.ug/news/631254-Ugandans-in-foreign-jails-to-be-brought-home.html> (accessed 31 October 2012).

3 The Transfer of Convicted Offenders Bill 14 of 2007 *Uganda Gazette* 35 vol C, 13 July 2007.

4 See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

5 See <http://www.gov.mu/portal/sites/mfamission/addisababa/news.htm> (accessed 19 November 2012).

6 The debates took place on 17 May 2012 between 15.33 and 17.40. Both the second and third readings of the Bill were completed within that time and the Bill was passed. See *Hansard* of Parliament of Uganda, 17 May 2012 3582-3605 (on file with the author).

7 Transfer of Convicted Offenders Act, 2012.

8 Sec 1 of the Act provides that '[t]he Act shall come into force on such day as the Minister may by statutory instrument appoint'. As at the time of writing, the author's attempts to ascertain whether this Act had come into force were futile.

9 Transfer of Convicted Offenders (Enactment and Enforcement) Act, ch T16, 1988.

10 Transfer of Convicted Persons Act, 2007 (Act 743).

11 Transfer of Convicted Offenders Act 9 of 2005.

12 Transfer of Prisoners Act 10 of 2004.

Mauritius;¹³ Zambia;¹⁴ Zimbabwe;¹⁵ Swaziland;¹⁶ Madagascar;¹⁷ and Malawi.¹⁸

The second approach is taken by African countries entering into prisoner transfer agreements with other African countries. This is the case with Zambia and Mozambique;¹⁹ Ghana and Nigeria;²⁰ Mauritius and Tanzania;²¹ Mozambique and Malawi;²² and Malawi and Zambia.²³ Some African countries have entered into prisoner transfer agreements with countries outside Africa, such as Nigeria with Thailand;²⁴ Mauritius with India;²⁵ and the UK with Rwanda, Uganda, Libya, Morocco and Ghana.²⁶ Another approach is for one country, Mauritius, to ratify

13 Transfer of Prisoners Act 10 of 2001.

14 Transfer of Convicted Persons Act 26 of 1998.

15 Transfer of Offenders Act 14 of 1990.

16 Transfer of Convicted Offenders Act 10 of 2001.

17 Transfer of Prisoners Act, 2001.

18 Transfer of Offenders Act 25 of 1995.

19 See 'Zambia and Mozambique sign MoU on the transfer of convicted persons' *Lusaka Times* 26 July 2011 <http://www.lusakatimes.com/2011/07/26/zambia-mozambique-sign-mou-transfer-convicted-persons/> (accessed 31 October 2012).

20 See 'Ghana, Nigeria to exchange prisoners' *Modern Ghana News* 12 January 2010 <http://www.modernghana.com/print/258677/1/ghana-nigeria-to-exchange-prisoners.html> (accessed 31 October 2012).

21 See Agreement Between the Government of the United Republic of Tanzania and the Government of the Republic of Mauritius on the Transfer of Convicted Offenders, First Schedule to the Transfer of Prisoners (Republic of Tanzania) Regulations 2008, GN 45 of 2008.

22 See 'Mozambique: Prisoner transfer agreement with Malawi' 20 March 2012, AllAfrica.com <http://allafrica.com/stories/201203201309.html> (accessed 31 October 2012).

23 See 'Malawi, Zambia to exchange prisoners' *Global Times* 7 October 2009 <http://world.globaltimes.cn/africa/2009-10/474864.html> (accessed 31 October 2012).

24 See A Agbese 'Nigeria: Thailand to repatriate 500 Nigerian prisoners' 4 December 2000, AllAfrica.com <http://allafrica.com/stories/200012040126.html> (accessed 31 October 2012).

25 Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India on the Transfer of Prisoners, Schedule to the Transfer of Prisoners (Republic of India) Regulations 2006, GN 29 of 2006.

26 See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana concerning the Transfer of Prisoners (17 July 2008); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on the Transfer of Prisoners (17 November 2008); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco on the Transfer of Convicted Offenders (21 February 2002).

the Convention on the Transfer of Sentenced Persons (European).²⁷ Prisoner transfer arrangements almost always involve issues such as the purpose of the transfer; the human rights of the people to be transferred; the consent of the person to be transferred; the costs involved in the transfer; the exclusion of some offenders from the transfer; and also the parole or amnesty of those who have been transferred. The article discusses some provisions of the Transfer of Convicted Offenders Act in the light of its drafting history – based on the *verbatim* parliamentary proceedings – and highlights some of the challenges that are likely to be encountered in its implementation in relation to the issues mentioned above. The discussion will start with the purpose of the Act.

2 Purpose of the Act

The memorandum to the Bill states, *inter alia*:²⁸

The principle object of this mutual arrangement [for the transfer of convicted offenders] within the Commonwealth is that a person convicted of an offence in a foreign country should be given an opportunity, with his or her consent and that of the countries concerned, to serve his or her sentence of imprisonment in his or her home country. This would promote the rehabilitation of the offender and the offender's eventual integration into the community to which he or she belongs.

Indeed, most prisoner transfer arrangements highlight rehabilitation as the main or one of the main reasons for the transfer. Whether the main objective of a prisoner transfer, in the Ugandan context, is to ensure that the offender is rehabilitated and reintegrated is debatable for the following reasons. First, it is based on the assumption that prisoners will be transferred from countries that have no effective rehabilitation programmes to Ugandan prisons, presumably with such programmes, for them to be rehabilitated and eventually reintegrated. Transferring a prisoner to Uganda for rehabilitation remains doubtful, especially in light of the fact that Ugandan prisons are not conducive to rehabilitation because of overcrowding.²⁹

It is precisely because of the poor prison conditions in Uganda that the UK reportedly offered to renovate Uganda's maximum security prison so that it meets international standards before prisoners were transferred from the UK to Uganda for fear that such prisoners could challenge their transfer on the ground that they would be detained

27 Convention on the Transfer of Sentenced Persons, CETS 112, entered into force on 1 July 1985, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG> (accessed 31 October 2012).

