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The Southern African Development Community (SADC) Protocol on the Inter-State Transfer of Sentenced Offenders (2019): Highlighting Potential Contentious Human Rights Issues
(Original Research)

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Abstract
Many SADC countries host foreign offenders in their prisons. One of the measures adopted by these countries to deal with this challenge is to transfer the foreign offenders to serve part(s) of their sentences in their respective countries. This has been achieved through enacting domestic legislation on the transfer of offenders and signing bilateral and, to a small extent, multilateral prisoner transfer agreements. In August 2019, the "SADC Protocol on the Inter-State Transfer of Sentenced Offenders" (the Protocol) was adopted. The Preamble to the Protocol states that the underlying reason for the transfer is to "contribute towards the social reintegration" of the transferred offenders. As of the time of writing this article, the Protocol had not yet come into force. In this article, the author highlights some of the human rights issues that are likely to be contentious in the implementation or enforcement of the Protocol, especially in the light of the prisoner transfer legislation in different SADC countries. These issues are: grounds for transfer of foreign offenders (under this sub-theme, the author discusses the persons eligible for transfer, application for transfer and consent to transfer); enforcement of the sentence; pardon, amnesty, commutation of sentences and parole; cost of transfer; monitoring the enforcement of the sentence; access to information by the prisoner before the transfer and after the transfer.

Keywords
SADC; Southern African Development Community; Protocol on the Inter-State Transfer of Sentenced Offenders; Human Rights; Africa; Consent; Continued Enforcement; Conversion

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I. Introduction

The Southern African Development Community (SADC), whose objectives are set out in Article 5 of the SADC Treaty,[1] is made up of the following sixteen countries: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini (formerly Swaziland), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia and Zimbabwe. Reports show that some SADC countries have foreign nationals in their prisons.[2] In order to address this challenge, some countries such as Namibia, Zambia, Zimbabwe, Mauritius, Swaziland and Tanzania have enacted prisoner transfer pieces of legislation. Some have signed bilateral prisoner transfer agreements. This is the case, for example, between Mauritius and Seychelles, Mozambique, Madagascar;[3] as well as Namibia and Zambia.[4] One country, Mauritius, has ratified the European Convention on the Transfer of Sentenced Persons.[5] Others, however, have not yet enacted such legislations although they host many foreign nationals in their prisons.[6] As at the time of writing, eleven heads of states had signed the SADC Protocol on the Inter-State Transfer of Sentenced Offenders (the Protocol).[7] According to Article 22, the Protocol "shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of Member States." The Preamble to the Protocol states that the underlying reason for the transfer is to

1. Article 5 of the Treaty of the South African Development Community (1992) provides that "The objectives of SADC shall be to: (a) achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; (b) evolve common political values, systems and institutions; (c) promote and defend peace and security; (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; (e) achieve complementarity between national and regional strategies and programmes; (f) promote and maximise productive employment and utilisation of resources of the Region; (g) achieve sustainable utilisation of natural resources and effective protection of the environment; (h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region".

2. For example, the South African Department of Correctional Services informed Parliament that there were approximately 18000 foreign national offenders in South African prisons in November 2024. That was 11% of the prison population. See "Foreign Nationals account for 11% of the incarcerated population says DCS", 18 November 2024 at https://www.defenceweb.co.za/security/civil-security/foreign-nationals-account-for-11-of-the-incarcerated-population-says-dcs/ "(last accessed 2025-01-01). See also 'Namibia, Botswana prisoner-swap talks supported' available at https://www.namibiansun.com/social-issues/namibia-botswana-prisoner-swap-talks-supported2022-10-31

3. As discussed below.

4. See https://www.namibian.com.na/6222535/archive-read/Namibia-to-extradite-Zambian-inmates (last accessed 2025-01-01).

5. See Chart of signatures and ratifications of Treaty 112, Status as of 2023-01-26 at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=112 (last accessed 2025-01-01)

6. This this the case, for example, with South Africa.

7. As at the time of writing (January 2025), the following countries had signed the Protocol: Angola, Comoros, Democratic Republic of Congo, Eswatini (formerly Swaziland), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, United Republic Tanzania, and Zimbabwe. It should be mentioned in passing that some SADC countries, the Democratic Republic of Congo and Tanzania, are also members of the East African Community. Thus, they can transfer offenders under Article 14 of the Protocol on Peace and Security (2013). However, it is beyond the scope of this paper to discuss Article 14 of this Protocol.

'contribute towards the social reintegration' of the transferred offenders. Thus, one of the purposes of the transfer of offenders between countries is to ensure that they are re-integrated in their respective countries of origin. This is one of the reasons why states have enacted legislation or signed treaties on the transfer of foreign offenders. The Protocol has 25 Articles. In this article, the author discusses the provisions of the Protocol in the light of the legislation on the transfer of sentenced offenders in SADC countries (where such legislation exists) and prisoner transfer agreements between SADC countries (where they exist) to highlight the issues which are likely to be contentious in the implementation of the Protocol. The article deals with the following issues (in this order): the grounds for transfer of foreign prisoners; enforcement of the sentence; pardon, amnesty, commutation of sentences and parole; cost of transfer; monitoring the enforcement of the sentence; and access to information.

II. Conditions for Transfer of Foreign Prisoners

Article 6 of the Protocol provides that:

1. A transfer may take place: (a) if the sentenced offender is a national of the administering state; (b) if the sentence has become enforceable in the sentencing State and is no more subject to appeal or review; (c) if not less than six (6) months of the sentence have still to be served on the date of receipt of the request for transfer, unless otherwise agreed under exceptional circumstances; (d) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory, regardless of any terminological differences; (e) if there are no legal barriers which include pending cases, that bar the sentenced offender from serving the remainder of the sentence, including under the statute of limitations; (f) if the sentencing state and the administering State unambiguously consent to the transfer; and (g) if written consent has been given by the sentenced offender or his or her duly appointed representative.
2. The sentencing State shall afford an opportunity to the administering State to verify, through a designated official, that the consent is given voluntarily and in writing with full knowledge of the legal consequences thereof, in accordance with the law of the sentencing State.

Under Article 6, an offender does not have a right to be transferred. This can be inferred from the use of the word 'may' in Article 6(1) and the requirement for consent of both states under Article 6(1)(f). As follows, other important observations about Article 6 are presented.

A. Persons Eligible For Transfer

For a person to be transferred, he/she has to be "a national of the administering

State." Article 6(1)(a) should be read with Article 5(2)(a) in mind, which provides that one of the documents that the administering State has to submit to the sentencing State is "a document or statement indicating whether the sentenced offender is a citizen of that State." The preamble to the Protocol also states, inter alia, that it was necessary for the SADC States to adopt the Protocol "considering that such co-operation should contribute towards the social reintegration of citizens who are sentenced offenders as a result of criminal offences they committed in foreign countries.". This is in line with Article 10(3) of the International Covenant on Civil and Political Rights (1966) which states that "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".[8] This raises two questions. The first question is whether a dual citizen of the sentencing and administering State may also qualify for transfer. The second question is whether it excludes non-citizens who have "close ties" with the administering State such as permanent residents,[9] stateless persons, and people with the "right to stay" in the administering states. It is evident that strictly interpreted, the Protocol requires states to transfer citizens or nationals to serve their sentences. The Protocol does not define the words "national" or "citizen."

