

Legal pluralism and the right to family life, and the transfer of offenders who are nationals of African countries, within Africa and to Africa

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Abstract

Globalisation has been accompanied by, inter alia, the movement of people from their countries of nationality or citizenship to other countries in search of better opportunities. Some of these people have been convicted of offences and sentenced to imprisonment in countries of which they are non-nationals. Because of the increase in the number of foreign nationals in prisons of different countries, initiatives have been taken at international, regional and national levels to transfer these offenders to their countries of nationality (administering countries) to serve sentences imposed by courts in a foreign country (sentencing countries). The effect is that the imposition of the sentence is governed by the laws of the sentencing country and the administration of the sentence is governed by the laws of the administering country. Therefore, the offender is governed by laws of different countries. Apart from the laws of the sentencing and the administering states, there are cases where these offenders are also governed by international law and in particular international human rights law. Although the rights of foreign offenders are increasingly receiving attention in the transfer discourse, one right that appears not to have been emphasised in Africa and other parts of the world is the right to family life and how seriously it should be taken by those responsible for transferring offenders before they make a decision. The purpose of this article is to argue that the right to family life should be taken seriously in deciding whether or not an offender should be transferred if the transferred offender is to be rehabilitated and ultimately reintegrated into society.

Introduction

Millions of people are estimated to be living and/or working outside countries of their nationality.¹ These include Africans who are working in countries outside Africa and within Africa.² This mobility has even triggered the international community to adopt an international treaty on the rights of migrant workers and members of their families.³ Many African countries are grappling with the issue of how to deal with the increase in the number of foreign nationals serving sentences in their prisons. Statistics show that countries, such as, South Africa,⁴ Uganda,⁵ Mauritius,⁶ Kenya,⁷ Ghana,⁸ Cameroon,⁹ Namibia¹⁰ and Zambia,¹¹ have many foreign nationals in their prisons. This is not a phenomenon unique to Africa. The increase in the number of

foreign nationals in many countries' prisons has been the driving force behind the adoption of bilateral and multilateral treaties on the transfer of offenders in Europe,¹² the inter-America region,¹³ North-America,¹⁴ Asia¹⁵ and within the Commonwealth.¹⁶ There are also many African prisoners in countries, such as, the United Kingdom.¹⁷ One of the issues that arises in the context of prisoner transfer is the right to family life. The right to family life, which is not absolute, is guaranteed in regional and international human rights instruments that have been ratified by many African countries, such as, the African Charter on Human and Peoples' Rights¹⁸ and the International Covenant on Civil and Political Rights.¹⁹ As will be shown below, the right to family life is also provided for in the constitutions of some African countries. This means, in legal pluralism terms, that the right to family life is governed not only by the laws of the countries or country in question but also by international human rights law.

One of the ways through which countries have dealt with the issue of foreign nationals in their prisons is to transfer them to their countries of nationality to serve the remainder of the sentence imposed by courts in the sentencing or transferring country. In other words, after an offender has served part of his sentence in a prison in a foreign country,²⁰ or immediately after the sentence has been imposed, he is transferred to complete his sentence in his country of nationality or with which he has close ties. This should be distinguished from deportation which almost always takes place after the offender has served his sentence in a foreign country and he is deported to his country of nationality. In cases of deportation, the offender's consent is not needed – although there are cases where the offender may also be transferred without his consent.²¹ Some countries have, in addition to transfers, emphasised the deportation of foreign nationals convicted of serious offences. In both cases of deportations and transfers, the issue of the right to family life has to be dealt with. There have been cases in the UK, for example, where some politicians have reportedly been angered by some judges who have blocked the deportation of many foreign offenders on the ground that their right to family life would be violated if they were deported.²² This also shows that there can be a tension between different laws in a country although they were enacted by the same body.²³ One law stipulates that the offender in question has to be deported but another law is invoked to prevent the deportation of the offender. It is imperative to mention at the outset what this article does not deal with. It is beyond the scope of this article to engage with the wider discourse on international inter-state prisoner transfer, with international human rights law on the right to family life, and with the law, literature and policy on prisoners' rights generally. These issues have been discussed in detail elsewhere (see, for example, Easton 2011; Rodley and Pollard 2009; Kaufmann 2002; Probert 2007; Plachta 1993; Dubinsky, Arnott, and Mackenzie 2012; Van Kalmthout, van der Meulen Hofsee, and Dunkel 2007). In this article, the author deals with 10 issues: legal pluralism and the transfer of offenders; the conditions which have to be met before an offender is transferred; the purposes of the transfer; the right to family life in deportation and expulsion cases in international human rights law; transfer of offender cases from the United States of America, Canada, the United Kingdom and the Republic of Ireland dealing with the right to family life; approaches adopted by African countries to transfer offenders; the right to family life in the constitutions of

some African countries; the right to family life of prisoners in some African countries; jurisprudence from some African countries on the relationship between the transfer of offenders and the right to family life; and the issue of human rights generally in the context of prisoner transfer.

Legal pluralism and the transfer of offenders and the right to a family life: the meaning of law

It is beyond the scope of this article to define or describe legal pluralism, because the meaning of 'legal pluralism' has been debated for decades (see Griffiths 1986; Merry 1988) and is likely to continue to be debated by scholars of different backgrounds, such as, lawyers, anthropologists and sociologists. However, mention should be made of the fact that legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field' (Merry 1988, 870). Tamanaha (2008, 392) has argued that the concept of legal pluralism is 'troubled' because, inter alia, 'legal pluralists cannot agree on the fundamental issue' of what law is, and that 'this issue has never been resolved in the legal philosophy and there are compelling reasons to think that it is incapable of resolution.' However, it is submitted that his observation is not applicable to the nature of the law that is under discussion in this article, because he made that observation after showing that there is a great deal of uncertainty whether different normative orderings, such as, customary law, indigenous law, private law, communal law etc. could indeed be referred to as law. Merry (1988, 879) also observed that '[t]he literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law.'

In the context of the transfer of offenders debate in this article, the discussion will be limited to the constitutions of different African countries,²⁴ the relevant pieces of legislation enacted by the different legislatures (the two are popularly known as state law in the legal pluralism debate), international law and in particular international treaties, both bilateral and multilateral, and the jurisprudence emanating from international human rights bodies and where necessary from courts. The issue of whether case law is indeed law does not arise at least in common law jurisdictions where the principle of precedent is well-known. The question of whether international law is indeed law is increasingly becoming moot in the light of the fact that states are increasingly implementing decisions handed down by international courts or tribunals and that some people have been prosecuted and indeed punished for breaking international law. Those convicted of war crimes, genocide and crimes against humanity before international tribunals, such as, the International Criminal Tribunal for Rwanda,²⁵ the International Criminal Tribunal for the Former Yugoslavia,²⁶ the Special Court for Sierra Leone²⁷ and recently the International Criminal Court,²⁸ are examples of how breaking international law has consequences. Countries are increasingly enacting legislation to grant domestic courts jurisdiction over international crimes committed in other countries – under the international law principle of universal jurisdiction. The constitutions of different countries also stipulate circumstances in which international law becomes part of national law.²⁹ Therefore, there is hardly any contention that all the laws referred to in this article are indeed considered by legal pluralists to be laws. Whether people obey such laws is a different question. My attention now shifts to the discussion of the conditions for the transfer of offenders.

Conditions for the transfer of offenders in multilateral treaties

It should be noted that multilateral and bilateral transfer agreements set out various conditions required for the transfer of prisoners but it is impossible in this article to deal with them in the context of bilateral agreements of which there are hundreds. For example, the UK has signed bilateral treaties with over 20 countries (Mujuzi 2012a), Canada with 14,³⁰ Hong Kong with 10³¹ and the USA with 9 (Abbell 2010, 189–250). Countries in Africa (as will be shown below) have also signed bilateral prisoner transfer agreements.