28 Para 3 Memorandum to the Bill.

29 See Human Rights Watch 'Even dead bodies must work: Health, hard labour, and abuse in Ugandan prisons' 14 July 2011 <http://www.hrw.org/node/100272> (accessed 31 October 2012). See also the discussion below on human rights.

in inhumane and degrading conditions.³⁰ The second point is that the existence of rehabilitation programmes is not one of the pre-conditions for the transfer of an offender. If indeed rehabilitation was the main object of the transfer arrangement, one would have expected the existence of rehabilitation programmes to be a pre-condition for any transfer to take place.³¹ In light of the fact that the existence of rehabilitation programmes is not one of the pre-conditions for the transfer, one is tempted to suspect that the main object of the transfer, especially from rich countries, is for the countries to get 'rid of' foreign nationals who have broken their laws.³²

3 Rights of transferees

Before I deal with the issue of the human rights of the offenders to be transferred, I must deal briefly with the issue of prisoners' rights in Uganda and in international law, especially in light of the international human rights treaties to which Uganda is a party. The Constitution of Uganda does not expressly provide for the rights of prisoners. This is

30 R Baguma 'UK funds Luzira prison rehabilitation' *The New Vision* 4 September 2009 <http://www.newvision.co.ug/D/8/13/693494> (accessed 31 October 2012).

31 The International Prisoner Transfer Unit (IPTU) of the Department of Justice of the United States of America uses the Guidelines for Evaluating Prisoner Transfer Applications and the likelihood of social rehabilitation is one of the factors that have to be considered before a request for the transfer of an offender is allowed. In assessing whether there is a likelihood of the offender's social rehabilitation, the IPTU looks at the following issues: the prisoner's acceptance of responsibility; his criminal history; the seriousness of the offence; criminal ties to the sending and receiving countries; and family and other social ties to the sending and receiving countries. See M Abbell *International prisoner transfer* (2010) 373.

32 It has been argued that there are several policy considerations for countries to enter into prisoner transfer agreements. 'The main problems facing a foreign prisoner are the cultural and language barriers, the lack of rehabilitation programmes and refusal of conditional release programmes (due to the perceived flight risk), and the general prejudice faced by the foreign prisoner, other prisoners, and prison staff. Prisoner transfer agreements were seen as a way to alleviate these additional burdens on the foreign prisoner. However, it would appear that these treaties are now also seen as a method by which the sentencing country can expel foreign prisoners and relieve itself of a considerable financial strain, which is a motive which runs contrary to the humanitarian goals of these treaties.' See MC Bassiouni 'United States policies and practices on execution of foreign sentences' in MC Bassiouni (ed) *International criminal law: Multilateral and bilateral enforcement mechanisms* (2008) 588. In Italy, an autonomous trade union for prison warders reportedly urged the government to sign prisoner transfer agreements because '[s]uch agreements would free up prison spaces and help the Italian government save millions of euros'. See 'Send foreign prisoners back home, Italy urged' *News Africa* 27 August 2012 <http://www.africa-news.eu/immigration-news/italy/4576-send-foreign-prisoners-back-home-italy-urged.html> (accessed 14 November 2012).

attributable to the drafting history of the Constitution. The Uganda Constitutional Commission wrote the following:³³

Despite Uganda being a signatory to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment ... there is consensus in people's views on the subject that the behaviour of governments since independence has often been to completely deny the rights of prisoners and their human dignity. The conditions in which prisoners live, the manner in which they are treated and the punishments which are meted out to them all show disregard for their rights. Prisoners have rights to sufficient food, hygienic conditions, fresh air and the like. The conditions of our prisons and the provisions given to prisoners, whether of food, drink and clothes, most often violate their rights. Prisoners have very little chance of lodging complaints to independent officials, although the institution of Justice of the Peace exists in name. Many prisoners and the public in general are rather ignorant about prisoners' rights.

The Constitutional Commission recommended that the following prisoners' rights be provided for in the new Constitution: sufficient food; water; fresh air; ample space; adequate bedding; a clean atmosphere; and the right to be treated as human beings.³⁴ The Commission added that prisoners should have the right to be visited by relatives, a lawyer, religious personnel and friends;³⁵ the right to lodge complaints to an impartial committee or personnel against prison officials for any unjust treatment;³⁶ and the right to quick and adequate medical examination and treatment.³⁷ The Commission added that prisoners should be rehabilitated and that the government should assist them to develop their talents and skills and should be rehabilitated.³⁸ The recommendations in the Constitutional Commission's report were debated by the Constituent Assembly. Some Constituent Assembly delegates argued that the Constitution should expressly provide for prisoners' rights.³⁹ However, the Legal and Drafting Committee was of the view that there was no need for prisoners' rights to be expressly mentioned in the Constitution. The Chairperson of the Legal and Drafting Committee submitted:⁴⁰

33 The Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992) para 7.80.

34 Para 7.171.

35 Para 7.171(b).

36 Para 7.171(c).

37 Para 7.171(d).

38 Para 7.171(e).

39 See Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Basaliza, 1 July 1994 504; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Bamwenda, 4 July 1994 523; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Atwoma Tiberio, 20 March 1995 3429 3437.

40 Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Prof Kanyeihamba 18 May 1995 4370.

There were two other matters ... which were raised with the Committee but which we think are already adequately covered. One was a matter ... raised by Hon Tiberio Atwoma which dealt with the rights of prisoners. He was particularly concerned that prisoners should have their rights enshrined in our new Constitution. Having examined the subject, the Legal and Drafting Committee came to the conclusion that every prisoner has the same rights as citizens, except that of movement. And that of movement is restricted in accordance with provisions of the law because he has been sentenced to internment. Having said that, then they should be exercising their rights like anybody else within the confines of the punishment they have been given. For example, everyone has got the right to vote in the election. We do not have to provide specifically that prisoners shall have a right to vote because they are also citizens. So, this is not a matter of the Constitution; it is a matter of administrative arrangement by the electoral commission to ensure that every Ugandan who has a right to vote and who is not prohibited by law can vote. Similarly, other rights of prisoners as to feeding in prison and so forth are covered by the Prisons Act and also by our accession to the Geneva Convention about prisoners of war and so forth. So, we do not need to specifically provide for it in the Constitution. Nevertheless, we did consider this matter.

The above submission shows that the drafters of the Constitution intended prisoners to enjoy all the rights in the Constitution apart from the right to freedom of movement. In 2006 Uganda enacted a new Prisons Act⁴¹ to replace the colonial legislation governing the administration of prisons. The Prisons Act was assented to by the President on 26 May 2006 and came into force on 14 July 2006. The long title of the Act provides that one of its objectives is 'to bring the Act in line ... with universally-accepted international standards'. International law, and especially the Standard Minimum Rules for the Treatment of Prisoners, was relied on in drafting the Act. It is against that background that the Act provides for the rights of prisoners. These rights are: the right to be treated with human dignity;⁴² the right to freedom from discrimination;⁴³ freedom of worship;⁴⁴ 'to take part in cultural activities and education aimed at the full development of the human personality';⁴⁵ the right 'to undertake meaningful remunerated employment';⁴⁶ and the right 'to have access to the health services available in the country'.⁴⁷ The Prisons Act also provides

41 Prisons Act 2006.

42 Sec 57(a).

43 Sec 57(b). For a detailed discussion of the right to freedom from discrimination in the Ugandan Constitution, see JD Mujuzi 'The drafting history of the provision on the right to freedom from discrimination in the Ugandan Constitution with a focus on the grounds of sex, disability, and sexual orientation' (2012) 12 *International Journal of Discrimination and the Law* 52-76.