SADC States have adopted two approaches on this issue. In some countries such as Tanzania,[10] only nationals may be transferred (the author refers to this as the strict approach). Other countries such as Swaziland (Eswatini),[11] Mauritius,[12] Zambia[13] and Zimbabwe[14] follow what we call a "flexible approach" – in terms of which both nationals and non-nationals with close ties with the administering state may also be transferred. Some countries, such as Namibia,[15] have adopted a "mixed" approach in terms of which they can only administer a sentence if the offender is one of their nationals. However, they can transfer both nationals and non-nationals with close ties to serve their sentences in the administering State. In Namibia,[16] people with dual citizenship also qualify for transfer to or from Namibia to serve their sentences. In the author's view, the "flexible" approach is preferable to the "strict" approach which is provided for under the Protocol. This is because it ensures that apart

8. For a detailed discussion of the drafting history of Article 14(3) of the International Covenant on Civil and Political Rights (16 December 1966, United Nations, Treaty Series, vol. 999, p. 171), see Jamil Ddamulira Mujuzi, "Remission of Sentences and the Constitutionality of Life Imprisonment in Seychelles" (2024) 15(1) *Jurnal HAM* 63 – 84.

9. In countries such as South Africa, Seychelles, Namibia legislation provides for permanent residents.

10. S 3 of the Transfer of Prisoners Act, 2004 defines a "prisoner" to mean "a Tanzania citizen serving a sentence in a designated country or a citizen of a designated country serving a sentence in Tanzania."

11. S 5(1)(a) and 12(1) of the Transfer of Convicted Offenders Ac, No. 10 of 2001.

12. Ss 2(1) and 4(5)(g) of the Transfer of Prisoners Act, Act 10 of 2001.

13. Ss 2(1) and 11(2) of the Transfer of Convicted Persons Act, No. 26 of 1998.

14. Ss 2(1) and 12(2) of the Transfer of Offenders Act, No. 14 of 1990.

15. Ss 2 and 4(1) of the Transfer of Convicted Offenders Act, 2005.

16. S 4(1)(a)(i) of the Transfer of Convicted Offenders Act, No 9 of 2005.

from citizens, people with close ties to the administering State are also transferred to serve their sentences in such countries hence increasing their chances of being rehabilitated and reintegrated. This is so, because there is evidence, for example, from human rights bodies that the mere fact that a person is a citizen of a given country does not necessarily mean they have strong/close ties with such countries.[17] It may be necessary for the Protocol to be amended to provide that States parties may transfer both nationals and people with close ties with the administering states. Otherwise, States parties which follow the strict approach should amend their legislation to introduce the flexible approach. This would be in line with Article 12(4) of the International Covenant on Civil and Political Rights, and Article12(2) of the African Charter on Human and Peoples' Rights which provide for every person's right to return to his/her country. As the discussion below illustrates, the right to return to one's country is not applicable to citizens only. It is applicable to every person. This is broad enough to include people with close ties with the administering States.

B. Consent to, or Application for Transfer

The Protocol provides for two circumstances in which an offender's transfer may be initiated: (1) if he/she consents to the transfer or (2) if he/she applies for the transfer. The first situation (consent) is governed by Article 6 (discussed below under 'consent'). The second situation is contemplated in Article 4 of the Protocol. Article 4(1) provides that "[a] sentenced offender to whom this Protocol is applicable shall be informed of its contents, as well as the legal effects of his or her possible transfer, and shall be provided with an application form as prescribed in domestic laws of the sentencing State." Article 4(1) implies that an offender can only apply to the sentencing State for his transfer to the administering State (country of nationality). In other words, he/she cannot make his/her application to the his/her country of nationality. The discussion will start with discussing the circumstances in which an application for the offender's transfer can be made before dealing with the issue of consent. This is because consent is dependent on an application.

C. Application For Transfer

The Protocol does not expressly provide for circumstances in which a prisoner's country of nationality can make an application for the transfer. Therefore, the request has to be made by either the prisoner or the sentencing State. However, Article 2(3) of the Protocol provides that "[a] transfer may be requested by any State Party, the sentenced offender or his or her duly appointed representative." The words "any State Party" cover both sentencing and administering States. On the basis of Article 2(3), the sentencing state requests the administering State

17. See generally, *Warsame v Canada* (Comm. 1959/2010, No. CCPR/C/102/D/1959/2010, A/66/40) Vol. II, Part 1 (2011), Annex VI at 601 (HRC, Jul. 21, 2011); *XHL v. Netherlands*, (Comm. 1564/2007, No. CCPR/C/102/D/1564/2007, A/66/40), Vol. II, Part 1 (2011), Annex VI at 271 (HRC, Jul. 22, 2011).

to allow it (the sentencing State) to transfer its citizens (the citizens of the administering State) to serve their sentences in its prisons (the prisons of the administering State). Article 2(3) also allows the administering State to request the sentencing State to transfer its nationals (the nationals of the administering state) to serve their sentences in its prisons (the prisons of the administering state). Pieces of legislation on prisoner transfer in SADC countries approach this issue differently. They draw a distinction between the procedure to be followed by a prisoner before he/she can be transferred out of the country to serve his/her sentence in their country of nationality (foreign prisoner) on the one hand and those applicable to nationals who are being transferred from abroad on the other. These differences will be discussed shortly.

D. Transfer of Foreign Offenders Out of the Country

In Zimbabwe[18] and Tanzania,[19] only offenders can apply for their transfer. In other words, neither the sentencing State nor the administering State can apply for the transfer of an offender from Zimbabwe to serve his/her sentence in his/her country of nationality.[20] In Namibia, the application or request can be made by the offender, the sentencing country or the administering country.[21] The application in question must be in writing.[22] In Mauritius,[23] the application or request for the transfer, which must be in writing, can be made by the offender or his/her country of nationality. The Zambian Transfer of Convicted Persons Act[24] provides that an application for the transfer of a foreign offender may be made by the offender, his/her country of nationality or with which he/she has close ties, the offender's relative or "any other interested person or body".[25]

18. S 12 of the Transfer of Offenders Act, Act 14 of 1990.

19. S 14(2) of the Transfer of Prisoners Act, No. 10 of 2004.

20. S 14(5) of the Transfer of Prisoners Act, No. 10 of 2004 (Tanzania) appears to suggest that an offender can also consent to the transfer from Tanzania. It provides that "[w]here an application for transfer outside the United Republic has been made by a prisoner or consent, for such transfer has been given by another person on behalf of that prisoner, then, if such prisoner is detained in Tanzania Zanzibar, the Minister shall before making any decision consult with the Minister responsible for the custody of offenders in the Revolutionary Government of Zanzibar regarding the application and, where there is consensus in the affirmative, the provisions of this Act shall mutatis mutandis apply to such transfer." However, it is silent on which state has to be making the application for the prisoner's consent.