The conditions for the transfer of offenders in stated multilateral agreements will be outlined below briefly (for a detailed discussion of these conditions see United Nations Office on Drugs and Crime 2012, 25–42). There are four multilateral instruments that relate to the transfer of offenders: the Council of Europe's Convention on the Transfer of Sentenced Persons, the Inter-American Convention on Serving Criminal Sentences Abroad, the Scheme for the Transfer of Convicted Offenders within the Commonwealth and the Council of Europe's Framework Decision 2008/909/JHA. The discussion here will exclude Framework Decision 2008/909/JHA because it is limited to the transfer of sentenced persons between European Union Member States. The UN Model Agreement on the Transfer of Foreign Prisoners (1985) should also be mentioned. Although it is not a treaty that states can ratify, it lays down the principles that states are encouraged to consider in drafting bilateral or multilateral treaties on the transfer of offenders. The issue of legal pluralism is also evident when it comes to the conditions that have to be met before the offender is transferred, because multilateral agreements have to be read in tandem with the national legislation on the transfer of offenders and, where applicable, the bilateral agreements in place. Practice has shown that an offender's transfer could be governed either by both multilateral and bilateral treaties³² or by two different multilateral treaties.³³ The fact that an offender meets the conditions for transfer in a multilateral or bilateral treaty does not mean that he will automatically be transferred. National law, in both the sentencing and the administering countries, also has to be considered. It is against this background that in Canada, for example, courts have had to intervene to set aside the minister's decision refusing to consent to the offenders' transfer,³⁴ and in at least one case ordered the minister to consent to the offender's transfer to Canada immediately.³⁵

The first condition is that the offender has to be a national or citizen of the administering state.³⁶ Unlike the Inter-American Convention on Serving Criminal Sentences Abroad and the Convention on the Transfer of Sentenced Persons, the Scheme on the Transfer of Convicted Offenders within the Commonwealth provides that in addition to the fact that the offender has to be a national of the administering state, a person who 'has close ties with the administering country of the kind that may be recognised by that country for the purpose' of the transfer may also be transferred. Countries have the discretion to define the term 'national.'³⁷ The issue of legal pluralism becomes important in this context when one looks at an example from Canada. Although Canada is a party to the Scheme on the Transfer of Convicted Offenders within the Commonwealth, its domestic legislation provides that for a person to be transferred to Canada he has to be a Canadian citizen (section 2 of the International Transfer of Offenders Act). The Canadian Federal Court has held that permanent residents, however close their ties are with Canada, do not

qualify to be transferred to Canada (see *Catenacci v. Canada (Attorney General)* 2006, para 25). The second condition for the transfer is that the judgement has to be final.³⁸ This means that the offender will not be permitted to appeal against his sentence after the transfer.³⁹ The effect of this provision is that some offenders have waived their right of appeal in order to expedite their transfer.⁴⁰

The third condition for the transfer is that the offender should still have at least six months of the sentence to serve⁴¹ or the sentence has to be indeterminate,⁴² although a transfer can also take place even if the remaining period to be served is less than six months.⁴³ The fourth condition is that the offender has to consent to the transfer,⁴⁴ and the fifth condition is that the sentencing state and the administering state have to consent to the transfer.⁴⁵ The act or omission of which the offender was convicted has to constitute an offence in both the transferring and the sentencing states.⁴⁶ The Inter-American Convention on Serving Criminal Sentences Abroad provides that for the transfer to take place '[t]he sentence to be served must not be the death penalty'⁴⁷ and '[t]he administration of the sentence [must not be contrary to domestic law in the receiving state].'⁴⁸

Purposes of the transfer of offenders

Foreign national prisoners experience problems, such as, language, cultural and dietary (Plachta 1993, 70–80; Dubinsky, Arnott, and Mackenzie 2012, 523; Abbels 2012, 509–514). Judge O'Malley of the High Court of Ireland observed in *Clive Butcher v. The Minister for Justice and Equality* that '[i]t is accepted that a prison sentence is harder for a foreign national with no ties to the State and no likelihood of family visits' (para 18). The main reason, at least in theory, behind the transfer of foreign national offenders is humanitarian – to ensure that these prisoners serve their sentences in countries where they would not be confronted with hardships they have to face in prisons in foreign countries. It should also be noted that such prisoners 'present special problems to prison administrators' (Commonwealth Secretariat 1987, iii). Linked to the above is the issue of rehabilitation of foreign national offenders. It was argued that 'an offender was more likely to be rehabilitated if, at least in the later stages of his or her sentence, he was in a place where he was more likely to be subject to the influence of family and friends' (Commonwealth Secretariat 1987, iii). It is against that background that rehabilitation and reintegration are mentioned as some of the purposes of the transfer of foreign national offenders to their countries of nationality or citizenship. The purposes of the transfer of offenders agreements which are mentioned in the Convention on the Transfer of Sentenced Persons are to develop 'international co-operation in the field of criminal law' and that 'such co-operation should further the ends of justice and the social rehabilitation of sentenced persons.' The preamble to the Inter-American Convention on Serving Criminal Sentences Abroad, like the Convention on the Transfer of Sentenced Persons, provides that States Parties are 'inspired by the desire to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons.' The UN Model Agreement on the Transfer of Foreign Prisoners (1985) provides that '[t]he social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence at the earliest possible stage' (Article I(1)). Although the Scheme for the Transfer of Convicted Offenders within the Commonwealth does not expressly

mention that the transfer of offenders is aimed at his or her rehabilitation, its drafting history shows that one of its aims is to contribute to the transferred offenders' rehabilitation (Commonwealth Secretariat 1987, iii). However, some commentators (Van Zyl Smit and Spencer 2010, 43) have argued that:

[W]hile the early Council of Europe instruments in particular were designed to meet humanitarian concerns for offenders who were held in countries other than their own and were thus less likely to be 'socially rehabilitated,' the focus has increasingly shifted to the interests of the sentencing states. These states often want troublesome foreign offenders to be returned to their home countries, not because the offenders' interests would be better served by being returned, but because the sentencing states want to be rid of them to reduce the burden they place on overstretched resources for the implementation of sentences.

That observation is also supported by a statement by the South African Department of Correctional Services to the effect that '[w]hile the interstate transfer approach is driven by the department's approach to rehabilitation and the inability of effective reintegration of foreign nationals into their home countries, such inter-state transfers will also have a positive impact on levels of overcrowding' (Department of Correctional Services 2012, 57). The above observations should be understood against the background that the offender's consent to his transfer is being dispensed with by some countries.⁴⁹ It should be noted that the offender's consent and his rehabilitation are closely linked. The rationale behind including the offender's consent as one of the requirements for the transfer in the Scheme for the Transfer of Convicted Offenders within the Commonwealth is that '[i]t is rooted in the Scheme's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation' (Commonwealth Secretariat 1987, 10). There are examples from some countries where courts have held that one of the penological goals of prisoner transfer is to facilitate the rehabilitation of the transferred offender.⁵⁰ If an offender is transferred to a country where he does not have family support, it is difficult for him to be rehabilitated and reintegrated into society. The role of family members in the rehabilitation of offenders cannot be overemphasised.⁵¹

The right to family life in deportation and expulsion cases: lessons for states intending to transfer offenders

The author is not aware of practice or jurisprudence from any international human rights body in which the issue of the relationship between the transfer of offenders and the right to family life has been dealt with. Because of the close relationship between the transfer of offenders and deportation or expulsion, it is important to highlight how international human rights bodies have dealt with the relationship between deportations or expulsions and the right to family life. The views expressed by these human rights bodies in deportation or expulsion cases could also be applicable in offender transfer cases. The issue of family life in deportation or expulsion cases is increasingly being addressed at the international human rights level. This shows how the deportation or expulsion of an offender is not exclusively governed by the laws of the sentencing state but also by international human rights law. In other words, these cases or instances show not only the co-existence of domestic law with international law but also the view held by

international human rights bodies, consciously or unconsciously, that international human rights obligation take precedence over domestic legal obligations (for a detailed discussion of legal pluralism in international and regional human rights law see Burker-White 2003–2004; Tamanaha 2008, 386–390). This principle is expressly provided for under Article 27 of the Vienna Convention on the Law of Treaties (1969) which is to the effect that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' The Human Rights Committee, the enforcement body of the International Covenant on Civil and Political Rights, has prevented Canada from deporting convicted foreign nationals on the ground, amongst others, that their deportation would violate their right to family life.⁵² When commenting on Ecuador's periodic reports, the Human Rights Committee concluded that 'while the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party, an alien may, in certain circumstances, enjoy the protection of the Covenant, even in relation to entry or residence, for example, when considerations ... [with] respect for family life arise' (see Concluding observations by the Human Rights Committee on Ecuador's fifth and sixth periodic reports 2009, para 18). With regard to Italy, the Human Rights Committee regretted the fact 'that insufficient information was provided on the extent to which the right to privacy and family life is taken into consideration by the judiciary when the criminal conviction of an alien is accompanied by an expulsion order from Italian territory' (see Concluding observations of the Human Rights Committee on Italy's fifth periodic report 2006, para 18). Thus, the expulsion of an offender is not exclusively governed by Italian national laws. It is governed by Italy's national laws which have to be implemented in the light of its international human rights obligations. When commenting on Portugal's periodic report, the Human Rights Committee recommended that '[t]he State party should amend its legislation in order to ensure that the family life of resident and non-resident aliens sentenced to an accessory penalty of expulsion is fully protected' (see Concluding observations of the Human Rights Committee on the third periodic report of Portugal 2003, para 17). This is a clear example of a situation where an international human rights body recognises that the expulsion of an offender could be governed by national law to the extent that it is in full compliance with Portugal's international human rights obligations. If national law is contrary to international law, the latter should prevail. This is legal pluralism at work – two normative systems, one international and one national, regulating the same social field.