44 Sec 57(c). For a detailed discussion of the right to freedom of worship in Uganda, see JD Mujuzi 'The right to freedom to practise one's religion in the Constitution of Uganda' (2011) 6 *Religion and Human Rights* 1-12.

45 Sec 57(d).

46 Sec 57(e).

47 Sec 57(f).

for the rights of foreign prisoners, such as the right to equal treatment with nationals; access to work, education and vocational training; respect for his religious and cultural beliefs or practices; the right to communicate with his country's diplomatic representatives; and the right to be informed of the prison rules and regulations.⁴⁸ It should be emphasised that the above are not the only rights of prisoners. The Prisons Act should be read in line with the Constitution. This means that prisoners should enjoy the rights which are provided for in the Constitution, even though those rights are not mentioned in the Prisons Act. This is because of the drafting history of the Constitution, as alluded to above. For example, the right to vote is not mentioned in the Prisons Act, but the drafting history of the Constitution shows that the provision on the right to vote was deliberately designed to allow prisoners to vote.⁴⁹ Prisoners in Uganda also enjoy the rights protected in the relevant international human rights instruments to which Uganda is a party. These include the rights under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter). Uganda has an obligation in terms of the Convention against Torture (CAT) to prohibit torture. This has been done by the enactment of the Prevention and Prohibition of Torture Act.⁵⁰

Although the Constitution of Uganda, international human rights instruments and the Prisons Act protect prisoners' rights, there are concerns that in practice prisoners' rights are being violated. At the international level, the poor prison conditions in Uganda have been an issue of concern for the United Nations (UN) human rights bodies. The Committee against Torture (CAT Committee) has been concerned about sexual violence and torture in Ugandan prisons.⁵¹ In its concluding observation on Uganda's initial report on ICCPR to the Human Rights Committee in 2004, the Committee expressed concern and had the following to say about the prison conditions in Uganda:⁵²

The state party has acknowledged the deplorable prison conditions in Uganda. The most common problems are overcrowding, scarcity of food, poor sanitary conditions and inadequate material, human and financial

48 Sec 82.

49 Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Sam Kutesa, 22 May 1995 4416; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Sam Ringwegi, 22 May 1995 4417. See also Mr Masika, 22 May 1995 4426; Proceedings of the Constituent Assembly (Official Report) (Uganda Printing and Publishing Corporation) submission by Mr Naburri, 24 June 1994 319.

50 Prevention and Prohibition of Torture Act 2012.

51 Conclusions and Recommendations of the Committee against Torture on Uganda's initial report, CAT/C/CR/34/UGA, 21 June 2005 paras 6(f), 10(m) & 11(c).

52 Para 18 Concluding Observations of the Human Rights Committee on Uganda's initial report, CCPR/CO/80/UGA, 4 May 2004.

resources. The treatment of prisoners continues to be a matter of concern to the Committee. There are reported incidents of corporal punishment for disciplinary offences. Solitary confinement and deprivation of food are also used as disciplinary measures. Juveniles and women are often not kept separate from adults and males.

The Committee recommended that Uganda 'should terminate practices contrary to article 7 and bring prison conditions into line with article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners' and that the country 'should also take immediate action to reduce overcrowding in prisons'.⁵³ Some of the issues raised by the Committee have been addressed. For example, the Prisons Act⁵⁴ prohibits corporal punishment⁵⁵ and solitary confinement.⁵⁶ The African Commission on Human and Peoples' Rights (African Commission) has also expressed concern about the poor prison conditions in Uganda.⁵⁷ Recent media reports show that prison authorities informed the Parliamentary Committee on Defence and Internal Affairs that prisons are overcrowded and that there were food shortages in prisons as the prison authorities do not have enough money to feed all the prisoners⁵⁸ and that the majority of inmates are awaiting trial.⁵⁹

The issue of human rights is critical in prisoner transfer arrangements as this determines whether countries would be willing to transfer offenders to Uganda. However, prisoner transfer legislation in African countries, such as Tanzania, Zimbabwe, Namibia, Swaziland, Mauritius, Nigeria and Ghana, does not mention the issue of the rights of the offenders to be transferred. In other words, it is not one of the prerequisites for the transfer of the offender that the administering state will respect the rights and freedoms of the offender. It should be emphasised that this is not unique to Africa. Legislation on the transfer of offenders in

53 Para 19 Concluding Observations of the Human Rights Committee on Uganda's initial report, CCPR/CO/80/UGA, 4 May 2004.

54 Prisons Act 2006.

55 Sec 81(2).

56 Sec 81(1).

57 See Mission Report by the Special Rapporteur on Prisons and Conditions of Detention in Africa on the visit to Uganda 11-22 March 2001 <http://www.achpr.org/states/uganda/missions/prisons-2001/> (accessed 15 November 2012).

58 I Imaka 'Overcrowded prisons facing food shortages' *The Daily Monitor* 9 August 2012 <http://www.monitor.co.ug/News/National/Overcrowded-prisons-facing-food-shortages/-/688334/1474842/-/en4hpbqz/-/index.html> (accessed 15 November 2012).

59 GM Araali 'Remands are straining our resources, says prison boss' *The Daily Monitor* 23 July 2012 <http://www.monitor.co.ug/News/National/Remands-are-straining-our-resources--says-prison-boss/-/688334/1460920/-/wqrgys/-/index.html> (accessed 15 November 2012).

other countries (such as Samoa⁶⁰ and Tonga)⁶¹ does not stipulate that for a prisoner to be transferred, the administering country guarantees that the rights of the offender will be respected. The two international multilateral treaties on the transfer of offenders – the Council of Europe’s Convention on the Transfer of Sentenced Persons⁶² and the Inter-American Convention on Serving Criminal Sentences Abroad – also do not stipulate that for a prisoner to be transferred, the administering country guarantees that the rights of the offender will be respected. Likewise, the UN’s Model Agreement on the Transfer of Foreign Prisoners⁶³ and the Scheme for the Transfer of Convicted Offenders within the Commonwealth⁶⁴ also do not stipulate respect for human rights as one of the prerequisites for the transfer.

It has to be recalled that in some countries, prisoners are detained in conditions that are below internationally-accepted standards. However, the fact that those pieces of legislation and treaties do not mention the rights of the offenders to be transferred does not mean that administering countries have no obligation to respect such rights. They are bound by their constitutions and regional and international human rights treaties to respect the rights of the people in their jurisdictions, including those of transferred offenders.