21. S 3(1)(b) of the Transfer of Convicted Offenders Act, Act 9 of 2005.

22. S 4(1)(d) of the Transfer of Convicted Offenders Act, Act 9 of 2005.

23. S 10(2)(a) and (3A) of the Transfer of Prisoners Act, Act 10 of 2001.

24. Transfer of Convicted Persons Act, No. 26 of 1998.

25. Ss 11(2) and (8). However, s 4(2) of the Act provides that "an application under this Act may be made in Zambia on behalf of a foreign convicted person by any other person where there is provision for a similar application to be made on behalf of a convicted person in the specified or designated country to which the foreign convicted person wishes to be transferred." In *Andries v Attorney General* (Appeal 23 of 2015) [2017] ZMSC 97 (11 September 2017), the Supreme Court of Zambia explained the circumstances in which the Act is applicable. It held that "the wording of the Zambian Act... is that it is meant for a foreign convict serving time in a foreign prison after being convicted by the foreign country seeking to return to

E. Transfer of National Offenders From Abroad

An offender can only be transferred to Zimbabwe following his/her application to the relevant authorities of the sentencing State. In other words, the law does not provide for circumstances in which such an application can be made on behalf of the offender by the Zimbabwean authorities.[26] In Namibia, the application or request can be made by the offender, the sentencing State or the administering State.[27] In Tanzania[28] and Mauritius,[29] only the prisoner and the sentencing State can apply or request for the transfer. The Zambian Transfer of Convicted Persons Act[30] provides that apart from the offender[31] and the Zambian Attorney General,[32] the offender's relative[33] or 'any other interested person or body' may apply for the offender's transfer.[34] This means that if a prisoner makes an application, his consent to the transfer is implied. All these pieces of legislation do not provide that an offender has a right to be transferred to their country of nationality. Likewise, they do not provide that either the sentencing State or the enforcement State has a right to transfer or request the transfer of an offender respectively. Thus, an offender does not have a right to be transferred. However, he/she is allowed to apply or request for the transfer. In some instances, his/her transfer can be requested by another person or entity. Either way, the offender's consent is needed before the transfer can take place. The form in which the prisoner should express his/her consent has been approached differently in SADC countries. It is to this issue that we turn next.

F. Consent

In terms of Article 6(1)(g), a transfer can only take place "if written consent has been given by the sentenced offender or his or her duly appointed representative." The representative in question does not have to be a lawyer. Otherwise, the provision would have provided so expressly. Thus, it is contrary to the Protocol to transfer a prisoner without his/her written consent. Before a prisoner can consent to the transfer, he/she should know what they are consenting to. Therefore, Article 6(1)(f) should be read with Article 6(2) which requires that consent has to be given voluntarily with full knowledge of the consequences.

Zambia or his or her country of origin. It does not relate to a situation where the convict commits the crime locally and flees to a foreign country [where he is detained awaiting his extradition to Zambia]." In other words, although Zambia law provides that the time a person spends in custody while awaiting sentence should be deducted from the period of imprisonment to which he/she is sentenced, that principle is only applicable to instances where he/she spent such time in custody in Zambia and not abroad.

26. S 4 of the Transfer of Offenders Act, Act 14 of 1990.

27. S 3(1)(b) of the Transfer of Convicted Offenders Act, Act 9 of 2005.

28. S 5(1) of the Transfer of Prisoners Act, No. 10 of 2004.

29. S 4(1)(a) of the Transfer of Prisoners Act, Act 10 of 2001.

30. Transfer of Convicted Persons Act, No. 26 of 1998.

31. S 4(1)(a).

32. S 4(1)(b).

33. S 4(1)(c).

34. S 4(1)(d).

These consequences include, for example, the duration of the sentence he/she will serve after transfer (continued enforcement or conversion) and the law that will govern his/her early release (for example, parole and pardon).

In countries where either the sentencing State or the administering State is empowered to apply for the prisoner's transfer, his or her consent is needed before the transfer can take place. In Namibia, the consent must be in writing,[35] has to be given voluntarily, and may be verified by the administering State.[36] However, the Tanzanian legislation does not expressly require that the consent be in writing.[37] Whereas the Swaziland prisoner transfer legislation provides that a prisoner's consent has to be given voluntarily and in writing,[38] it does not provide for the verification such consent. Although Mauritian law provides that consent has to be given voluntarily,[39] it is silent on whether or not it has to be in writing. It is also silent on the verification process. The prisoner transfer pieces of legislation of Tanzania and Zambia are silent on the fact that consent has to be given voluntarily and do not provide for verification of such consent. In countries where legislation does not specify that an offender's consent has to be in writing, such laws may have to be amended to comply with Article 6(1)(g) of the Protocol. Practice from some countries shows that many offenders are reluctant to consent to their transfer. As a result, the emerging trend is to exclude the offender's consent as one of the conditions for the transfer.[40] This is an approach that the author would not recommend to SADC countries. Thus, there is no need to amend the Protocol to exclude the offender's consent as a pre-condition for the transfer. The offender's consent to the transfer could also act as a safeguard against transferring offenders in violation of the principle of non-refoulement (in both refugee law and human rights law).[41]

Article 6(1)(f) provides that the transfer can only take place "if the sentencing State and the administering State unambiguously consent to the transfer." It is understandable if the sentencing State declines to consent to the transfer because, for example, it would like the offender to serve the sentence in the country in which he/she broke the law. Since the offender does not have a right to be transferred, he may not compel the sentencing State to transfer him or her. However, if he/she thinks that the administrative decision relating to

35. S 4(1)(d) of the Transfer of Convicted Offenders Act, Act 9 of 2005.

36. S 8 of the Transfer of Convicted Offenders Act, Act 9 of 2005.

37. S 5(1)(b) of the Prisoner Transfers Act, No. 2 of 2010.

38. Ss 5(2) and 14(2) of the Transfer of Convicted Offenders Act, No. 10 of 2001.

39. S 10 (3A)(a) of the Transfer of Prisoners Act, No. 10 of 2001.

40. See generally, Jamil Ddamulira Mujuzi "Analysing the Agreements (Treaties) on the Transfer of Sentenced Persons (Offenders/Prisoners) between the United Kingdom and Asian, African and Latin American Countries" 2012 20(4) *European Journal of Crime, Criminal Law and Criminal Justice* 377.