Like the Human Rights Committee, other human rights bodies have also dealt with the impact of expulsion on the right to family life. The Committee on the Elimination of Racial Discrimination has called upon the Dominican Republic to '[a]void the expulsion of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life' (see Concluding observations of the Committee on the Elimination of Racial Discrimination on the ninth to twelfth periodic reports of the Dominican Republic 2008, para 13(c)). The Committee on Economic, Social and Cultural Rights has called upon Denmark to ensure that the right to family life of foreign nationals is protected (see Concluding observations of the Committee on Economic, Social and Cultural Rights, on the fourth periodic report of Denmark 2004, paras 16 and 29). The African Commission on Human and Peoples' Rights, the enforcement body of the African Charter on Human and Peoples' Rights, held that the deportation of the complainant from Botswana to South Africa violated his right to family life which is protected under the

African Charter on Human and Peoples' Rights.⁵³ In other words, although domestic law sanctioned such deportation, the government of Botswana had an obligation to ensure that the law is not implemented in a manner that violates the African Charter on Human and Peoples' Rights. In effect, the right of the individual in question is not only governed by the laws of Botswana but also by the African Charter on Human and Peoples' Rights, and if there is a tension between the two, the latter takes precedence. As in the UK, Portugal, Italy and Canada, in some African countries the issue of the deportation or expulsion of foreign nationals has also raised the question of the right to family life.⁵⁴ Unlike the position at the international level, at the national level there have been cases where courts have dealt with the issue of the right to family life in the context of the transfer of offenders.

The right to family life in cases involving the transfer of offenders

There have been cases in countries, such as, the UK, the United States of America, Canada and Ireland, in which the issue of family life has been dealt with or raised in the context of prisoner transfer although these cases have not dealt with the transfer of offenders to or from Africa. In the light of the fact the author is not aware of any case in Africa in which the issue of family life has been dealt with in the context of prisoner transfer, it is imperative to briefly have a look at the jurisprudence and practice of the aforementioned countries on the issue of family life in the transfer of offenders.

Jurisprudence emanating from courts in the UK shows that the issue of family life has come to the fore in the context of prisoner transfer. Courts have held that the possibility of the offender being transferred back to the UK to serve his sentence could enable him to enjoy his right to family life (see *HH v. Deputy Prosecutor of the Italian Republic, Genoa*; *PH v. Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v. Polish Judicial Authority 2012*, para 105; *Glen Howell v. Deputy Attorney General Court of Appeal of Douai France 2012*, para 30). The right to family life on its own will not be invoked by a court to order the transfer of an offender from the UK to serve his sentence in his country of domicile (see *The Queen on the Application of Henry Max Shaheen v. The Secretary of State for Justice*). In *The Queen on the Application of Henry Max Shaheen v. The Secretary of State for Justice*, the Secretary of State in refusing to allow the applicant's application to be transferred to serve his sentence in The Netherlands said that '[i]n reaching his decision to refuse [the applicant's] application [he] gave full consideration to [the applicant's] family and residency links with The Netherlands but concluded that [his] right to return to the UK at any time following his release from custody in The Netherlands outweighed these considerations' (ibid. para 8). The applicant's lawyer argued that his imprisonment in the UK made it difficult for him to be in constant contact with his family, that 'the maintenance of family contacts is an essential aim of the prison system,' and that transferring him to The Netherlands would enable him to enjoy his right to family life (ibid. para 18). The Court, in dismissing the applicant's application held that:

In assessing the proportionality of the decision, I have considered the extent of the interference with the claimant's right to respect for his family life that will result from the refusal to consent to the transfer. I fully accept that serving prisoners have Article 8 rights. But their rights to see members of their families are inevitably and seriously

curtailed simply by virtue of their being deprived of their liberty. A decision not to transfer a prisoner to a prison where he will be nearer to his family must be viewed in that light. Even if a prisoner is transferred to a prison closer to his family, he will inevitably only have exiguous rights to see them (para 40).

The right to family life is not absolute and it is one of the factors that the Secretary of State could consider in making his decision of whether or not to consent to the offender's transfer from the UK to serve his or her sentence in another country (ibid. para 16). In Canada, the issue of family life has also been raised in prisoner transfer cases. Section 10 (1) of the Canadian International Transfer of Offenders Act (2004) gives the following as some of the factors to be considered in deciding whether the offender should be transferred to serve his sentence in Canada: the safety of any member of the offender's family, in the case of an offender who has been convicted of an offence against a family member (section 10(1)(b)(ii)); and whether the offender has social or family ties in Canada (section 10(1)(b)(f)). In most of the cases that have appeared before courts in Canada where offenders have sought to be transferred to Canada, one of the factors that has been used to motivate for the offender's transfer is that his family was willing to have him transferred to Canada.⁵⁵ In the USA, the Department of Justice's Guidelines for the Evaluation of Transfer Applications of Federal Prisoners provides that one of the issues to be considered in deciding whether or not to consent to the offender's transfer is the likelihood of the offender's social rehabilitation. In determining whether there is that likelihood, factors to be considered include, the offender's family and other social ties to the sending and receiving countries.⁵⁶ For example, in *Mario Alonso Marquez-Ramos v. Janet Reno*, Attorney General of the United States, the offender's application to be transferred to Mexico from the USA was refused because of, inter alia, his 'significant ties to the United States.'⁵⁷ Likewise, in *Albrecht Pansing v. Michael B. Mukasey*, United States Attorney General, the Attorney General refused to consent to the petitioner's application to be transferred to serve his sentence in Germany because, inter alia, he was 'a domiciliary of the United States, through extended residence in the United States and/or presence of family ties and close family member in the United States.'⁵⁸ In *Robert B. Coleman v. Janet Reno*⁵⁹ the Attorney General refused to consent to the petitioner's application to be transferred from Canada to serve his sentence in the USA because of, inter alia, 'the apparent weakness of Plaintiff's ties to the United States.'⁶⁰ In *Clive Butcher v. The Minister for Justice and Equality*, the applicant applied to be transferred from the Republic of Ireland to serve his sentence in the UK because he wanted to be visited in prison by his elderly 'mother and family' in the UK.⁶¹ His application for the transfer was declined by the respondent and the High Court held that it was not clear whether the respondent 'gave consideration to the applicant's family rights and if so how he balanced them against the public interest' in coming to the conclusion that he should serve the whole of his sentence in Ireland (ibid. para 42). The Court held that jurisprudence emanating from the European Court of Human Rights is 'sufficient to ground a finding that a request by a prisoner for transfer to his home country on the grounds of access to his family is capable of engaging Article 8 rights' (ibid. para 40).⁶² The above jurisprudence shows that the right to family life is one of the factors that are critical in deciding whether or not the offender should be transferred. Although none of the above cases dealt with the transfer of an offender to or from Africa, there is nothing to suggest that the courts would have come to different conclusions were

the offenders in question Africans or wanted to be transferred to Africa or from Africa. Courts in Africa, especially in common law jurisdictions, could find the above decisions persuasive in cases involving the transfer of offenders within Africa or to Africa. Our attention now shifts to the approaches that African countries have adopted on the issue of prisoner transfer.