The above deficiency is being addressed in some bilateral prisoner transfer agreements or treaties. The transfer of prisoner agreements or treaties between the UK and some African countries mention the issue of human rights in the context of prisoner transfer. For example, the agreements between the UK and Rwanda and Uganda state that ‘[s]entenced persons shall be treated with respect for their rights’⁶⁵

60 International Transfer of Prisoners Act 16 of 2009.

61 Transfer of Prisoners Act 8 of 1997.

62 Even the Additional Protocol to the Convention on the Transfer of Sentenced Persons, European Treaty Series 167 (1997) is silent on the rights of the transferred person except, in limited circumstances, with regard to the right not to be tried for the offence that was committed in the administering state before the transfer. See art 3.

63 For a brief drafting history of the United Nation’s Model Agreement on the Transfer of Foreign Prisoners, see M Abdul-Aziz ‘International perspective on transfer of prisoners and execution of foreign penal judgments’ in Bassiouni (n 32 above) 529-532. See also United Nations Office on Drugs and Crime *Handbook on the international transfer of sentenced persons* (2012) 17-18.

64 For the drafting history of the Scheme for the Transfer of Convicted Offenders within the Commonwealth, see AMF Webb *The scheme for the transfer of convicted offenders within the Commonwealth: Explanatory documentation prepared for Commonwealth* (1987) 1-39.

65 See Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010) and Preamble to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

and that '[e]ach party shall treat all sentenced persons transferred under this agreement in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment'.⁶⁶

It is clear that the rights emphasised here are the rights to life, freedom from torture, cruel, inhuman or degrading treatment or punishment. It should be recalled, as mentioned earlier, that prison conditions in many, if not all, Ugandan prisons are below internationally-accepted standards, a fact that has been recognised by human rights organisations⁶⁷ and Ugandan courts.⁶⁸ As mentioned earlier, in order to ensure that Ugandan nationals who have been sentenced to imprisonment in the UK do not challenge their transfer to serve their sentences in Uganda on the grounds that the prison conditions in Uganda are poor, the UK government reportedly offered to renovate prisons in Uganda with the objective of improving the conditions in these prisons.⁶⁹ It is, thus, not surprising that the issue of human rights was discussed at length by Ugandan law makers during the debates on the Transfer of the Convicted Offenders Bill. The Committee on Legal and Parliamentary Affairs (the Committee) submitted:⁷⁰

Where the transfer of a convicted offender is based on a request from an administering country, there is a need for stronger safeguards against potential abuse by the requesting country. Due regard should be placed on its human rights record and the operation and condition of its prison system, the existence of an inspection mechanism, etc. This is with a view to assess its observance of human rights standards, to ensure that the convicted offender will not be placed in a situation where he or she is particularly vulnerable to possible abuse as a result of such transfer, and to adhere to the principle of *non-refoulement*.

Clause 5 of the Bill provided for two general requirements for the transfer: The convicted offender has to be informed, by the sentencing country, of the substance of the Transfer of Convicted Offenders

⁶⁶ Art 9 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); art 9 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009).

⁶⁷ See Human Rights Watch (n 29 above).

⁶⁸ In *Uganda v Nabakoza Jackline & Others* [2004] UGHC 24 (7 September 2004) the High Court, in setting aside the sentence of three months' imprisonment that had been imposed on the accused and substituting it with a sentence of caution, considered, *inter alia*, the fact that prisons in Uganda were overcrowded and that there was no need for the accused, who had committed the minor offence of being idle and disorderly, to be sentenced to direct imprisonment.

⁶⁹ Baguma (n 30 above).

⁷⁰ *Hansard* of Parliament of Uganda, 17 May 2012, Committee Report 3585.

Act,⁷¹ if he or she or the sentencing or the administering country has made the request for the transfer and, in a case where the convicted offender makes a request for the transfer, the Ugandan authorities have to inform the relevant authorities in the administering country of that request, or where the offender is to be transferred to Uganda, the relevant authorities in the sentencing country have to inform the relevant authorities in Uganda of that request.⁷²

The Committee proposed that clause 5 should be amended by inserting a sub-clause to read as follows: 'A convicted offender shall not be transferred to a country where he is at a risk of being tortured or subjected to other human rights abuses.'⁷³ The Committee member submitted that the above amendment was justifiable on the basis of article 3 of CAT, General Comment 3 of the UN Human Rights Committee and the jurisprudence from the UN CAT Committee.⁷⁴ Although in the above submission the Committee makes it very clear that the rights in question are not limited to the right to freedom from torture, most delegates based their submissions on the fact that a transferred offender should not be subjected to torture. For example, the Deputy Chairperson of the Committee submitted that he 'would surely need a law that would secure [him] from being taken to a country where I would be tortured'.⁷⁵

Another legislator submitted that he supported the proposed amendment to clause 5, but added that the amendment should read that '[a] convicted offender shall not be transferred to a country where there is sufficient proof' that such a person would be subjected to torture. He added that by inserting such a qualification in clause 5, Parliament 'would subject it to proof that [the offenders] are likely to be tortured where they have been transferred'.⁷⁶ The Deputy Chairperson of the Committee opposed the above qualification on the ground that it would be impossible for the offender to prove that he would be subjected to psychological torture if he were to be transferred and that the proposal 'would make it subject to a trial on which the court needs to convince itself with evidence that there is

71 Cl 5(1).

72 Cl 5(2).

73 *Hansard* of Parliament of Uganda, 17 May 2012, submissions by Baka 3888-3589.

74 Mr Baka submitted that '[t]he justification is that the UN Committee against Torture, in *Tapia Paez v Sweden* (Communication 39/1996), on 28 April 1997 noted: "The test of article 3 of the Convention against Torture is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another state, the state party is under obligation not to return the person concerned to that state. The nature of activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention." It is also to comply with the UN Human Rights Committee General Comment 31.' See *Hansard* of Parliament of Uganda, 17 May 2012 3589 (emphasis removed).

75 *Hansard* Parliament of Uganda, 17 May 2012 3589.

76 As above.

bound to be torture'.⁷⁷ In support of his submission that there has to be proof that such a person would be tortured before his transfer is refused, Mr Biraaro added that⁷⁸

[t]here are countries which are known to be notorious for torturing people. So, what I am looking at is that someone can stubbornly want to stay away and not be transferred and yet we are looking at instances where we may have our countrymen, Ugandans, being convicted in other countries but may be stubborn and want to stay away claiming that Uganda is a risky home for them to be. So, that is the situation I am looking at. Even if it is psychological, it should be internationally known that such and such a country tortures people. But there are those which do not. So, how do we know? There should be glaring proof that the person if transferred will be subject to ill-treatment.