41. For a detailed discussion of this principle in refugee law and human rights law, see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2007); Fanny De Weck, *Non-Refoulement Under the European Convention on Human Rights and the UN Convention Against Torture: The Assessment of Individual Complaints by the European Court of Human Rights Under Article 3 ECHR and the United Nations Committee Against Torture Under Article 3 CAT* (2016).

his/her transfer is unreasonable, irrational or illegal, he/she may challenge such decision before the courts of the sentencing State. Upon such action, the decision may be reviewed and set aside.[42] Case-law from different SADC countries explains the circumstances in which national courts can review administrative actions/decisions.[43] The question becomes complicated when it is the administering State, the country of nationality, which declines to the transfer of the offender when both the offender and the sentencing State have consented to the transfer. Such a situation is contemplated, for example, under section 5 of the Zambian Transfer of Convicted Persons Act.[44] This is understandable, as the High Court of South Africa held, if there is no prisoner transfer agreement between the sentencing State and the administering State.[45] However, if there is a prisoner transfer agreement between them, the prisoner could argue that the refusal by the administering State to allow his/her transfer is a violation of his right to return to enter or return to his/her country which is protected in the constitutions of almost all SADC countries,[46] with the exception of Comoros[47] and Mozambique. Although the Constitution of Comoros and Mozambique do not provide for the right to return, they provide that treaties ratified by these States become part of domestic law.[48] The African Charter on Human and Peoples' Rights which was ratified by both countries provides for the right to return to one's country.[49] Thus, nationals of these countries have a

42. For example, s 6(2) of the Tanzania Prisoner Transfers Act, No. 2 of 2010 provides that "[a] prisoner or his representative who is aggrieved by the decision of the Minister [to transfer him/her] my appeal to a court."

43. See for example, *Commissioner General of His Majesty's Correctional Services and Another v Magongo* [2023] SZSC 21 (Supreme Court of Eswatini); *Professional Logistics International (Pty) Ltd v The Minister of Trade and Industry* [2021] LSHC 2 (High Court of Lesotho); *R v Judicial Service Commission & Another* [2019] MWHC 34 (High Court of Malawi); *Transworld Cargo (Pty) Ltd v Air Namibia (Pty) Ltd and Others* [2014] NASC 11 (Supreme Court of Namibia); *Bouchereau & Others v Supt of Prisons & Others* [2015] SCCA 3 (Court of Appeal of Seychelles); *Mwikabe Samo Mungine v Mzumbe University and Another* [2024] TZHC 7296 (High Court of Tanzania); *William Harrington v Attorney General* [2019] ZMSC 14 (Supreme Court of Zambia); and *ZIMSEC v Mukomeka & Another* [2020] ZWSC 10 (Supreme Court of Zimbabwe).

44. S 5 of the Zambian Transfer of Convicted Persons Act No. 26 of 1998 provides that "[u]pon receipt of an application under subsection (1) of section four [for the transfer of a convicted person to Zambia] the Minister shall, after consultation with the Attorney-General and the Commissioner, indicate in writing, to the appropriate authority, whether or not the Minister agrees to transfer to Zambia the person applying for such a transfer. (2) The Minister shall refuse the convicted person's application for a transfer where— (a) the convicted person has not obtained final judgement on appeal from the final court of appeal of the specified or designated country; or (b) there is no agreement regarding the cost of the transfer as provided under section fourteen."

45. *Gerber v Government of the Republic of South Africa and Others* (51128/09) [2010] ZAGPPHC 240 (9 December 2010).

46. Article 17(1) of the Constitution of Tanzania (1977); Article 25(2) of the Constitution of Seychelles (1993); section 21(3) of the Constitution of South Africa (1996); Article 66(1)(a) of the Constitution of Zimbabwe (2013); Constitution of Angola (2010)(Article 46(2); Article 22(1)(c) of the Constitution of Zambia (1991); Article 30 of the Constitution of the Democratic Republic of Congo (2005); Article 26(1) of the Constitution of Swaziland (2005); Article 15(1) of the Constitution of Mauritius (1968); Article 21(1)(i) of the Constitution of Namibia (1991).

47. Article 12 of the Constitution (2018).

48. Article 12 of the Constitution of Comoros (2018); Article 18 of the Constitution of Mozambique

49. Article 12(2) of the African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right to leave any country including his own, and to return to his country.' However, Article

right to return by virtue of this treaty. The International Covenant on Civil and Political Rights has been ratified by most SADC countries,[50] with its Article 12(4) providing that "[n]o one shall be arbitrarily deprived of the right to enter his own country."[51] The administering State has to prove that the refusal to consent to the transfer does not amount to an arbitrary deprivation of the offender's right to enter his/her own country. In its General Comment No. 27 on Article 12, the Human Rights Committee stated that:

"In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country".[52]

As the Human Rights Committee observes, "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable." Unless the State of nationality does not genuinely have the resources to transfer its national to serve his/her sentence on its territory, there is hardly any reason why it should not consent to his/her transfer. The fact that because of his/her conviction he/she poses a danger to society cannot be a justification for refusing his/her transfer. This is so because he/she, unless he/she is a dual national, he/she will most likely be deported to the same State after serving his/her sentence. It is in that State's interests that he is transferred as early as possible and participate in rehabilitation programmes.

Related to the above is the question of whether one's "own country" within the meaning of Article 12(4) of the ICCPR or Article 12(2) of the African Charter on Human and Peoples' Rights is limited to nationals. It has been illustrated above that in some countries only nationals may be transferred to serve their sentences. According to the Human Rights Committee:

"The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is,

12(2) also provides that '[t]his right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.'

50. With the exception of Comoros which has just signed it.

51. For the drafting history of Article 12(4), see Jamil Ddamulira Mujuzi "The Right to Enter One's Own Country: The Conflict between the Jurisprudence of the Human Rights Committee and the *Travaux Préparatoires* of Article 12(4) of the ICCPR" (2021) 10 *International Human Rights Law Review* 75.

52. CCPR General Comment No. 27: Article 12 (Freedom of Movement) (CCPR/C/21/Rev.1/Add.9) para 21.

nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence."[53]

Whether or not a non-national will have a right to return to his/her country of permanent residence or domicile is an issue governed by domestic law. In most SADC countries, only citizens or nationals have the right to return.[54] In Malawi, this right is protected in respect of "every person"[55] whereas in Namibia, the Democratic Republic of Congo, Swaziland and Mauritius, it is protected in respect of "all persons".[56] In Madagascar, "any resident" has the right to return.[57] The return of all persons irrespective of their nationality is subject to the law. Therefore, nothing prevents countries from limiting that right to nationals or extending it to a few categories of non-nationals.