Approaches adopted by African countries to transfer offenders

Different African countries have dealt with the issue of the transfer of offenders differently. Some countries, such as, Mauritius (Transfer of Prisoners Act, Act no. 10 of 2001), Namibia (Transfer of Convicted Offenders Act, Act no. 9 of 2005), Uganda (Transfer of Convicted Offenders Act, 2012), Swaziland (Transfer of Convicted Offenders Act, Act no. 10 of 2001), Ghana (Transfer of Convicted Persons Act, 743 of 2007), and Tanzania (Transfer of Prisoners Act, Act no. 25 of 2004), Malawi (Transfer of Offenders Act, Act no. 25 of 1991), Nigeria (Transfer of Convicted Offenders (Enactment and Enforcement) Act, Chapter T16 of 1988) and Zambia (Transfer of Convicted Persons Act, Act 26 of 1998), have enacted prisoner transfer legislation. Others have entered into bilateral prisoner transfer agreements with other African countries. These include countries, such as, Zambia and Namibia,⁶³ Zambia and Mozambique,⁶⁴ Ghana and Nigeria,⁶⁵ Tanzania and Mauritius⁶⁶ and Uganda and Mauritius.⁶⁷ It was reported that Nigeria and South Africa had agreed to sign a prisoner transfer agreement.⁶⁸ Some African countries have entered into bilateral prisoner transfer agreements with countries outside Africa. These include: Rwanda with the UK (Agreement between the UK and Rwanda 2010), Uganda with the UK (Agreement between the UK and Uganda 2009), Egypt with the UK (Agreement between the UK and Egypt 1993), Morocco with the UK (Agreement between the UK and Morocco 2002), Ghana with the UK (Agreement between the UK and Ghana 2008), Nigeria with Thailand,⁶⁹ Libya with the UK (Agreement between the UK and 2008), Libya with the UK (Agreement between the UK and 2008), Mali with France⁷⁰ and Mauritius with India (Agreement between India and Mauritius 2006). One African country, Mauritius, has ratified the Council of Europe's Convention on the Transfer of Sentenced Persons.⁷¹ The issue of legal pluralism is clearly evident here. In countries, such as, Uganda and Ghana, the transfer of offenders is governed by different laws: the specific legislation on the transfer of offenders; the agreements these countries have signed with other countries; national constitutions; and, of course, these countries' international human rights obligations. In the case of Mauritius, the transfer of offenders is governed by the transfer of offenders legislation, the Council of Europe's Convention on the Transfer of Sentenced Persons, the agreements with other countries and by international human rights law. In all cases, international human rights principles could prohibit the transfer of an offender to another country even if such transfer would be legal under domestic law or under bilateral agreements. For example, if domestic legislation sanctioned the transfer of an offender to a country where there are substantial grounds to believe that he would be subjected to torture or cruel, inhuman or degrading treatment in the administering state, a country has an international law obligation not to transfer such offender. This obligation is derived from, for example, Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) which provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in

danger of being subjected to torture' (for a detailed discussion of Article 3 of the Convention against Torture see Weissbrodt and Hörtreiter 1995). It is argued that although Article 3(1) of the Convention against Torture does not include the word 'transfer,' states parties have an obligation not to transfer a person to a country where there are reasons to believe that he would be subjected to torture.⁷² A country also has an obligation not to transfer an offender to a country where it has reason to believe that he would be subjected to inhuman or degrading treatment or punishment. This is the reason why the UK has reportedly embarked on renovating prisons in African countries, such as, Uganda⁷³ and Nigeria,⁷⁴ so that offenders transferred from the UK to these countries do not challenge their transfers on the ground that they would be imprisoned in inhumane or degrading prison conditions.⁷⁵

In all the above-mentioned treaties and pieces of legislation, the right to family life is not mentioned as one of the factors that should be considered before the offender is transferred. As will be shown below, jurisprudence emanating from some African countries on the transfer of offenders shows that the right to family life has either not been mentioned at all or where it has been raised, at least in one instance, the court did not consider it to be a compelling reason to order South Africa to enter into a prisoner transfer agreement. It is argued that in the light of the recommendations of, and the decisions made by, the international human rights bodies and also by the African Commission on Human and Peoples' Rights, the issue of whether or not an offender should be transferred is not exclusively governed by national legislation. International law has a role to play, and in cases where the transfer of an offender would violate his right to family life which is protected under international law, although not specifically mentioned in national legislation, the state in question should refrain from such a transfer unless there are other compelling reasons to do so. It is also argued that in the light of the fact that rehabilitation is considered to be one of the main reasons behind the transfer of foreign offenders and indeed the stipulated aim of imprisonment in Article 10(3) of the International Covenant on Civil and Political Rights,⁷⁶ the right to family life should be one of the decisive factors in determining whether the offender should be transferred.

Right to family life in the constitutions of several African countries

As mentioned earlier, the right to family life is protected in the constitutions of several African countries and in international law. It should be noted that in international law and in the constitutions of different African countries, as it will be shown shortly, the right to family life is not absolute. Africa is made up of over 50 countries and the space available for this article does not permit the author to refer to all the constitutions of all African countries. The discussion will, therefore, be limited to examples from a few African countries. The Constitution of Uganda (1995) provides that '[t]he family is the natural and basic unit of society and is entitled to protection by society and the State' (Principle XIX of the National Objective and Directive Principles of State Policy. See also Article 9 of the Constitution of Egypt (2012)). A Ugandan citizen has a duty 'to engage in gainful work for the good of ... the family' (Principle XXIX(b) of the National Objective and Directive Principles of State Policy). Article 31 of the Ugandan Constitution provides the following 'rights of the family':

1. A man and a woman are entitled to marry only if they are each of the age of 18 years and above and are entitled at that age – (a) to found a family; and (b) to equal rights at and in marriage, during marriage and at its dissolution...
2. Marriage between persons of the same sex is prohibited.
3. Marriage shall be entered into with the free consent of the man and woman intending to marry.
4. It is the right and duty of parents to care for and bring up their children.
5. Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.

The Constitution of Mozambique (Article 65(2)) provides that '[c]riminal trial hearings shall be public, except in so far as it is prudent to exclude or restrict publicity in order to safeguard...family...' and that any evidence obtained through the 'abusive intrusion' into family life is inadmissible (Article 65(3)). The Constitution (Article 105) establishes a 'family sector' and provides in Article 115 that:

1. The family is the fundamental unit and the basis of society.
2. The State shall, in accordance with the law, recognise and protect marriage as the institution that secures the pursuit of family objectives.
3. In the context of the development of social relations based on respect for human dignity, the State shall guarantee the principle that marriage is based on free consent.
4. The law shall establish forms in which traditional and religious marriage shall be esteemed, and determine the registration requirements and effects of such marriage.

The Constitution of Mozambique (Article 120(2)) also provides that '[t]he family shall be responsible for raising children in a harmonious manner, and shall teach the new generations moral, ethical and social values' and that '[t]he family and the State shall ensure the education of children, bringing them up in the values of national unity, love for the motherland, equality among men and women, respect and social solidarity' (Article 120(3)). Children (Article 121(1)), people with disabilities (Article 125(1)) and the elderly (Article 124(1)) have the right to be protected by the family. The Constitution of Kenya (2010) protects a person's right to privacy which includes the right 'not to have - information relating to their family or private affairs unnecessarily required or revealed' (Article 31(c)). Article 45 of the Kenyan constitution protects the right to family life in detail in the following terms:

6. The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
7. Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
8. Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
9. Parliament shall enact legislation that recognises – (a) marriages concluded under any tradition, or system of religious, personal or family law; and (b) any system of personal and family law under any tradition, or adhered to by persons professing a

particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

The Constitution of Kenya provides that older persons have a right 'to receive reasonable care and assistance from their family and the State' (Article 57(d)). The Constitution of Namibia (section 14(1)) provides for the right to family and, like the constitutions of Uganda, Kenya and Mozambique, provides that men and women shall have a right to enter into marriage, marriage shall be entered into with the consent of both parties (section 14(2)), and that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State' (Article 14(3)). The Constitution of Lesotho provides that every person in Lesotho is entitled to 'the right to respect for private and family life' (section 4(1)(g); see also section 11(1)). It is silent on the issues of marriage and how it should be entered into and dissolved⁷⁷ and also on the issue of bringing up children. The only instance in which the Constitution of Tanzania refers to the issue of family life is in the context of the right to privacy by providing that '[e]very person is entitled to respect and protection of ... his family' (Article 16(1)). Article 32 of the Constitution of Seychelles (1993) provides that:

5. The state recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.

6. The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees.

The Constitution of South Africa provides that every child has the right to family care (section 28(1)(b)), and empowers parliament to enact laws which recognises marriage conducted under any family law (section 15(3)(a)(i)). The Constitution of Malawi provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State' (section 22(1)).⁷⁸ It adds that '[e]ach member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation' (section 22(2)). It provides for the right to marry and found a family,⁷⁹ the right not to be forced to enter into marriage (section 22(4)), and the age of marriage (section 22(6–8)). The Constitution of Swaziland provides that the right to respect of the family is fundamental (Article 14(1)(f)), men and women have the right to marry and found a family (Article 27(1)), that marriage shall be entered into with the consent of those intending to get married (Article 27(2)), that '[t]he family is the natural and fundamental unit of society and is entitled to protection by the State' (Article 27(3)) and that '[s]ociety and the State have the duty to preserve and sustain the harmonious development, cohesion and respect for the family and family values' (Article 27(5)).⁸⁰ Unlike the above constitutions, the constitutions of Botswana, Mauritius and Zambia are silent on the right to a family life.