The qualification was rejected on the ground that it could not be proved that the person in question would indeed be subjected to torture, especially psychological torture, if he were to be transferred.⁷⁹ Another reason given for opposing the proposal was that it would be a burden on the sentencing country to prove such evidence. As one delegate put it:⁸⁰

I disagree with the proposal ... because sufficient proof is very subjective. You will be giving the sentencing country another burden of having to research to find out whether there is sufficient proof. I think the provision as it is is sufficient enough. Once the sentencing country thinks that the convicted offender will be at a risk of being abused even when he has requested to be transferred, I think that is enough for the transfer not to be effected.

In the end, however, the proposed amendment was not made part of clause 5 as the Committee withdrew the amendment.⁸¹ The result was that it is not a requirement, in terms of the Transfer of Convicted Offenders Act, that the offender shall not be transferred if there is a reason to suspect that he or she would be subjected to torture.⁸² It is argued that, although the Transfer of Convicted Offenders Act does not expressly bar the transfer of an offender to a country where there are reasons to believe that such a person would be subjected to torture, Uganda has an international obligation, in terms of article 3(1) of CAT, not to 'expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

In assessing whether such a person could be in danger of being subjected to torture, Uganda would have to rely on the test set in

77 As above.

78 As above.

79 As above.

80 *Hansard* Parliament of Uganda, 17 May 2012, submission by Mugabi 3590.

81 As above.

82 See secs 5 & 6.

article 3(2) of CAT, which is to the effect that Uganda 'shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights'. Torture in this context should be understood as physical and mental torture. This is in line with article 1 of CAT⁸³ and section 2 of the Prohibition and Prevention of Torture Act that was recently passed by the Ugandan Parliament.⁸⁴ Uganda also has a national and international human rights obligation to ensure that prisoners are not transferred to Uganda where there are substantial grounds to believe that they will be tortured or that they will be subjected to cruel, inhuman and degrading treatment or punishment. This is because article 24 of the Constitution of Uganda expressly provides that no person shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. CAT also requires Uganda to prohibit torture.

It should be recalled that the prison conditions in Uganda are below international standards. The question that arises is whether a prisoner who has consented to or has applied for his or her transfer to Uganda, who is fully aware of the prison conditions in Uganda, can have his or her application declined by the relevant authorities, for example, in the UK, on the basis that his transfer to Uganda would be a violation of the right not to be subjected to cruel, inhuman or degrading treatment. During the debates in parliament on the Transfer of Convicted Offenders Bill, it was argued that Uganda should not allow the transfer of an offender to a country where he or she would be subjected to torture, even if such an offender consented to his or her transfer.⁸⁵

It is argued that, even if a prisoner consents to his transfer to a country where he would be subjected to cruel, inhuman or degrading treatment, such a transfer should not be allowed. This is because the right not to be subjected to cruel, inhuman or degrading treatment

83 Art 1 of CAT defines torture to mean 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

84 S Kakaire 'Parliament passes law to criminalise torture' *The Observer* 27 April 2012 http://observer.ug/index.php?option=com_content&task=view&id=18439&Itemid=114 (accessed 14 November 2012). The Prevention and Prohibition of Torture Act, 2012 was assented to by the President of Uganda on 27 July 2012.

85 See discussion below on consent.

is an absolute and non-derogable⁸⁶ right in ICCPR.⁸⁷ It is also an absolute and non-derogable right in the Ugandan Constitution.⁸⁸ The Prevention and Prohibition of Torture Act also criminalises cruel, inhuman and degrading treatment or punishment.⁸⁹ It is argued that Uganda also has a legal duty not to accept the transfer of a prisoner to its territory if it knows that he or she would be detained in inhuman and degrading prison conditions as the imprisonment of such a person in such conditions would be contrary to Uganda's national and international human rights obligations.

Another important issue to consider in the context of prisoner transfer is whether a prisoner who has been transferred to Uganda will complete his sentence in the prison to which he had been transferred – assuming that the prison in question meets international standards. Section 73(3) of the Prisons Act⁹⁰ provides that '[t]he Commissioner-General may, by general or special order, direct that a prisoner be transferred from the prison to which he or she was committed or in which he or she is detained to another prison'. A prisoner who has been transferred to a given prison in Uganda may, therefore, be transferred to another prison. In order to ensure that prisoners who have been transferred from other countries to Uganda are not transferred from prisons that comply with international standards to those that do not comply with such standards, clause 21 of the Bill was amended to include a provision to the effect that there shall be a regular inspection of prisons by 'inspectors' to monitor the conditions under which those offenders are being detained. The 'justification' for the existence of such inspectors is 'to provide for routine inspections of correctional or penal institutions where the sentences are to be served by the transferred convicted offender in compliance with rule 55 of the United Nations Standard Minimum Rules for the Treatment of Prisoners'. In its report to Parliament, the Committee wrote:⁹¹

Provisions of the reports under clause 21 should be made mandatory.⁹² In addition, the administering country should guarantee access to a convicted person's place of detention for independent inspection mechanisms. On

86 For a distinction between absolute and non-derogable rights, see A Conte *Human rights in the prevention and punishment of terrorism: Commonwealth approaches: The United Kingdom, Canada, Australia and New Zealand* (2010) 284-287.

87 Arts 4 & 7 ICCPR.

88 Art 44 Constitution of Uganda.

89 See sec 7.

90 Prisons Act 2006.

91 Committee Report, *Hansard* Parliament of Uganda, 17 May 2012 3585.

92 Cl 21(1) provided that '[a]fter a convicted offender is transferred to Uganda, the proper authority in Uganda shall notify the sentencing country (a) when it considers enforcement of the sentence to be completed; (b) if the convicted offender escape from custody before the enforcement of the sentence is completed; (c) if the offender commits any other offence while serving sentence; or (d) if the offender dies while serving sentence'.

this account, the Bill should integrate rule 55 of the Standard Minimum Rules for the Treatment of Prisoners of 1977. It states that there shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be, in particular, to ensure that these institutions are administered in accordance with the existing laws and regulations, with a view to bringing about the objectives of penal and correctional services.