III. Enforcement of the Sentence

Prisoner transfer agreements normally draw a distinction between "continued enforcement" and "conversion".[58] The Explanatory Report to the Convention on the Transfer of Sentenced Persons[59] explains the difference between these

53. General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999) para 20.

54. Article 46(2) Constitution of Angola (2010); Article 25(2) of the Constitution of Seychelles (1993); Article 17(1) of the Constitution of Tanzania (1977); Article 22(1)(c) of the Constitution of Zambia (1991); Article 66(1)(a) of the Constitution of Zimbabwe (2013); S 21(3) of the Constitution of South Africa (1996).

55. Article 39(2) of the Constitution of Malawi (2017).

56. Article 30 of the Constitution of the Democratic Republic of Congo (2005) provides that "[a]ll persons who are on the national territory have the right to circulate freely in it, to establish their residence in it, to leave it and to return to it, under the conditions established by the law." See also Article 26(1) of the Constitution of Swaziland (2005); Article 15(1) of the Constitution of Mauritius (1968); Article 21(1)(i) of the Constitution of Namibia (1991).

57. Article 12(1) of the Constitution of Madagascar (2010) provides that '[a]ny resident Malagasy has the right to leave the national territory and to return to it within the conditions established by the law.'

58. See for example, Articles 10 and 11 of the Convention on the Transfer of Sentenced Persons (1983) (European Treaty Series - No. 112).

59. Explanatory Report to the Convention on the Transfer of Sentenced Persons (1983). Available https://rm.coe.int/16800ca435

two concepts in the contexts of Article 10[60] and 11[61] of the Convention. Since the Protocol provides for continued enforcement only (as will be illustrated below), it is important to reproduce the content of the report on this issue in detail. It states that:

"Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer".[62]

The report adds that:

"If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11,

60. Article 10 of the Convention provides that "[1] In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State. [2] If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State."

61. Article 11 provides that "[1]. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority: (a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State; (b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction; (c) shall deduct the full period of deprivation of liberty served by the sentenced person; and (d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed. [2] If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure."

62. Explanatory Report to the Convention on the Transfer of Sentenced Persons (1983) para 49.

under which the administering State substitutes a sanction for that imposed in the sentencing State, the procedure under Article 10.2 enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system".[63]

On the question of conversion, the Report provides that:

"Article 11 concerns the conversion of the sentence to be enforced, that is the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "*exequatur*"…It is essential for the smooth and efficient functioning of the convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for similar offence, the penal system of the administering State differs from that of the sentencing State".[64]

Under the Protocol, the enforcement of the sentence of the transferred offender is governed by Article 10. It is stated that:

1. The sentenced offender shall complete the sentence imposed on him or her by the sentencing State, in accordance with the legal provisions of the administering State.
2. In so far as the administering State is concerned, the type and length of the penalty must be consistent with those stated in the sentence such that the sentenced offender may not be subjected to a worse off sentence than that imposed by the sentencing State.

Article 10 contemplates continued enforcement as opposed to conversion of the sentence. Prisoner transfer legislation in most SADC countries also provide for continued enforcement only.[65] It is the same approach followed in prisoner transfer agreements between Mauritius and other SADC countries such as Seychelles[66] and Tanzania.[67] The Zambian[68] and Zimbabwean[69] prisoner transfer pieces of legislation are silent on whether continued enforcement or conversion is applicable. It is for the relevant ministers to enact regulations

63. As above para 50.

64. As above para 51.

65. S 13 of the Transfer of Convicted Offenders Act, Act 9 of 2005 (Namibia); s 8 of the Transfer of Convicted Offenders, No. 10 of 2001 (Swaziland); s 16 of the Transfer of Prisoners Act, 2004 (Tanzania).

66. Article 8 of the Transfer of Prisoners (Republic of Seychelles) Regulations 2016 (GN No. 24 of 2016)(Government Gazette of Mauritius No. 17 of 27 February 2016).

67. Article 5 of the Transfer of Prisoners (Republic of Tanzania) Regulations 2008 (GN No. 45 of 2008).

68. S 15(b) of the Zambian Transfer of Convicted Persons Act, No. 26 of 1998 provides that the Minister may, by regulation, prescribe "the procedure to be followed for the enforcement in Zambia of a sentence imposed on a convicted person in a specified or designated country."

69. S 15(b) of the Transfer of Offenders Act, No. 14 of 1990 provides that the Minister may make regulations prescribing, "the procedure to be followed for the enforcement in Zimbabwe of a sentence imposed on an offender in a specified country."

providing the procedure for the enforcement of the sentences imposed abroad. Mauritius is the only SADC country whose legislation allows both continued enforcement and conversion. Section 4(5)(i) of the Transfer of Prisoners Act[70] provides that an application or request for the transfer of an offender to Mauritius shall be accompanied by, *inter alia*, "a statement indicating whether the sentence is to be enforced in the designated country immediately or through a Court or administrative order, or whether it is to be converted into a decision of the designated country or varied." However, the conversion is subject to the conditions under section 6(4) of the Act.[71] The prisoner transfer agreement between Mauritius and Mozambique also allows both continued enforcement and conversion.[72] Since an offender's consent is needed before he/she can be transferred to serve their sentence in the administering state, the Protocol may have to be amended to also provide for conversion in addition to continued enforcement. The possibility of conversion may encourage more prisoners to apply for, or consent to, the transfer as the length of their sentences will be reduced.[73] It may also allow enforcement countries to convert sentences which are incompatible to their domestic law.

IV. Pardon, Amnesty, Commutation of Sentences and Parole

One of the most important issues in prisoner transfer arrangements is whether the offender, after the transfer, will, as a result of the law governing the early release of offenders in the administering State, serve a short or lengthy sentence than he/she would have served had he/she not been transferred. Practice from other countries shows that the early release of a transferred offender can strain diplomatic relations between countries.[74] Article 11 of the Protocol provides

70. The Transfer of Prisoners Act, No. 10 of 2001.

71. S 6(4) provides that "[w]here the Judge in Chambers decides to vary the sentence imposed – (a) he shall be bound by the findings of facts as they appear from the judgment imposed in the designated country; (b) he shall not convert a sanction involving deprivation of liberty to a pecuniary sanction; (c) he shall deduct the full period of deprivation of liberty served by the offender; (d) he shall not be bound by any minimum term of imprisonment which the law of Mauritius provides for the offence or offences committed."

72. Article 10 of the Transfer of Prisoners (Republic of Mozambique) Regulations 2020 (GN No. 36 of 2020)(Government Gazette of Mauritius No. 14 of 7 February 2020).

73. There are case from Europe in which offenders applied for transfer mainly because they expected their sentences to be converted to more lenient ones. See for example, *Smith v Germany* (Application no. 27801/05)(1 April 2010); *Buijen v Germany* (Application no. 27804/05) (1 April 2010). In some cases, offenders were unsatisfied with the continued enforcement of the transferred sentences, see for example, *Neville, R (On the Application of) v Secretary of State for Justice* [2021] EWHC 957 (Admin); and *Douglas, Re* [2020] EWHC 3018 (QB) para 13.

