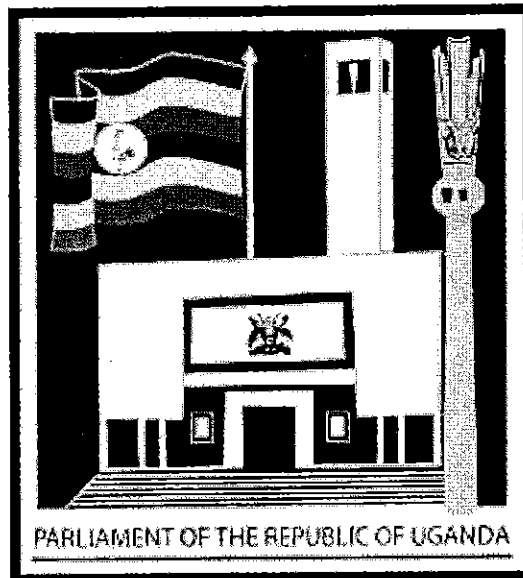


THE REPUBLIC OF UGANDA



REPORT OF THE COMMITTEE ON LEGAL AND PARLIAMENTARY AFFAIRS ON THE TRANSFER OF CONVICTED OFFENDERS BILL, 2007

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REPORT OF THE COMMITTEE ON LEGAL AND PARLIAMENTARY AFFAIRS ON THE TRANSFER OF CONVICTED OFFENDERS BILL, 2007

1.0 Introduction

The Transfer of Convicted Offenders Bill, 2007 was read for the first time on 23rd March 2012 and it was referred to the Committee of Legal and Parliamentary Affairs in accordance with Rules 112 and 113 of the Rules of Procedure of Parliament.

2.0 Background

A conference of Law Ministers from Commonwealth countries was held in 1986 in the Zimbabwean capital, Harare at which meeting a scheme providing for the transfer of convicted offenders amongst Commonwealth member countries was debated and adopted.

Uganda as a Commonwealth country has an obligation to enact the present piece of legislation to accord with the provisions of the Harare Scheme. Article 19 of the said Scheme states as follows:

“any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary general of the fact and shall inform him of the proper channel of communication and deposit with him a copy of the legislation”

In addition to the above stated international obligation, many Ugandan nationals convicted and sentenced in foreign countries have continued to express their desire to serve their sentences at home to no avail for lack of the requisite domestic legislation to regulate their transfer and subsequent handling.

3.0 Methodology

In the process of analysing the Bill, the Committee discussed the Bill and received memoranda from the following stakeholders:

1. Uganda Prisons Service
2. Uganda Law Reform Commission
3. Directorate of Public Prosecutions
4. United Nations Office of the High Commission for Human Rights
5. Uganda Law Society
6. Law Development Centre

4.0 Object of the Bill

1. The object of this Bill is to give legal effect to the scheme for the transfer of convicted offenders within the Commonwealth
2. The provisions of the Bill, when enacted will empower the Minister responsible for Justice and Constitutional Affairs to approve and facilitate the repatriation and transfer of convicted prisoners between Uganda and any other Commonwealth country, of which they are citizens or nationals, or with which they have close ties like permanent residence or domicile, and which countries have substantially similar legal arrangements as those embodied in this Bill.
3. The principal object of these mutual arrangements 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, thus promoting the

rehabilitation of the offender and the offender's eventual reintegration into the community to which he or she belongs.

4. The Bill further empowers the Minister to apply the provisions of the Act to a country which though not in the Commonwealth, the Minister is satisfied that it has in force a law providing for the transfer of convicted offenders from its territory to Uganda on substantially similar terms as are provided for in this Act. In that case the transfer scheme will apply only between that country and Uganda.
5. In addition, clauses 23(3) and (4) also empower the Minister by statutory instrument, to apply the provisions of the Act to countries not having equivalent law but with which Uganda has entered into arrangements for transfer of convicted offenders from Uganda to any such country or from any such country to Uganda. This will be subject to such modifications as may be specified in the arrangement. These provisions will obviously be convenient if Uganda wishes to apply the Act to neighbouring countries.