The above discussion shows that the right to a family is recognised in the constitutions of several African countries. As mentioned earlier, the right to family life is also recognised in international human rights instruments. This means that in this regard national law and international law are protective of the same right. In the constitutions of Uganda,

Namibia and Malawi the state and society have an obligation to protect the family. In Swaziland this obligation is imposed on the state. This means, inter alia, that if a decision is to be made on whether to transfer an offender from the sentencing country to the administering country within Africa, one of the questions that should be asked is whether such transfer would not violate the right to family life. It should also be recalled that the right to family life is unique in the sense that not only does the state have an obligation to protect the family, but that this obligation is also imposed on society as a whole in the constitutions of Uganda, Malawi and Namibia. This is important in the light of the fact that even in respect of absolute and non-derogable rights, these constitutions do not impose an obligation on society to protect them.

It is not in dispute that one of the contentious issues in the fields of family law and human rights in the world today is whether people of the same sex should have the right to get married or to have their relationship recognised by the law. Africa is certainly no exception. Cultural and religious grounds have been advanced to oppose same-sex relationships in many parts of the world. Homosexuality is an offence in most African countries (Human Rights Watch 2008), and at the time of writing South Africa was the only African country that had passed legislation permitting people of the same-sex to enter into a union (see Civil Union Act, Act 17 of 2006). In some countries such as Uganda, Kenya and Seychelles, the constitutions expressly prohibit marriage between people of the same sex. Legislation has also been proposed in Nigeria to expressly prohibit marriage between people of the same sex.⁸¹ The issue of same sex relationships could be critical in the transfer of offenders from countries, such as, South Africa,⁸² where same-sex relationships are allowed, to countries, such as, Uganda, Kenya, Seychelles and Nigeria, where such relationships are prohibited and to countries where homosexuality is an offence. In *Chairperson of the Immigration Selection Board v. Frank and Another*,⁸³ the Supreme Court of Namibia held that a foreign national who was in a same-sex relationship with a Namibian citizen could not invoke her right to family life to be granted a visa to live in Namibia as she was not recognised as a spouse in terms of Namibian law. The court held that Namibian law recognised relationships between men and women and not between women and women or between men and men. The issue of same-sex relationships could also arise if an offender in such a relationship is to be transferred from a country outside Africa where same-sex marriages are legal⁸⁴ to an African country where same-sex relationships are prohibited.

A serious tension between national law and international human rights law in the context of the right to family life and the transfer of offenders is likely to arise with regards to the issue of same-sex relationships. International human rights bodies have called upon states, including African states, such as, Botswana (Report of the Working Group on the Universal Periodic Review, Botswana 2009, paras 36 and 37), Togo (Concluding observations of the Human Rights Committee on the fourth periodic report of Togo 2011, para 14), Namibia (Concluding observations of the Human Rights Committee on the initial report of Namibia 2004, para 22), Egypt (Conclusions and recommendations of the Committee against Torture on the fourth periodic report of Egypt 2002, para 6(k)), Ethiopia (Concluding observations of the Human Rights Committee on the initial report of Ethiopia 2011, para 12), Malawi,⁸⁵ Cameroon (Concluding observations of the Human Rights Committee on the fourth periodic report of Cameroon 2010, para 12),

Burundi (Report of the Working Group on the Universal Periodic Review, Burundi 2009, paras 19, 24 and 24) and Uganda (Concluding observations of the Committee on the Elimination of Discrimination against Women on the combined fourth to seventh reports of Uganda, CEDAW/C/UGA/CO/7, 5 November 2010, paras 43 and 44) to respect people's rights to equality and in particular the right not to be discriminated against on the ground of sexual orientation. In some countries, such as, Malawi⁸⁶ and Cameroon,⁸⁷ people have been prosecuted for and convicted of homosexuality. A foreign national in a same-sex relationship, of course in a country where such relationships are recognised, who has been convicted of an offence, can argue that his transfer to a country where same-sex relationships are prohibited would be in violation of his right to family life, even if he were to move to that country with his partner, the relationship would not be recognised and he could even end up being persecuted or prosecuted for homosexuality. Such an argument would raise the issue of the tension in legal pluralism. The sentencing country would be faced with a situation where the right to family life of the offender is governed by one piece of legislation (for example, the marriage law) and his transfer is governed by another piece of legislation (the transfer of offenders law). The tension between the two could be resolved by resorting to another source of law – which is international human rights law. The transfer of the offender would perhaps not violate national law but international law would oblige the state in question not to order the transfer. Our attention now shifts to the discussion of the right of prisoners to family life.

The right of prisoners to family life

The constitutions of some African countries do not expressly provide that prisoners have a right to family life. It is argued that the right to family life that is enjoyed by those outside prisons should be enjoyed by those in prison for as long as the exercise of that right is in accordance with the prison rules and regulations. This is so for two reasons. The first reason is that the same approach has been taken in countries where prisoners are allowed conjugal visits (Carlson and Cervera 1991) and artificial insemination.⁸⁸ In fact there have been reports that in Uganda⁸⁹ and Tanzania governments are contemplating allowing prisoners conjugal visits.⁹⁰ The second reason is that international law prohibits discrimination on, amongst others, the ground of social status and other status (see Article 2 of the African Charter on Human and Peoples' Rights and Article 2 of the ICCPR). As mentioned earlier, prisoners are governed not only by the laws enacted by the sentencing country but also by international law – that is legal pluralism. If there is a tension between national law and international law, Article 27 of the Vienna Convention on the Law of Treaties is very clear that a state shall not invoke its domestic law to defeat its international treaty obligation. Although the constitutions of some African countries provide that a detained person has a right to be visited by their next-of-kin or spouse or partner⁹¹

they are silent on the question of whether a sentenced prisoner also has that right.⁹² Prison legislation in some African countries provides that an offender has the right to be visited by people, including his relatives or next-of-kin and also to contact the outside world.⁹³ Legislation in some African countries also provides for the rights of foreign prisoners, such as, the right to communicate with the appropriate diplomatic or consular representative.⁹⁴ Section 82(3) of the Ugandan Prisons Act specifically deals with the foreign prisoner's right to family life by providing that '[a] foreign prisoner shall be

allowed reasonable facilities to communicate with his or her family..’ It is argued that the right to family life in the context of prisoners includes the right to be visited by a prisoner’s family members. As indicated earlier, prison legislation is not the only law that is applicable to prisoners. Prisons are also governed by the constitution and international human rights law in terms of which discrimination on any ground is prohibited. Even in situations where all laws are state laws, in some African countries, such as, Ethiopia, Mauritius, Lesotho, Seychelles, Uganda, South Africa, Nigeria, Swaziland Zimbabwe, Kenya, Namibia and Zambia, the constitution is the supreme law of the land⁹⁵ and legislation that is inconsistent with the constitution is invalid. Therefore, in countries where legislation allows such visits, this should be understood as protecting the right to family life. It is now imperative to have a look at jurisprudence emanating from African countries on the issue of prisoner transfer and the right to family life.