74. See for example, Resolution 2022 (2014) of the Parliamentary Assembly of the Council of Europe on the Measures to prevent abusive use of the Convention on the Transfer of Sentenced Persons (ETS No. 112) para 3 at which the Parliamentary Assembly noted "with concern that the convention was invoked in order to justify the immediate release, upon transfer to Azerbaijan, of Mr Ramil Safarov, an Azerbaijani soldier convicted of murdering an Armenian fellow participant on a 'Partnership for Peace' training course in Hungary, sponsored by the North Atlantic Treaty Organization (NATO). Upon his arrival in Azerbaijan, he was welcomed as a national hero and granted an immediate pardon – long before the expiry of the minimum sentence set by the Hungarian court – and a retroactive promotion as well as other rewards" at http://assembly.coe.int/nw/

that "[t]he administering state may grant a pardon, amnesty, parole or commutation of the sentence, pursuant to its constitution or other laws." This implies that the transferred offender's sentence is governed by the laws of the administering State. His/her release from prison is governed by the laws of the administering State. The administering State does not have to consult with the sentencing State in deciding whether or not to release the offender early through pardon, amnesty, commutation or parole (unless if that consultation process is required by its domestic law). This has the potential of either benefitting the offender (by serving a reduced sentence) or putting him/her at a disadvantage (by serving a sentence longer than he/she would have served had he/she not been transferred). It is against this background that Article 6(2) of the Protocol, as discussed above, requires States Parties to ensure that an offender has "full knowledge of the legal consequences" of the transfer. SADC Countries have approached this issue differently. In Namibia, subject to the agreement between Namibia and the sentencing State, an offender may be granted pardon or reprieve by the President. The pardon or reprieve granted to an offender before his/her transfer to Namibia has the same effect as if it were granted by the Namibian President.[75] The Namibian prisoner transfer legislation does not stipulate how the administering State should deal with pardon or reprieve in the case of an offender transferred from Namibia. The Swaziland prisoner transfer legislation provides that unless there is an agreement between Swaziland and the administering State, the King of Swaziland retains the power to pardon, grand amnesty or commute the sentence of an offender transferred from Swaziland.[76] Likewise, unless there is an agreement between the sentencing country and Swaziland, the former retains the power to pardon and commute the sentence of an offender transferred to serve his/her sentence in Swaziland.[77] In Tanzania and Zimbabwe, the prisoner transfer pieces of legislation do not require the existence of an agreement between Tanzania or Zimbabwe and the sentencing country before the President of each of these countries grants pardon or commute the sentence of a transferred offender. In other words, these issues are exclusively governed by Tanzanian,[78] or Zimbabwean law.[79] However, the authorities in these countries have to give effect to the pardon granted to the transferred prisoners by the sentencing countries. If a transferred offender is pardoned by the authorities in the sentencing sentence, Tanzanian[80] and Mauritian[81] authorities will terminate the enforcement of his/her sentence.

xml/XRef/Xref-XML2HTML-en.asp?fileid=21319 (last accessed 2023-01-26). See also *Makuchyan and Minasyan v Azerbaijan and Hungary* (Application no. 17247/13)(2020-05-26) para 41.

75. S 16 of the Transfer of Convicted Offenders Act, 2005.

76. S 9 of the Transfer of Convicted Offenders Act, No. 10 of 2001.

77. S 17 of the Transfer of Convicted Offenders Act, No. 10 of 2001.

78. S 13 of the Transfer of Prisoners Act, 2004.

79. S 10 of the Transfer of Offenders Act 14 of 1990

80. S 17 of the Transfer of Prisoners Act, 2004.

81. S 12 of the Transfer of Prisoners Act, No. 10 of 2001.

Section 9(1)(a) of the Zambian Transfer of Convicted Persons Act provides that one of the conditions that have to be accepted by the administering State before Zambian consents to the transfer of the offender is that the Head of State of the administering State can only pardon or grant amnesty to the transferred offender or commute his/her sentence with the written consent of the Zambian authorities. In the case of an offender transferred to serve his sentence in Zambia, the Zambian President can only pardon him/her "with the consent" of the sentencing country.[82] This has the effect of limiting the manner in which a head of state may exercise his constitutional power of prerogative of mercy.

Unlike the Protocol and prisoner transfer legislation in other SADC countries such as Namibia, Swaziland and Zambia, the Tanzanian, Mauritian and Zimbabwean pieces of legislation contemplate a situation in which an offender on parole (in cases of Tanzania and Mauritius) or licence (in the case of Zimbabwe) may be transferred to complete his parole period in these countries. Section 12 of the Tanzanian Transfer of Prisoners Act provides that:

(1) Where a prisoner has, before transfer been released on parole in the designated country and that parole was subsequently revoked, the time spent on parole shall count towards the completion of sentence in Tanzania.
(2) A transferred prisoner who is, at the date of his transfer on parole in the designated country in which he was convicted and sentenced shall, upon transfer to Tanzania, be treated as a person on parole, notwithstanding that such a prisoner may not be eligible for parole under the law relating to parole of Tanzania.
(3) A breach of any condition of parole or of a conditional pardon shall render the offender liable to the same consequences as if he had been granted respite, or had been conditionally pardoned, in accordance with the laws of Tanzania.

Section 2 of the Tanzanian Transfer of Prisoners Act is to identical to section 9 of the Mauritian Transfer of Prisoners Act.[83] Section 297B of the South African Criminal Procedure Act provides for the circumstances in which foreign suspended sentences can be enforced in South Africa.[84] Section 9 of the

82. S 9(2) of the Transfer of Convicted Persons Act, No. 26 of 1998.

83. The Transfer of Prisoners Act, No. 10 of 2001.

84. Section 297B Criminal Procedure Act 51 of 1977 states that "(1) The State President may, on such conditions as he may deem necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.
(2) The State President may, if the parties agree, amend such an agreement to the extent which he deems necessary.
(3) If an application is made for a suspended sentence, imposed by a court of a state referred to in subsection (1), to be put into operation, the court at which the application is made shall, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.