5.0 General observations

The Committee observed that:

- (a) The Scheme for the transfer of convicted offenders within the Commonwealth is designed for persons "convicted and sentenced to a term of imprisonment..." it is for this reason that "convicted offender" is defined as a "person upon whom a sentence has been imposed". The implication is that not only must the person have been convicted but also a sentence must have been imposed on him/her. The scheme envisages finality of the decision in the "sentencing country" before a convicted prisoner can be eligible for transfer to the "administering country"

However, clause 3 of the bill defines "convicted offender as a person who has been found guilty of an offence or upon whom a sentence has been imposed". This formulation, which includes the disjunctive "or" renders the requirement that **"a sentence has been imposed,"** an alternative consideration rather than a mandatory requirement for triggering the provisions of the Act, Contrary to the declared principle of the scheme and as further reflected in its definition.

The definition further contradicts Clause 6 (b) of the Bill which requires that "the judgement in respect of the offence committed is final" as a pre-condition for the transfer of a convicted prisoner. A finding of guilty does not bring finality to a criminal trial. The definition of "convicted prisoner" should therefore not include "a person who has been found guilty" but rather be restricted to persons upon whom "a sentence has been imposed".

- (b) Considering that the scheme targets convicted prisoners, the only facilities in which such persons may be lawfully kept in Uganda are; Prisons, Mental health facilities (if the person is of sound mind) or Rehabilitation Centres (if the person is under the age of 18 year). There ought not to be any possibility of the Minister designating any other place for serving ones sentence upon transfer into Uganda for completion of that sentence as envisaged in Clause 16.
- (c) Where the transfer of a convicted offender is based on a request from an administering country there is need for stronger safeguards against potential abuse by the requesting state. Due regard should be placed on its human rights record and the operation and condition of its prison system, existence of inspection mechanism etc. with a view to asses its observance of

human rights standards, ensure that the convicted offender will not be placed in a situation where he/she is particularly vulnerable to possible abuse as a result of such transfer and adhere to the principle of non-refoulement.

- (d) Principle 16(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment obligates competent authorities immediately after transfer of an imprisoned person from one place of imprisonment to another to notify members of his/her family or other appropriate persons of his choice of the transfer. If the imprisoned person is a juvenile or is incapable of understanding his entitlement, the Competent Authority shall on its own initiative undertake the notification. Special attention shall be given to notifying parents or guardians. There is no such provision currently in the Bill. Consideration should be made to include similar obligation under Clause 10 of the bill.
- (e) Art 6 (4), ICCPR provides that any one sentenced to death shall have the right to seek pardon or commutation of the sentence. However, in terms of amnesty, clarity should be made on the fact that amnesty is granted to those who are excluded from facing trial rather than convicted offender. According, to the Ugandan legal regime for one to qualify for amnesty he must not have been tried yet the bill applies to persons who have been tried, convicted and sentenced. Similarly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights, including torture, are inconsistent with States' human rights obligations and to the extent, perpetrators of such crimes should be excluded from such privileges under the bill particularly in Clause 16.

- (f) Provisions of the reports under Clause 21 should be made mandatory. In addition to this, the administering country should guarantee regular access to convicted person's place of detention for independent inspection mechanisms. On this account, the bill should integrate Rule 55 of the Standard Minimum Rules for the Treatment of Prisoners, 1977 which 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 existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.
- (g) Clause 22 of the Bill envisages that the costs of transfer are to be met by the Government of Uganda and the Government 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 of the nature of the offence committed such as white collar crime, it would be inequitable to apply public resources to the repatriation of a 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 transfer agreed to be met by the Government of Uganda will be borne by such offender or by someone on his behalf, or in the alternative, the Minister should have the power to require a person with or without a surety to give an undertaking to pay the whole or part of the expenses to the Minister, such expenses to be regarded as a civil debt owing to the State. Only when the offender is indigent or for the other good reason should the costs be met by the Government of Uganda.

(h) Under the Magistrates Court Act and the Trial on indictment Act, committal to a prison or mental health facility pursuant to a finding of guilty is by court order only and not administrative order. Committal to a mental health facility pursuant to a finding of inability to stand trial is the only situation in which an administrative order may form the basis of such detention. In that situation, committal is effected by the way of the Minister, upon consideration of the Court record, issuing a warrant directed to the court, ordering that the accused may be confined as a criminal lunatic in a mental hospital or other suitable place of custody, in which case the court gives directions necessary to carry out that order.