Jurisprudence from some African countries on the transfer of offenders and the right to family life

Unlike the situation in some parts of the world, such as, North America and Europe, where, as discussed above, there have been a growing number of reported cases on the transfer of offenders, thus making it very easy for researchers to analyse these cases,⁹⁶ the author is not aware of many cases on the transfer of offenders in Africa. The cases that the author is aware of have been from courts in Malawi, Swaziland and South Africa,⁹⁷ and those from Malawi and Swaziland do not exclusively deal with the transfer of offenders. In Malawi a prosecutor argued, though unsuccessfully, that the court should invoke the transfer of offenders legislation to order the transfer of a Tanzanian national to Tanzania to stand trial for the offences he had allegedly committed in that country.⁹⁸ The court held that the transfer of offenders legislation was inapplicable in this case because the person in question had not been convicted. Although this case was about extradition for the purpose of trial, it is important for this article because the prosecutor made the request in question without ascertaining the impact the transfer would have had on the offender’s right to family life, notwithstanding the fact that the Constitution of Malawi provides that ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’⁹⁹ In a case from the Kingdom of Swaziland, *R v. Machava and Others*¹⁰⁰, the accused, who were foreign nationals, were convicted of drug trafficking and sentenced to between 5 and 7 years’ imprisonment. Before the judge imposed the sentence he stated:

[21] Mrs. Dlamini, for the Crown, referred the Court to the provisions of The Transfer of Convicted Offenders Act, 2001 and urged the Court to recommend that the Minister for Justice should invoke it and request for the convicts in the instant case to be transferred to their respective administering countries or those with which they have close ties in the event a custodial sentence is imposed. I decline that invitation having particular regard to the provisions of section 3 (2) of the Act, which stipulates the persons at whose instance the transfer may be made. These include the Minister for Justice, the administering country or the convict himself. [22] It is clear that this Court is not one of the parties that has the right to initiate such a process and does not appear to have any role in the transfer of such a convict. If this country is of the view that these are proper cases in which to invoke the provisions of the Act, then the Directorate of Public Prosecutions may be the appropriate authority, in the circumstances, to advise and make appropriate

recommendations to the Minister. The transfer, it would seem to me, regard being had to section 5 (1) (d), would only be consummated once the convicts themselves consent to be so transferred. It would therefore be wise to confer with them in any event before any decision even to approach the Minister is taken by the Crown in this matter. (ibid. paras 21 and 22)

The above holding is important because of the fact that the prosecutor did not attempt to find out whether the transfer of the offenders would in any way violate their right to family life although the Constitution of Swaziland (Article 27(3)) provides that '[t]he family is the natural and fundamental unit of society and is entitled to protection by the State.' This case also raises an important issue relating to the role of the court in prisoner transfer agreements. It is argued that the Swazi prisoner transfer legislation does not oust the jurisdiction of the High Court in any way and the court's reasoning that it has no role to play in the transfer of offenders should not be understood as a categorical statement that the court cannot intervene in transfer cases under any circumstances. It is suggested that if the offender were to argue that his transfer would be contrary to the transfer of offenders legislation or to the Constitution, he could challenge the transfer in the High Court. Most importantly, if the offender argued that his transfer would violate his right to family life and that by transferring him the state would be in violation of Article 27(3) of the Constitution which, as we have seen above, states that '[t]he family is the natural and fundamental unit of society and is entitled to protection by the State,' the court is not barred from intervening to prevent the transfer. In legal pluralism terms, the Constitution and the transfer of offenders legislation co-exist in the same social field – the transfer of offenders, and there is a tension between the two. It is argued that the Constitution is supreme and the transfer of offenders legislation has to defer to it.

The December 2010 High Court of South Africa decision of Patricia Gerber v. Government of the Republic of South and Others,¹⁰¹ in which the applicant sought to compel the South African government to enter into a prisoner transfer agreement with Mauritius, raises the issue of the right to family life in the context of prisoner transfer.¹⁰² The brief facts of the case were the following. In 2007 the applicant's son pleaded guilty to a charge of drug trafficking and the Supreme Court of Mauritius sentenced him to nine years' imprisonment (ibid. para 13). The applicant brought the application on behalf of her son (ibid. para 3) and wanted the High Court to order the South African government to enter into a prisoner transfer agreement with Mauritius because 'she and her family are suffering physical, emotional and financial strain as a result of her son's imprisonment as they were unable 'to visit him often enough' as visiting him was straining their financial resources (ibid. para 14). She submitted that there was 'a real need' for her son 'to be returned to South Africa so that he might enhance his opportunities for rehabilitation and reintegration into a city and the community once he is eventually released' (ibid. para 14). With regards to the submission that the applicant and her family were facing emotional challenges because of their son's imprisonment in Mauritius, the court held that 'those in themselves are not sufficient grounds to review and set aside the respondents' decision' not to sign a prisoner transfer agreement with Mauritius (ibid. para 45). The court dismissed the application after finding that the government had solid policy reasons for deciding that the time was not ripe to enter into a prisoner transfer agreement with any country. The above decision shows how the

imprisonment of the offender in a foreign country could affect not only the offender's right to a family life but also that of the offender's relatives. Such imprisonment also has an impact on the offender's prospects for rehabilitation. We now turn our attention to the issues of human rights in prisoner transfer arrangements and the purpose of such transfers.

Prisoner transfer and human rights

Human rights issues have emerged in the context of prisoner transfer at both legislative and implementation levels. Most bilateral prisoner transfer agreements between African countries and the UK deal with the rights of the transferred offender, such as, the right not to be subjected to double jeopardy, the right to consent to the transfer, the right not to have the sentence aggravated by the administering state and the right to be informed of the substance of the transfer agreement. Some of these bilateral treaties provide that the offender's rights to freedom from torture, or cruel, inhuman or degrading treatment or punishment shall be protected.¹⁰³ However, all legislation and treaties, including the multilateral treaties, are silent on the issue of the offender's right to family life and how relevant it is to the transfer. Practice also shows that it is issues, such as, prison conditions and the fairness of the trial,¹⁰⁴ that have arisen in the prisoner transfer debate. However, there have been arguments that the lack of a 'link' between the prisoner and the sentencing country should be a factor in determining the transfer of such an offender to his or her country of nationality without his or her consent. The Explanatory Memorandum to the agreement on the transfer of offenders between the UK and Uganda states that:

Most existing prisoner transfer agreements to which the United Kingdom is a party require the consent of both States involved, as well as that of the prisoner concerned. It is increasingly the case that many foreign national prisoners have no links with the country in which they are detained and will be removed at the end of their sentence by the authorities. As a consequence international prisoner transfer agreements are moving away from the idea that prisoners should have to consent to transfer and therefore have the power to exercise an effective veto over the transfer. (para 7)

The above argument shows that in cases where there is a 'link' between a foreign offender and the sentencing country, the foreign national could argue that he should not be transferred to his country of nationality to serve his sentence if he wishes to remain in the UK. This 'link' to the UK could be understood to include close family ties as it has been illustrated above that the right to family life has been hotly debated in the UK with regard to deporting from the UK foreign nationals who have been convicted of offences. There are some prisoner transfer agreements that make it very clear that the offender's close family ties should be considered before his or her transfer. For example, the agreements on the transfer of offenders between the United States and Bolivia (1978) and the United States and Mexico (1976) highlight close family ties as one of the issues that should be considered before a transfer is ordered. Article V(6) of the agreement between the United States and Bolivia provides that:

In making the decision concerning the transfer of an offender and with the objective that the transfer should contribute effectively to his social rehabilitation, the authority of each

party will consider, among other factors, the seriousness of the crime, previous criminal record if any, health status, and the ties that the offender may have with the society of the Transferring State or the Receiving State.

Article IV(4) of the agreement between the United States and Mexico provides that:

In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving state.

If indeed, as mentioned earlier, one of the objectives of the transfer of offenders from the sentencing country to the administering country is to facilitate their rehabilitation,¹⁰⁵ then sentencing states cannot ignore the issue of the offender's family life in relation to the transfer. This point has recently been recognised in the Council Framework Decision 2008/909/JHA.¹⁰⁶ Therefore, the issue of the offender's family life has to be high on the agenda in deciding whether he should be transferred.

Another important issue in prisoner transfer which is relevant to family life relates to those offenders who qualify for transfer from one country to another. All prisoner transfer agreements or treaties and legislation provide that for an offender to be transferred from the sentencing country to the administering country, he has to be a national or citizen of the administering country. There are some treaties or pieces of legislation which provide that apart from citizens, people with close ties to the administering state also qualify to be transferred to such states. This is the case with the treaties between the UK and Uganda (Article 1(f)(i)), Libya (Article 1(f)(i)), and Ghana (Article 1(f)(i)) and the transfer of offenders legislation in Zambia (section 2(1)), Malawi (section 2(1)), Zimbabwe (section 2(1)), and Swaziland (section 5(1)(a)). These treaties and pieces of legislation do not define what 'close ties' are. It is argued that in assessing what these close ties are, the relevant authorities in the administering country should consider the family ties the offender has in the administering country.¹⁰⁷ This will not only ensure that the person is reunited with his family but will also ensure that the offender is rehabilitated and reintegrated in the society as family support is critical in offender rehabilitation and reintegration.