Zimbabwean Transfer of Offenders Act[85] is to the same effect as the above-mentioned provisions of the Tanzanian and Mauritian pieces of legislation. These provision on parole and licence imply that although, strictly speaking, only offenders who are serving their sentences can be transferred, there is an exception to this rule – in the case of an offender on parole or licence. Once transferred to Tanzania, Mauritius or Zimbabwe, he/she is obliged to comply with the parole or licence conditions imposed in the sentencing State. However, should he/she breach any of the parole or licence conditions, he/she is dealt with in accordance with Tanzanian, Mauritian or Zimbabwean law; That is, in accordance with the laws of the enforcement State. There may be a need for the Protocol to be amended to provide for instances in which an offender on parole or licence may be transferred to complete his/her parole or licence period in the administering country. This will ensure that as many people as possible are transferred to serve their sentences in their countries of nationality. A similar approach has been adopted in some European countries.[86] It is not impossible that an offender sentenced to imprisonment in one SADC country could escape to another country. In this case, the Protocol on the Transfer of Sentences Persons is not applicable. Such an offender would have to first be extradited to the sentencing country before being transferred to his/her country of nationality to serve their sentence. This could be an expensive and time-consuming exercise. To ensure that the offender serves his/her sentence as soon as possible, SADC countries may have to enact legislation providing for the enforcement of sentences imposed abroad. This approach has been followed in some European countries.[87]

Closely related to the issues of continued enforcement and conversion is the issue of double criminality under Article 6(1)(d) of the Protocol. For a person to be transferred, the action or omission of which he/she was convicted has to be an offence an offence in the administering State "regardless of any terminological differences." This is important because some acts such as homosexuality and using dependence producing substances are offences in some SADC countries but not in others.[88] Some offences are also named differently in some countries. For example, the killing of a person unintentionally

(4) (a) An agreement referred to in subsection (1), or any amendment thereof, shall only be in force after it has been published by the State President by proclamation in the Gazette."

85. Transfer of Offenders Act 14 of 1990

86. See Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

87. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

88. For example, homosexuality is an offence in Zimbabwe but it is not an offence in South Africa. Smoking marijuana at one's residence is not an offence in South Africa although it is prohibited in some SADC countries.

is known as manslaughter[89] in some SADC countries and culpable homicide in others.[90] This implies that some of the offenders will not be eligible for transfer because the conduct of which they were convicted in the sentencing states is not prohibited in the would-be enforcement statement.

V. Cost of Transfer

The Protocol leaves the issue of the cost of transfer in the hands of States Parties. Thus, Article 14 of the Protocol provides that "[t]he cost of transfer of a sentenced offender, including all expenses connected with the transit, shall be negotiated between the concerned States Parties." Prisoner transfer pieces of legislation in Namibia[91] and Swaziland[92] provide that the cost of transfer will be incurred by the sentencing State or the administering State, or both. In Tanzania[93] and Mauritius,[94] the general rule is that the cost of a transfer of a prisoner shall be borne out by the sentencing and administering States in such proportion as may be agreed upon by them. This means that both countries must contribute to the costs of the transfer. However, Tanzanian[95] and Mauritian[96] pieces of legislation also provide that in certain circumstances, the prisoner or his/her agent may be required to incur the costs for his/her transfer. The Zambian legislation provides that the cost of the transfer shall be borne by the sentencing and administering countries, "in such proportions as may be

89. For example, in Seychelles, Zambia and Tanzania.

90. For example, in South Africa, Zimbabwe and Namibia.

91. S 19 of the Transfer of Convicted Offenders Act, 2005

92. S 22 of the Transfer of Convicted Offenders Act, No. 10 of 2001.

93. S 18(1) of the Transfer of Prisoners Act, 2004.

94. S 13 (1) of the Transfer of Prisoners Act, No. 10 of 2001

95. S 18 of the Tanzanian Transfer of Prisoners Act, 2004 provides that "(2) Subject to the provisions of subsection (4), in the case of a transfer of a prisoner who is a Tanzanian citizen, the expenses of such transfer shall be borne by such prisoner or by his agent, and for this purpose the Minister shall have the power to require a person with or without a surety to give an undertaking to pay the expenses to the Minister.
(3) Any expenses referred to in subsection (2) shall be regarded as a civil debt owed to the Government of Tanzania.
(4) The provisions of subsections (2) and (3) shall not apply where it appears to the Minister that it would be unreasonable for him to exercise the power conferred by these subsections because: (a) of the exceptional circumstances of the case; or (b) the means of such a sentenced prisoner are insufficient to meet the expenses, and their recovery, whether immediately or at some future time, from such sentenced prisoner or from any other source is impracticable."

96. S 13 of the Mauritian Transfer of Prisoners Act, No. 10 of 2001 provides that "(2) (a) Subject to subsection (3), in the case of a transfer of an offender to Mauritius, the expenses of such transfer shall be borne by such offender or by someone on his behalf, and for this purpose the Minister shall have the power to require a person with or without a surety to give an undertaking to pay the expenses to the Minister.
(b) Any expenses referred to in paragraph (a) shall be regarded as a civil debt owed to the Government of Mauritius.
(3) Subsection (2) shall not apply where it appears to the Minister that it would be unreasonable for him to exercise the power conferred by that subsection because-
(a) of the exceptional circumstances of the case; or (b) the means of such offender are insufficient to meet the expenses, and their recovery, whether immediately or at some future time, from such offender or from any other source, is impracticable."

agreed by the two countries".[97] The Zimbabwean prisoner transfer legislation is silent on the cost of the transfer.[98] Since the transfer of an offender to their country of nationality is meant to, *inter alia*, ensure that their right to return to their own country is protected, the best approach would be for the enforcement State to incur the expenses associated with the transfer. This is because the process facilitates the realisation of one of their citizen's constitutional right (in countries where the right is provided for in constitutions) or treaty right (in countries in which the constitutions are silent on this right). The transfer also enables the enforcement State to provide suitable rehabilitation programmes to the offenders to minimize the risk of re-offending on their research.

VI. Monitoring the Enforcement of the Sentence

The sentencing State may be interested in ensuring that the offender serves his/her sentence in accordance with the conditions of the transfer. It is against that background that the Protocol provides for the circumstances in which the sentencing State can monitor the enforcement of the sentence. For example, Article 12 of the Protocol provides that:

1. The administering State shall provide information to the sentencing State concerning: (a) the completion of the sentence by the sentenced offender; (b) the release of the sentenced offender as a result of pardon, amnesty or commutation of the sentence; or (c) the escape of the sentenced offender from custody.
2. The sentencing State may, at any time, request a special report from the administering State concerning the enforcement of the sentence.