Since the Bill concerns convicted prisoners rather than ones found not fit to stand trial by reason of insanity, the possibility of continuation to serve a sentence on the basis of an administrative order therefore ought to be excluded by deletion of that phrase for purpose of maintaining procedural consistence between the relevant legislations mentioned above and the Bill.

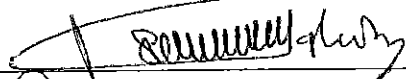
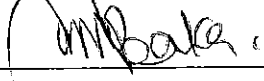
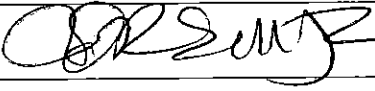
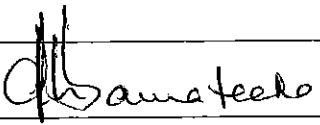

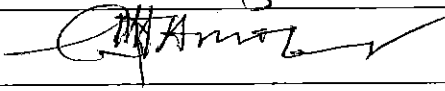
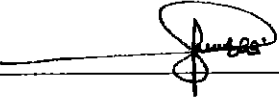
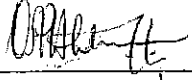
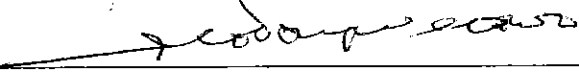
(i) Paragraph 4 of the Memorandum to the Bill alongside its Preamble envisages situations where the Minister is empowered to apply the provisions of this piece of legislation to countries other than those within the Commonwealth community of nations. Clause 23 of the Bill specifically deals with this ministerial power to apply this Act to other countries outside those envisioned under the Harare Scheme. The above provisions notwithstanding, Clause 2 and 4 of this same Bill narrow down its application to only convicted offenders within the Commonwealth member countries contrary to the provision of both the memorandum of and preamble to the Bill alluded to hereinabove.

(j) Clause 23 of the Bill provides for the Ministerial power to apply provisions of the Act to countries beyond those envisaged under the Harare Scheme. The need to incorporate this is in our view, justification given the fact that many of our neighbours are not members of the Commonwealth. The Clause further stipulates that in the exercise of the said power, the Minister "...may, by statutory instrument, with the approval of Parliament," apply the provisions of this Act to a country is not in the Commonwealth ...". Granting the Minister power to apply the Act through issuance of the statutory instrument and at the same time requiring him or her to seek for Parliamentary approval is; in our view, unnecessarily restrictive and likely to result in red-tape and in inordinate delays. On the other hand, Section 121 of the Prisons Act has a provision pertaining to the detention of convicted offenders sentenced abroad. In light of the fact that both clauses 23 of the Bill and section 121(2) of the Prisons Act are dealing with substantially the same matter, we recommend that the two provisions be reconciled.

6.0 Recommendation

The Committee recommends that the Transfer of Convicted Offenders Bill, 2008 be passed into law subject to the proposed amendments.

**REPORT OF THE SESSIONAL COMMITTEE ON LEGAL AND
PARLIAMENTARY AFFAIRS ON THE TRANSFER OF CONVICTED
OFFENDERS BILL, 2007**

| NO. | NAME | |
|-----|----------------------------|--|
| 1. | Hon. Stephen Tashobya (CP) |  |
| 2. | Baka Stephen Mugabi (D/CP) |  |
| 3. | Amoding Monicah | |
| 4. | Niwagaba Wilfred | |
| 5. | Achia Remigio |  |
| 6. | Karungi Elizabeth | |
| 7. | Kamateeka Jovah |  |
| 8. | Obua Denis Hamson | |
| 9. | Ndeezi Alex |  |
| 10. | Lugolobi Amos |  |
| 11. | Timbigamba Lindah | |
| 12. | Katuntu Abdu | |
| 13. | Lubega Medard Sëggona |  |
| 14. | Odonga Otto | |
| 15. | Balikuddembe Joseph | |
| 16. | Ayena Chris | |
| 17. | Mpabwa Sarah |  |
| 18. | Odoi Oywelowo Fox |  |
| 19. | Mujungu Jeniffer | |

| | | |
|-----|--------------|--|
| 20. | Otada Amooti | |
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PROPOSED AMENDMENTS TO THE TRANSFER OF CONVICTED OFFENDERS BILL, 2007

1. In Clause 3: interpretation

In the definition of “Convicted offender”, by substituting for the word “or” the word “and”.