Conclusion

With globalisation the world has witnessed an increase in the number of people moving from one country to another in search of opportunities and safety. Some foreign nationals have been convicted of offences and sentenced to imprisonment. Multilateral and bilateral agreements on the transfer of offenders have been drafted and legislation has been enacted in different African countries to regulate the transfer of foreign offenders. The existence of multilateral and bilateral agreements alongside national legislation on the transfer of offenders has meant that the transfers are governed by different rules and laws that exist alongside one another. Another layer that is added to those laws is international human rights law which 'kicks in' should the bilateral and multilateral agreements and

national legislation fail to protect the offender's rights sufficiently before, during or after the transfer. It has been illustrated that in case of a tension between national law and international law, international law takes precedence, and if there should be a tension between the constitution and any piece of legislation, the constitutions of some African countries state that the constitution is supreme. The author has illustrated the importance of the right to family life in prisoner transfer and has argued that it should be one of the most important factors that should be taken into consideration in determining whether or not the offender should be transferred. If the right to family life is not emphasised in prisoner transfer arrangements and agreements, it is likely to be very difficult for the transferred offenders to be rehabilitated and ultimately reintegrated into society, hence defeating the main objective of prisoner transfer arrangements.

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Notes

1. See UN Secretary General's Message on International Migrants Day, 18 December 2012 at <http://www.un.org/esa/population/migration/2012migrantsday-sge.pdf>.
2. It is estimated, for example, that close to two million Zimbabweans are working in South Africa. See Tawanda Karombo, 'Zimbabwe cash transfer service growing in South Africa' Business Day, 12 April 2013 at <http://www.bdlive.co.za/business/financial/2013/04/12/zimbabwe-cash-transfer-service-growing-in-south-africa>.
3. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
4. The exact number of foreign nationals serving prison sentences in South Africa is unknown but in June 2011 the Minister of Correctional Services reportedly informed parliament that there were 4982 sentenced foreigners in SA prisons. See Sapa, 'Most foreign prisoners from Zim, Moz' 24 June 2011, News24 at <http://www.news24.com/SouthAfrica/News/Most-foreign-prisoners-from-Zim-Moz-20110624>.
5. It is estimated that 0.8% of the prison population in Uganda are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F451.
6. It is estimated that 4.9% of the prison population in Mauritius are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F433.
7. It is estimated that 0.7% of the prison population in Kenya are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F425.
8. It is estimated that 4.5% of the prison population in Ghana are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F422.
9. It is estimated that 2.4% of the prison population in Cameroon are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F47.
10. It is estimated that 5.5% of the prison population in Namibia are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F436.
11. It is estimated that 2.1% of the prison population in Zambia are foreign nationals. See International Centre for Prison Studies at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country%2F452.
12. See the Council of Europe Convention on the Transfer of Sentenced Persons 1983. This Convention and the Additional Protocol thereto of 18 December 1997 have been replaced, only in the context of prisoner transfers between EU Member States, by Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, which now regulates the transfer of offenders in the European Union. The Convention on the Transfer of Sentenced Persons and the additional Protocol are still applicable to the transfer of offenders between EU Member States and other countries and also between non-EU Member States which ratified it.

The UK has signed over 20 agreements on the transfer of offenders with countries in Africa, Asia and Latin America. See <http://www.fco.gov.uk/en/publications-and-documents/treaties/treaty-texts/prisoner-transfer-agreements>. For a detailed discussion of these treaties see Mujuzi (2012a).

13. See the Inter-American Convention on Serving Criminal Sentences Abroad.
14. The United States of America has signed bilateral prisoner transfer agreements or treaties with the following countries: Mexico, Bolivia, Turkey, France, Hong Kong, Panama, Peru, Thailand and Canada.
15. For example, China has signed prisoner transfer agreements with countries, such as, Australia, Portugal and Thailand; Hong Kong has signed prisoner transfer agreements with 10 countries: Australia, Italy, the United Kingdom, the Philippines, the United States of America, Sri Lank, Thailand, Portugal, France and Belgium (see List of Transfer of Sentenced Persons Agreements (Gazette References) at <http://www.legislation.gov.hk/table5ti.htm>); the Philippines has signed prisoner transfer agreements with Canada, Cuba, Hong Kong Special Administrative Region, Spain and Thailand. Saudi Arabia has ratified the InterAmerican Convention on Serving Criminal Sentences Abroad; and some Asian countries such as Japan and Korea have ratified the Council of Europe's Convention on the Transfer of Sentenced Persons.
16. See the Scheme for the Transfer of Convicted Offenders within the Commonwealth, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BBF5E0493-DE14-43D6-A5E8-7641447B2CB1%7D_convicted_criminals.pdf.
17. It is reported that there are close to 600 Nigerians in prisons in the United Kingdom. See Jack Doyle, 'UK to pay for foreign jails in a bid to repatriate more prisoners' Daily Mail, 26 April 2013 at <http://www.dailymail.co.uk/news/article-2315548/UK-pay-for-eign-jails-bid-repatriate-prisoners.html>.
18. Article 18 of the African Charter on Human and Peoples' Rights 1981 provides: '1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'
19. Article 19 of the International Covenant on Civil and Political Rights 1966, provides for, inter alia, the right to privacy in the context of the family setting. Article 23 provides that: '1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.' See also Article 17(1) of the ICCPR.
20. Some treaties require that before an offender is transferred, he is required to serve a certain part of the sentence. See, for example, Article 3(e) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the

Government of the Kingdom of Thailand on the Transfer of Offenders and on Co-operation in the Enforcement of Penal Sentences 1991.

21. See Council Framework Decision 2008/909/JHA, *supra*. In late 2011 Nigeria also amended its transfer of offenders legislation to remove the offender's consent as one of the conditions that must be met before the transfer. See also treaties between the UK and Rwanda, Libya and Ghana do not require the offender's consent before the transfer takes place. See Mujuzi (2012a, 383).
22. See, for example, 'Theresa May criticises judges for "ignoring" deportation law' 17 February 2013, BBC News at <http://www.bbc.co.uk/news/uk-21489072> where it was reported that figures from the Home Office suggested that between 2011 and 2012, '177 foreign criminals avoided deportation ... after convincing judges of their right to a family life in Britain' prompting the Home Secretary, Mrs May, to accuse some judges 'of making the UK more dangerous by ignoring rules aimed at deporting more foreign criminals.' In November 2012, the Home Affairs Committee criticised the UK Border Agency for failing to deport as many foreigners convicted of offences as possible. See 'Border Agency's backlog spiralling out of control say Home Affairs Committee' 8 November 2012 at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/121109-ukba-rpt-published/>.
23. This has been referred to as new legal pluralism as opposed to classic legal pluralism. See generally Merry (1988).
24. Since Africa is made up of over 50 countries with different legal systems, in this article the author refers to constitutions and legislation mostly from common law African countries. It is the system with which the author is familiar.
25. For the status of cases including completed cases by this tribunal see <http://www.unictt.org/Cases/tabid/204/Default.aspx>.
26. For the status of cases including completed cases and the sentences imposed see <http://www.icty.org/action/cases/4>.
27. Most of the cases have been completed and all those convicted by the special court were transferred to Rwanda to serve their sentences. One case (of Charles Taylor) is still on appeal. See <http://www.sc-sl.org/CASES/tabid/71/Default.aspx>.
28. At the time of writing the ICC has convicted only one offender, Mr Thomas Lubanda Dyilo, as a co-perpetrator in recruiting, conscripting and using child soldiers in his rebel movement. He was sentenced to 14 years' imprisonment by Trial Chamber I but he is appealing both the conviction and sentence. See
29. http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200104/Pages/situation%20index.aspx.
30. For example, see section 231 of the Constitution of South Africa (1996); Article 2(5) of the Constitution of Kenya (2010); Article 144 of the Constitution of Namibia; section 211 of the Constitution of Malawi (2004); section 238 of the Constitution of Swaziland (2005); and sections 34 and 326 of the Constitution of Zimbabwe (2013).
31. See List of Countries acceding a Bilateral Treaty with Canada at <http://www.csc-scc.gc.ca/international-transfers/004001-0004-eng.shtml>.
32. See List of Transfer of Sentenced Persons Agreements (Gazette References) at <http://www.legislation.gov.hk/table5ti.htm>.
33. In *Roman Eleuterio Smythe v. U.S. Parole Commission* 312 F.3d 383 the offender had been transferred from Panama to the USA to serve his sentence. The court had to

decide whether the offender's placement on parole had to be decided on the basis of the Treaty between the United States of America and the Republic of Panama on the Execution of Penal Sentences or the Convention on the Transfer of Sentenced Persons. The court held that the bilateral treaty between the USA and Panama was applicable in this case. In *Corey Darryl Wirsz v. John Sugrue* 2010 WL 3957500 (E.D.Cal.) the court held that neither the bilateral treaty between the USA and Canada on the transfer of offenders nor the Convention on the Transfer of Sentenced Persons provided for the offender's right to be transferred. In *John W. Walsh v. Governor Rick Scott, et al.* 2012 WL 3240789 (N.D.Fla.) the petitioner argued that his transfer to Canada should have been considered in terms of the Treaty between the United States of America and Canada on the Execution of Penal Sentences and not on the basis of the Council of Europe Convention on the Transfer of Sentenced Persons.