Section 21(3) of the Act indeed incorporates the above recommendation.⁹³ The challenge with the amendment is that, although its drafting history makes clear the task of the inspectors, it does not stipulate the powers of the prison inspectors and what they are supposed to do with their reports. It appears that such reports will be forwarded to the sentencing country in terms of section 21(2) of the Act, which provides that 'the proper authority in Uganda shall, if requested by the proper authority of the sentencing country, provide that authority with a report or reports concerning the enforcement of the sentence'. What is not clear is what the sentencing state would do with such reports. Assuming that the sentencing state finds that the conditions in which the offender is being detained are inhuman and degrading, it would have to raise the issue with the administering state. And if the administering state does not improve the conditions of detention, the sentencing state, if the transfer agreement allows it to do so, could pardon the offender or commute his sentence which would ensure that he or she is released from detention.

4 Consent before the transfer

One of the most contentious issues in the prisoner transfer arrangement is whether the offender's consent should be a prerequisite for the transfer to take place. Some countries, such as Nigeria⁹⁴ and the UK,

93 Sec 21(3) provides that '[t]here shall be a regular inspection of penal institutions and correctional services of the administering country by qualified and experienced inspectors appointed by the proper authority to ensure that these institutions are administered in accordance with existing laws and regulations and to bring about the objectives of penal and correctional services'.

94 Sec 8 of the Transfer of Convicted Offenders (Enactment and Enforcement) Act, ch T16, 1988 provided: '(1) The sentencing country shall ensure that the convicted offender or a person authorised to act on his behalf [due to the convicted offender's age or his physical or mental condition] ... voluntarily and in writing with full knowledge of the legal consequences thereof; and the procedure for giving such consent shall be in accordance with the law of the sentencing country. (2) The sentencing country shall afford to the administering country every opportunity to verify that the consent is given in accordance with the provisions of subsection (1) of this section.' Sec 3 of the Transfer of Convicted Offenders (Enactment and Enforcement) (Amendment) Bill, 2011 deletes sec 8 of the main Act. This Bill was passed in October 2011. See 'Nigeria: Representatives pass transfer of Convicted Offenders Bill' AllAfrica <http://allafrica.com/stories/201110070519.html> (accessed 31 October 2012).

have removed the prisoner's consent as a requirement for the transfer to take place. For example, the treaties between the UK and Libya, Rwanda and Ghana do not require that a prisoner should consent to his or her transfer for such a transfer to take place.⁹⁵ It has been argued that 'the requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition'.⁹⁶ Clause 6(d) of the Bill provided that the transfer of the offender could only take place if he or she, *inter alia*, 'has, in writing, applied for or consented to the transfer' and if he or she is incapable or incompetent to consent to such a transfer because of his age or mental state, such consent has to be given by a person who is legally empowered to act. The above clause was passed without amendment.⁹⁷

However, the mere fact that such a person has consented to his or her transfer or has applied for his or her transfer does not mean that the Ugandan authorities will approve such a transfer, even if the administering country also agrees to such a transfer. One of the factors that will have to be put into consideration is the issue of the rights of the offender in question should he or she be transferred. As one legislator made it clear in Parliament when the Bill was being debated:⁹⁸

Even when a convicted offender seeks for a transfer to their own country, if the sentencing country has proof in their own way that they will be tortured, they do not do the transfer because they are supposed to initiate the process of the transfer.

It should also be recalled that section 9 of the Act provides for the verification of the prisoner's consent. It provides that the prisoner must give his 'consent voluntarily according to the law and with full knowledge of the legal consequences of the transfer'.⁹⁹ The proper authorities in Uganda have an obligation in terms of section 9(2) 'to afford an opportunity to the proper authority of the country to which a convicted offender is to be transferred, to verify whether the consent complies with the conditions provided for' under section 9(1). In the case of a prisoner who is 'incapable or incompetent to give consent', such consent has to be given by a person who is entitled to act on that prisoner's behalf.¹⁰⁰ Although the section does not expressly say so, it is applicable to children or mentally or intellectually-challenged prisoners. It is argued in both cases that a prisoner should only be

95 Art 4(3) (Libya); art 2(3) (Rwanda). The treaty with Rwanda expressly mentions that the offender's consent will not be required for the transfer to take place.

96 M Abdul-Aziz 'International perspective on transfer of prisoners and execution of foreign penal judgments' in Bassiouni (n 32 above) 533.

97 See sec 6(d).

98 *Hansard* Parliament of Uganda, 17 May 2012, submission by Baka 3590.

99 Sec 9(1).

100 Sec 6(d).

transferred if it is in his or her best interests.¹⁰¹ Sections 6(d) and 9 of the Act are silent on the details of how the consent in question will be made and verified. This means that Uganda could learn from countries with experience on the transfer of offenders in dealing with these issues. Section 24 of the Act allows the Minister of Justice to issue regulations implementing the Act. It is recommended that in such regulations, the following issues could be dealt with.

The first issue is that of legal representation for an offender who is to be transferred. It is recommended that the regulations should provide that an offender who is contemplating being transferred should acquire legal advice before the authorities can come to the conclusion that he has consented to the transfer. If he is unable to pay for legal advice, legal advice should be provided at state expense. The lawyer should be able to explain to the offender issues such as parole and early release legislation in the administering country.¹⁰² The second issue is that of the verification process of the offender's consent. In cases where offenders have been transferred to or from the United States of America, a judicial officer is appointed to verify the consent in question.¹⁰³ It would also be a good idea for Ugandan authorities to ensure that a judicial officer presides over the verification process to ensure that the offender indeed voluntarily consented to the transfer.¹⁰⁴ The third issue to be dealt with is whether the offender can revoke the consent when it has already been verified as having been given voluntarily.¹⁰⁵ Although generally the offender should not be allowed to revoke his consent when it has been verified as having been given voluntarily, there could be cases where he should be permitted to revoke that consent, for example, if after verification it emerges that there is a possibility that he could be subjected to torture or cruel, inhuman and degrading treatment or punishment. In such a case, his transfer would be in violation of Uganda's national and international human rights obligations.

5 Pardon, amnesty, commutation and review of sentence

Clause 19 of the Bill allowed the Ugandan authorities to grant pardon or amnesty to the transferred offender or to commute the sentence of

101 See art 3 of the Convention on the Rights of the Child and generally the Convention on the Rights of Persons with Disabilities.

102 The implications of the transfer on the duration that the offender will spend in prison is one of the issues that lawyers have dealt with in cases where offenders have been transferred to and from the United States of America. See Abbell (n 31 above) 27-30 110-111.