Article 12 should be read with Article 7(1) of the Protocol, which provides that, "[t]he administering State shall endeavour to incarcerate the sentenced offender under similar conditions as were applicable to the offender at the time of transfer by the sentencing State." A combined reading of Articles 7 and 12 creates the possibility for the sentencing state to monitor the conditions in which the transferred offender is serving his/her sentence. Under Article 7, the administering State has to try to ensure that the conditions of detention are more or less like those under which the offender was being detained before his/her transfer. The test should not be whether or not the conditions in the administering State are "similar" to those in the sentencing State but rather whether the conditions in the administering State meet the minimum international standards of imprisonment.[99] It should be recalled that the preamble to the Protocol provides, *inter alia*, that the transfer of offenders "should contribute towards" their "social reintegration" and that in transferring offenders, States Parties have to bear in mind "the need to

97. S 14 of the Transfer of Convicted Persons Act, No. 26 of 1998.

98. Transfer of Offenders Act 14 of 1990.

99. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) General Assembly resolution 70/175, annex, adopted on 17 December 2015.

observe fully the respect for human rights, as laid down in universally recognised principles." For an offender to be reintegrated, he/she should be rehabilitated while serving their sentence. This means, *inter alia*, that the conditions of imprisonment must meet minimum international standards and prisoners should have access to effective rehabilitation programmes. This requires sentencing States to put measures in place and ensure that before an offender is transferred, there are sufficient guarantees that his/her conditions of imprisonment will not violate his/her rights especially the rights not to be subjected to cruel, inhuman or degrading treatment or punishment. These rights are guaranteed not only in the constitutions of SADC countries but also in international human rights instruments such as the under Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the African Charter on Human Peoples' Rights. The absence of prison conditions in administering countries which meet minimum international standards could be invoked by some of the offenders to object to their transfer to their countries of nationality. It is therefore of great importance that States improve such conditions. Since prison authorities in administering States have the discretion to decide the prison in which an offender will serve his/her sentence, such discretion should not be invoked to move transferred offenders from prisons which meet minimum international standards to those which do not. Otherwise this may discourage sentencing states, which care about human rights, from transferring offenders to administering States that incarcerate transferred offenders in conditions which do not meet the minimum international standards.

The Protocol does not provide for circumstances in which the sentencing state can ask the administering State, in the event of failure to comply with the conditions of the transfer, to return the transferred offender to the sentencing State to complete the serving of his/her sentence. However, it provides for a dispute resolution mechanism. Under Article 18:

1. State Parties shall strive to resolve any dispute arising between or among them regarding the application, interpretation or implementation of this Protocol amicably.
2. Any dispute arising between State Parties for the application, interpretation or implementation of this Protocol which cannot be settled amicably shall be referred to the Ministerial Committee of the Organ.
3. Any dispute arising from the application, interpretation or implementation of this Protocol which cannot be settled by the Ministerial Committee of the Organ shall be referred to the SADC Tribunal.
4. The Decision of the SADC Tribunal shall be final and binding.

On the basis of Article 18, if the sentencing State is not satisfied with the manner in which the administering state is enforcing the sentence of the transferred offender, it may invoke the relevant procedure to have the dispute resolved. This could require, for example, the administering state to ensure

that offenders are being imprisoned in conditions which comply with the minimum international standards.

VII. Access to Information

Article 17 of the Protocol provides that:

1. State Parties undertake to keep strictly confidential in perpetuity any information obtained under this Protocol, and not to use it to the detriment of or against the interests of any Member State.
2. The confidentiality shall remain in force even after withdrawal of any State Party to the Protocol.

Article 17 applies to "any information obtained under" the Protocol. This includes information on the enforcement of sentences under Article 12, the supporting documents for the purpose of the transfer under Article 5 and the applicable information under Article 4. Empowering a State to treat any information as confidential "in perpetuity" implies that there are no circumstances in which such information can be made available to the public. Article 17 is potentially contrary to the constitutions of some SADC countries which provide for circumstances in which a person has a right to access information held by the state for the protection of human rights or in the interests of public accountability.[100] It is possible for such States to avoid a situation where their constitutional provisions contradict with their international treaty obligation under Article 17. They can do this by making reservations or interpretative declarations on Article 17(1) of the Protocol at the time of ratifying the Protocol. In those reservations or interpretative declarations, they should explain the circumstances in which the information obtained under the Protocol may be made available to their citizens. Otherwise, they will be presumed to have accepted to give effect to Article 17(1) of the Protocol. This will create a tension between their treaty obligation (to keep the information confidential) and their constitutional obligation (to release such information). The refusal to release such information could be justified on the basis of Article 27 of the Vienna Convention on the Law of Treaties which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[101] However, the constitution of some SADC countries provide that if there is conflict between international law and the constitution, the constitution prevails.[102] This is because the constitution is the supreme law of the country. In some of these countries, ratified treaties form

100. See ss 32(1) of the Constitution of South Africa (1996);
Article 69 of the Constitution of Angola (2010); Article 253 of the Constitution of Mozambique (2019); Article 28 of the Constitution of Seychelles (1993); Article 62 of the Constitution of Zimbabwe (2013).

101. Vienna Convention on the Law of Treaties (1969), United Nations, Treaty Series, vol. 1155, p. 331.

102. See for example, 144 of the Constitution of Namibia (1990); section 231(4) of the Constitution of South Africa (1996).

part of domestic law. The treaties are also superior to domestic law, in the event of a conflict between domestic law and these treaties.[103] In these countries, if no reservations are made at the time of ratifying the Protocol, Article 17 becomes part of domestic law and citizens will not have access to the said information. However, in other countries, as a general rule, an international treaty is not binding before its domestication by an enabling piece of legislation.[104] Thus, at the time of domesticating the Protocol, States Parties may create exceptions to Article 17 of the Protocol. This is so because the Protocol does not prohibit reservations on Article 17 and such a reservation is not incompatible with object and purpose of the Protocol as contemplated under Article 19 of the Vienna Convention on the Law of Treaties (1969).[105]

VIII. Conclusion

In this article, the author has discussed the contentious issues which States Parties to the SADC Protocol on the Inter-State Transfer of Sentenced Offenders are likely to grapple with. This is a very important treaty and if implemented, many offenders will be transferred to serve sentences in their countries of nationality which will increase their chances of rehabilitation and reintegration. This is important as some SADC countries deport foreign offenders after serving their sentences and if they are not rehabilitated, they may pose a danger to the societies in their countries of nationality. The author has also highlighted, where possible, the tensions between the Protocol and prisoner transfer legislation in some SADC countries. He has suggested ways in which such tensions could be resolved. He has also highlighted some of the weaknesses in the Protocol and suggested how it could be amended to address them. Apart from transferring offenders sentenced to imprisonment, SADC countries may also have to enact legislation on the enforcement of suspended sentences imposed in other states. As illustrated above, South Africa has included a section in its Criminal Procedure Act which could be operationalised to give effect to this arrangement.

103. See for example, Article 18 of the Constitution of Mozambique (2007); Article 215 of the Constitution of the Democratic Republic of Congo (2005).

104. See for example, Article 238 of the Constitution of Swaziland (2005); section 231(4) of the Constitution of South Africa (1996); section 64 of the Constitution of Seychelles (1993) and section 34 of the Constitution of Zimbabwe (2013).

105. Article 19 of the Vienna Convention on the Law of Treaties provides that "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty." For some types of prohibited reservations on treaties, see for example, *Chorherr v Austria* [1993] ECHR 36 paras 17 – 18; *Hilaire v. Trinidad and Tobago*, (Judgment, Preliminary Objections) (IACtHR, Sep. 01, 2001); *Good v. Botswana* (Communication No. 313/05) (ACmHPR, May. 26, 2010).

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