Justification: the finding of guilt as presented in the current definition does not bring finality to a criminal trial. It also contradicts the spirit in clause 6.

2. In Clause 4: Persons liable to be transferred

By inserting immediately after paragraph (c) a new paragraph (d) reading as follows-

“(d) is a person to whom section 23 applies”

Justification: to align the clause with the powers given to the Minister in clause 23.

3. In Clause 5: General requirements and application for transfer

Immediately after sub clause (2), by inserting a new sub clause (3) reading as follows-

“(3) 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”

Justification: The UN Committee against Torture, in **Tapia Paez v. Sweden, (Communication No. 39/1996)**, on 28th April 1997 noted that: “[T]he 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". Also, To comply with UN Human rights committee General Comment No. 31.

4. In Clause 6: Conditions of Transfer

At the beginning of the provision, by inserting the words "Notwithstanding the provisions of section 122 of the Prisons Act,..."

Justification: to bring the provision in consonance with the Harare Scheme for the Transfer of Convicted Offenders within the Commonwealth.

5. Clause 10: Notification of decisions of convicted offender

(a) By renumbering the current provision as (1)

(b) Immediately after the newly created sub clause (1), by inserting a new sub clause (2) to read as follows-

"(2) The proper authority shall, after the transfer of any convicted offender, notify the members of his or her family or other appropriate persons of the convicted offender's choice of his or her transfer and of the place where he or she shall be kept in custody"

Justification: to comply with Principle 16 of the Body of Principles for the Protection of all persons under any form of Detention or Imprisonment.

6. Clause 12: effect of Transfer to Uganda

In clause (1), by deletion of the words "or administrative order"

Justification: In Uganda, the only authority clothed with the power to commit a person to a mental facility, whether convicted offender or not, is the court and not any administrative body as envisaged by the clause. Refer to section 113 (5) of the Magistrates Court Act, Cap 16 of the Laws of Uganda and section 45 (5) of the Trial on Indictments Act, Cap 23 of the Laws of Uganda.

7. Clause 15: effect of continued enforcement and remission of sentence.

In sub clause (2), by deleting the words “or administrative order” in the third line.

Justification: in Uganda, the only authority with the power to issue punishment in criminal matters is a court of law. Refer to section 164 of the Magistrates Court Act and Section 2 of the Trial on Indictments Act.

8. Clause 19: Pardon, amnesty, commutation and review

(a) **In the head note,** by deleting the word “amnesty”

(b) **In sub clause (1),** by deleting the comma after the word “pardon” and further deleting the word “amnesty”

Justification: Amnesty does not require a conviction under the laws of Uganda yet to qualify under this bill the offender must be convicted.

9. Clause 21: Information on enforcement

Immediately after sub clause (2), by inserting a new sub clause (3) reading as follows-

“(3) There shall be a regular inspection of penal institutions and services of the administering country by qualified and experienced

inspectors appointed by a proper authority whose primary objective shall be to ensure that these institutions are administered in accordance with existing laws and regulations and to bringing about the objectives of penal and correctional services.”

Justification: to provide for routine inspections of the 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, 1977.

10. Clause 23: Power of the Minister to apply Act to other countries

- (a) **In sub clause (1)**, by deleting the words “with approval of Parliament,” in the first line.

Justification: the requirement for Parliamentary approval is unnecessarily strenuous and may result in inordinate delay.

- (b) **In sub clause (3)**, by deleting the words “with approval of Parliament,” in the first line.

Justification: the requirement for Parliamentary approval is unnecessarily strenuous and may result in inordinate delay.

- (c) **Immediately after sub clause (4)**, by inserting a new sub clause (5) reading as follows-

“A certificate under the hand of the Minister certifying that, from the documents laid before him or her, it appears that the person named in the certificate has been sentenced, the period of imprisonment specified in the certificate shall be

accepted as proof during the continuity of such period, that that person is lawfully detained in accordance with the provisions of this section."

Justification: to align it with section 121 of the Prisons Act, 2006