103 Abbell (n 31 above) 24-26 102-103.

104 Uganda could also use diplomatic or consular corps or any other official do verify the prisoner's consent.

105 See Abbell (n 31 above) 30-31 111-112.

the offender in question unless one of the conditions of the transfer is that the sentencing state reserves the right to grant such amnesty, pardon or to commute such a sentence. The Committee suggested that the word ‘amnesty’ should be deleted from clause 9 of the Bill because ‘amnesty does not require conviction under the laws of Uganda and yet to qualify under the Bill, the offender must be convicted’,¹⁰⁶ and it was emphasised that in Ugandan laws, ‘a convicted person can never get amnesty. They can get something else but not amnesty.’¹⁰⁷ During the debates on clause 19 of the Bill, it was made clear that¹⁰⁸

[a]mnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide and crimes against humanity and other gross violations of human rights, including torture, are inconsistent with the state’s human rights obligations. To that extent, perpetrators of such crimes should be excluded from such privileges under the Bill, particularly in clause 19.

When the Bill was passed, section 19 excluded amnesty.¹⁰⁹ It is beyond the scope of this article to discuss the law relating to amnesty in Uganda. It should be mentioned in passing that the above submission does not appear to be supported by the jurisprudence emanating from the Constitutional Court on the question of amnesty. In *Thomas Kwoyelo Alias Latino v Uganda*,¹¹⁰ the petitioner, a former rebel leader, was indicted before the International Crimes Division of the High Court for grave breaches of the Geneva Conventions. He argued before the Constitutional Court that his indictment was discriminatory and therefore contrary to article 21 of the Constitution which prohibits discrimination, because thousands of rebels, including rebel leaders and some of his seniors, had been granted amnesty, but that the petitioner had been denied such amnesty.¹¹¹ The Constitutional Court observed that ‘insurgents are subject to international law and can be prosecuted for crimes against humanity or genocide’,¹¹² but concluded that the prosecution of the petitioner was unconstitutional because it violated article 21 of the Constitution which prohibited discrimination. It is, therefore, clear that even those who commit international crimes or gross human rights violations could be granted amnesty in Uganda.

106 *Hansard* Parliament of Uganda, 17 May 2012, submission by Mr Baka 3598.

107 *Hansard* Parliament of Uganda, 17 May 2012, submission by Deputy Chairperson of the Committee 3598.

108 *Hansard* Parliament of Uganda, 17 May 2012, submission, Committee Report 3585.

109 See sec 19 of the Act.

110 *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Petition 036/11) (judgment of 22 September 2011).

111 Evidence presented to the Constitutional Court showed that by the time of the petitioner’s trial, 24 066 rebels had been granted amnesty from prosecution and that in 2010, when the applicant applied for amnesty, 274 were granted amnesty but the applicant was not granted amnesty. See *Thomas Kwoyelo* (n 110 above) 17.

112 As above.

The Transfer of Convicted Offenders Act does not provide that people who have been convicted of war crimes, genocide and crimes against humanity and other gross violations of human rights, including torture, will not be pardoned or have their sentences commuted. One cannot successfully invoke the drafting history of clause 19, and in particular the above-mentioned submissions on the issue of pardon, to argue that the drafters of the Act were of the view that people convicted of international crimes and gross violations of human rights cannot be pardoned. This is because article 121(4)(a) of the Constitution provides that the President may, on the advice of the Committee on the Prerogative of Mercy, 'grant to any person convicted of an offence a pardon either free or subject to lawful conditions'. Article 121(4)(a) is very clear that the President can grant pardon to 'any person', including those who have been transferred from other countries to serve their sentences in Uganda. This also includes those people who have been convicted of international crimes, including gross violations of human rights. However, the agreement between Uganda and the UK on the transfer of offenders is to the effect that¹¹³

[t]he continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the receiving state, including those governing conditions of imprisonment, confinement or other deprivation of liberty, and those providing for the reduction of the term of imprisonment, confinement or other deprivation of liberty by parole, conditional release, remission or otherwise.

And that¹¹⁴

The receiving state shall modify or terminate enforcement of the sentence as soon as it is informed of any decision by the transferring state to pardon the sentenced person, or of any other decision or measure of the transferring state that results in cancellation or reduction of the sentence.

The effect of article 7 of the agreement between the UK and Uganda is that an offender transferred from the UK to Uganda can be pardoned by the UK authorities and if such a decision is communicated to the Ugandan authorities, they have to put it into effect. This has the effect of subjecting the prisoner in question to two pardon 'regimes'. The prisoner could be pardoned by the President in terms of article 121 of the Constitution and also by the UK authorities in terms of article 7 of the agreement. Whether this encroaches on Uganda's sovereignty is a question that will not be answered here.

113 Art 7(2) Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Uganda on the Transfer of Sentenced Persons (2 June 2009).

114 n 113 above, art 7(4).

6 Exclusion of some offenders from the Act

The Transfer of Convicted Offenders Bill was silent on the offenders to which the Act would not be applicable. This prompted one member of parliament to ask whether the Act would also be applicable to Ugandans who have been sentenced to death in other countries.¹¹⁵ The Committee made it clear that the Bill was not applicable to all Ugandans who have been sentenced abroad or to all foreign nationals who have been sentenced in Uganda. In particular, the Act is not applicable to those who have been sentenced to death. It was made clear during the debates in parliament that ‘the death sentence is not catered for here’ and that ‘if you are sentenced to death, this not being sentenced to imprisonment’, and therefore the Act is not applicable here.¹¹⁶

One would have expected the Act to expressly state which offenders it excludes. Some countries, such as Zambia, provide in their legislation that people who have been sentenced to death cannot be transferred to serve their sentences in other countries.¹¹⁷ The treaty between the UK and Peru provides that a person who has been sentenced to death shall not be transferred under the treaty unless his or her sentence has been commuted.¹¹⁸ The agreement between the UK and Laos provides that a person who has been convicted of the following offences under Lao law shall not be transferred to serve his or her sentence in the UK: offences against the President; internal security; and under legislation protecting national art treasures.¹¹⁹

7 Costs of the transfer

In any prisoner transfer arrangement the costs involved in such a transfer have to be considered. Some countries, such as South Africa, have been reluctant to enter into prisoner transfer agreements or to enact prisoner transfer legislation because of the enormous costs

¹¹⁵ *Hansard* Parliament of Uganda, 17 May 2012, submission by Alaso 3595.

¹¹⁶ *Hansard* Parliament of Uganda, 17 May 2012, submissions by the Deputy Chairperson of the Committee and by Mugabi 3595.

¹¹⁷ See sec 4(3) of the Zambia Transfer of Convicted Persons Act.

¹¹⁸ Art 3(b) of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru on the Transfer of Sentenced Persons (7 March 2003).

¹¹⁹ Art 4(h) of the Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lao People's Republic on the Transfer of Sentenced Persons (7 May 2009).

involved in such transfers.¹²⁰ Clause 22 of the Bill, which was passed without any amendment,¹²¹ provides:

Without prejudice to the right of the proper authority of the sentencing country or the administering country to defray all expenses connected with the transfer of a convicted offender, the cost of transfer shall be defrayed in such proportions as may be agreed upon either generally or in any particular case between the proper authority in Uganda and that of the country involved in the transfer.

In its report on the Bill, the Committee gave the rationale behind clause 22 in the following terms:¹²²

Clause 22 of the Bill envisages that the costs of transfer are to be met by the government of Uganda and that of the sentencing country in such proportions as may be agreed upon, either generally or in respect to any particular case. Considering that there could be cases where by reason or the nature of the offence committed, such as the white-collar crimes, it would be inequitable to apply public resources to the repatriation of the convicted prisoner back to Uganda. It should therefore be a requirement that in case of a transfer of an offender to Uganda, the proportion of expenses of such a transfer agreed to be met by the government of Uganda will be borne by such offender or by someone on their behalf. In the alternative, the Minister should have the powers to require a person, with or without a surety, to give an undertaking to pay part of the expenses to the minister. Such expenses shall be regarded as a debt owed to the state. Only when the offender is indigent or for any other good reason should the costs be met by the government of Uganda.

Different countries have taken different approaches on the question of meeting the costs involved in the transfer of offenders.¹²³ When interpreting or applying section 22 of the Transfer of Convicted Offenders Act, courts or the relevant authorities should bear in mind the fact that the drafters of the Act envisioned a situation where there would be circumstances when the offender in question would be expected to foot the bill of the transfer. Therefore, in applying section 22, the relevant authorities should not only consider the nature of the offence that was committed by the offender. The financial position of the offender should also be considered. If the offender in question committed an offence such as murder without any financial gain, and such an offender is able to pay for his transfer to Uganda, he should pay for his transfer. If the offender committed a 'white-collar' crime but is unable to foot the bill for his transfer, the expenses should be met by the Ugandan authorities or by the sentencing state.

¹²⁰ See, generally, JD Mujuzi 'Towards the establishment of a prisoners transfer legal regime in South Africa: Failed attempts, available options and critical issues to consider' (2012) 20 *African Journal of International and Comparative Law* 281-300.

¹²¹ *Hansard* Parliament of Uganda, 17 May 2012 3599. Cl 22 would become sec 22 of the Act.

¹²² *Hansard* Parliament of Uganda, 17 May 2012, Committee Report 3585.

¹²³ Mujuzi (n 120 above) 281-300.

8 Conclusion

This article has dealt with the drafting history of the Transfer of Convicted Offenders Bill, focusing on the following issues: the purpose of the transfer of the offender; the rights of the offender to be transferred; the consent of the offender before the transfer; the costs involved in the transfer; the exclusion of some offenders from the Bill; and the question of pardon and amnesty. Enacting prisoner transfer legislation is one of the ways through which offenders can be transferred to or from Uganda to serve the remainder of their sentences. Uganda is called upon to explore the possibility of ratifying multilateral treaties on the transfer of offenders. The ratification of those treaties will enable Uganda to transfer offenders to state parties to those treaties and to receive offenders from state parties to those treaties without the need to sign bilateral agreements or treaties with such countries. The treaties that Uganda could ratify are the Council of Europe's Convention on the Transfer of Sentenced Persons and Inter-American Convention on Serving Criminal Services Abroad.¹²⁴ This Convention has been ratified by at least one African country, Mauritius, as has many non-European countries. The drafting history of the Council of Europe's Convention on the Transfer of Sentenced Persons shows that the word 'European' was deliberately excluded from the title because, as stated by the select committee of the European Committee on Crime Problems:¹²⁵

Unlike other conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word 'European' in its title. This reflects the draftmen's opinion that the instrument should be open also to like-minded democratic states outside Europe. Two states – Canada and the United States of America – were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

The Inter-American Convention on Serving Criminal Services Abroad is also open for signature and ratification by non-inter-American states and, at time of writing this article, it has been ratified by two non-inter-American states – Saudi Arabia and the Czech Republic.¹²⁶ Section 3 of the Ugandan Transfer of Convicted Offenders Act defines a sentence to mean 'any punishment or measure involving deprivation of liberty ordered by a court or tribunal in the exercise of its criminal jurisdiction

124 Inter-American Convention on Serving Criminal Sentences Abroad, OAS Treaty Series 76.

125 Para 11 Explanatory Report on the Convention on the Transfer of Sentenced Persons <http://conventions.coe.int/Treaty/EN/reports/html/112.htm> (accessed 19 November 2012).

126 Czech Republic ratified this treaty on 13 October 2011 and Saudi Arabia on 8 July 2011. See <http://www.oas.org/juridico/english/sigs/a-57.html> (accessed 19 November 2012).

and includes supervision while at liberty on parole or on probation'. The Act is therefore not exclusively applicable to those offenders sentenced to imprisonment. This means that Uganda, unlike other African countries, such as Swaziland¹²⁷ and Namibia,¹²⁸ whose transfer of offenders legislation defines 'sentence' to mean 'any punishment or measure involving deprivation of liberty', is in a position to transfer and receive offenders who have been sentenced to other forms of sentences other than imprisonment. In the light of the increasing emphasis on alternatives to imprisonment in Africa,¹²⁹ Uganda should be applauded for enacting legislation that is not limited to the transfer of only those offenders sentenced to imprisonment.¹³⁰ The challenge, though, is that Uganda does not have effective mechanisms to ensure that transferred offenders on parole are properly supervised. This is because of the fact that, although the Prisons Act provides for circumstances under which a prisoner may be released on parole,¹³¹ it does not establish a parole board.¹³² There is thus an urgent need for the parole board to be established for other countries to be able to send offenders on parole to complete part of their sentences in Uganda. In interpreting or applying the Act, the relevant authorities, where necessary, should have regard to its drafting history for the purpose of ensuring that the intentions of the drafters are not disregarded or ignored.

127 Sec 2 Swaziland Transfer of Convicted Offenders Act.

128 Sec 1 Namibian Transfer of Convicted Offenders Act.

129 See, generally, JD Mujuzi 'Alternative sentencing under African human rights instruments and mechanisms: Lessons for Southern Africa' (2008) 8 *University of Botswana Law Journal* 47.

130 The trend in Europe is also to transfer not only offenders sentenced to imprisonment, but also those sentenced to non-custodial measures or those on parole. See the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. For a brief discussion of the benefits of transferring offenders sentenced to non-custodial sentences or those released on parole, see Abbell (n 31 above) 147-148.

131 Sec 89.

132 C Ariko 'Prisons to launch parole system' *The New Vision* 10 December 2007 <http://www.newvision.co.ug/D/8/13/601422> (accessed 19 November 2012).