34. In *United States of America v. Manuel Florez* 52 Fed.Appx. 23, 2002 WL 31689057 (C.A.9 (Mont.)) the court held that neither the Inter-American Convention on Serving Criminal Sentences Abroad nor the Convention on the Transfer of Sentenced Persons required the district court to recommend that the offender should serve his sentence in Mexico. In *Clive Butcher v. The Minister for Justice and Equality* [2012] IECH 347, the applicant, a British national, applied to be transferred from Ireland to serve his sentence in the UK. He submitted before the Irish High Court that the respondent's refusal to agree to his transfer was 'contrary to the spirit and intent of the Scheme for the Transfer of Sentenced Persons; is contrary to the Convention on Human Rights and contrary to law.' See para 12.
35. In the following cases, the court gave the minister 60 days within which to reconsider the decision refusing to consent to the offender's transfer to Canada: *Downey v. Canada (Minister of Public Safety)* 2011 CarswellNat 246, 2011 FC 116, 267 C.C.C. (3d) 366, 24 Admin. L.R. (5th) 223 para 13; *Randhawa v. Canada (Minister of Public Safety & Emergency Preparedness)* 2011 CarswellNat 1894, 2011 FC 625; and *Singh v. Canada (Minister of Public Safety & Emergency Preparedness)* 2011 CarswellNat 244, 2011 FC 115, 267 C.C.C. (3d) 361, 24 Admin. L.R. (5th) 70.
36. *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)* 2013 CarswellNat 391, 2013 FC 55 para 16.
37. Article 3(1)(a) of the Convention on the Transfer of Sentenced Persons; Article III(4) of the Inter-American Convention on Serving Criminal Sentences Abroad; Article 4(1)(a)(i) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
38. Article 3(4) of the Convention on the Transfer of Sentenced Persons; and Article 4(3) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
39. Article 3(1)(b) of the Convention on the Transfer of Sentenced Persons; Article III(1) of the Inter-American Convention on Serving Criminal Sentences Abroad; and Article 4(1)(b) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
40. However, in the USA an offender who was transferred to Bahamas managed to challenge in the USA court, though unsuccessfully, his conviction after the transfer. See *Jeremy Major v. United States of America* 2011 WL 281033 (M.D.Fla.).
41. In *Hugh Stevens v. United States of America* 2012 WL 2401384 (W.D.N.Y.) the offender waived his right of appeal in order to expedite his transfer from the USA to Scotland but his application for transfer was not successful; *Samantha Orobator v.*

Governor of HMP Holloway, Secretary of State for Justice [2010] EWHC 58 (Admin) para 61 (the offender was transferred to the UK from Laos).

42. Article 3(1)(c) of the Convention on the Transfer of Sentenced Persons; Article III(6) of the Inter-American Convention on Serving Criminal Sentences Abroad.
43. Article 3(1)(c) of the Convention on the Transfer of Sentenced Persons; and Article 4(1)(c) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
44. Article 4(2) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth; and Article 3(2) of the Convention on the Transfer of Sentenced Persons.
45. Article 3(1)(d) of the Convention on the Transfer of Sentenced Persons; Article III(2) of the Inter-American Convention on Serving Criminal Sentences Abroad; and Article 4(1)(d) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
46. Article 3(1)(f) of the Convention on the Transfer of Sentenced Persons; and Article 4(1)(e) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
47. Article 3(1)(e) of the Convention on the Transfer of Sentenced Persons; Article III(3) of the Inter-American Convention on Serving Criminal Sentences Abroad.
48. Article III(5) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
49. Article III(7) of the Scheme for the Transfer of Convicted Offenders within the Commonwealth.
50. As discussed in this paper, Nigeria amended its legislation to remove the requirement of the offender's consent before his transfer.
51. *Holmes v. Canada (Minister of Public Safety & Emergency Preparedness)* 2011 CarswellNat 188, 2011 CF 112, 2011 FC 112, 226 C.R.R. (2d) 220, 267 C.C.C. (3d) 335, 22 Admin. L.R. (5th) 147, 383 F.T.R. 185 (Eng.) para 7 (Canada); *Jerome J. Scalise, et al., v. Richard Thornburgh, et al.* 891 F.2d 640, 645 – 646 (USA). In *Regina v. Secretary of State for the Home Department, Ex parte Read* [1989] A.C. 1014, 1048, the House of Lords held that the transfer of offenders is meant to serve a humanitarian purpose.
52. It is argued that '[p]risoners without family support are between twice and six times as likely to be reconvicted as those with support from a family.' See Cavadino 2006.
53. *John Michael Dauphin v. Canada*, Communication 1792/2008, (HRC, 28 July 2009) (Canada attempted to deport a young Haitian who had lived in Canada for most of his life) and *Jama Warsame v. Canada*, Communication 1959/2010, (HRC 21 July 2011) (the HRC held that the deportation of the author, who had committed crimes, to Somalia where he had no family ties would be a violation of Article 17(1) of the ICCPR).
54. *John K. Modise v. Botswana*, Communication 97/93, para 93. See also *Article 19 v. Eritrea* Communication 275/03, para 103, where the African Commission held that the incommunicado detention of suspects amounted to a violation of the right to family life.
55. See, for example, 'South Africa: Deportation of Zimbabweans tearing families apart' 22 October 2011 at <http://www.irinnews.org/Report/94057/SOUTH-AFRICA-Deportation-of-Zimbabweans-tearing-families-apart>.
56. See, for example, *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)* 2012 CarswellNat 5014, 2012 FC 1500, 104 W.C.B. (2d) 769 para 16; *Tangorra v. Canada (Minister of Public Safety & Emergency Preparedness)* 2011 CarswellNat 5406, 2011 FC 1433, 213 A.C.W.S. (3d) 99, 401 F.T.R. 246 (Eng.) para 30; *Grant v. Canada (Minister of Public Safety & Emergency Preparedness)* 2010 CarswellNat 3432, 2010 FC 958, 373 F.T.R. 281 (Eng.) para 22; *Getkate v. Canada (Minister of Public Safety & Emergency Preparedness)* 2008 CarswellNat 2941, 2008

- FC 965, 236 C.C.C. (3d) 102, 298 D.L.R. (4th) 558, 177 C.R.R. (2d) 49, 333 F.T.R. 121 (Eng.), [2009] 3 F.C.R. 26, 79 W.C.B. (2d) 435 para 5.
57. See Department of Justice, Guidelines for the Evaluation of Transfer Applications of Federal Prisoners at <http://www.justice.gov/criminal/oeo/iptu/guidelines.html>.
 58. Mario Alonso Marquez-Ramos v. Janet Reno, Attorney General of the United States 69 F.3d 477, 478.
 59. Albrecht Pansing v. Michael B. Mukasey, United States Attorney General, 2008 WL 3861222 (S.D.N.Y.) page 2.
 60. Robert B. Coleman v. Janet Reno 91 F.Supp.2d 130. 60. Ibid., 131.
 61. Clive Butcher v. The Minister for Justice and Equality [2012] IECH 347 para 5.
 62. In Minister for Justice, Equality and Law Reform v. Tobin [2012] IESC 37, the offender challenged his surrender to Hungary to serve a sentence that was imposed in his absence, on the ground that the transfer would violate his right to family life. The Irish Supreme Court held that '[n]o cases were cited before this Court, and I know of none, which prohibit the surrender by a member state of a convicted person to serve a sentence lawfully ordered in another member state, on the grounds of interference with family life.' See para 88.
 63. See Fred Goeieman, <http://www.namibiansun.com/content/national-news/naratifies-zambia-namibia-prisoner-exchange>.
 64. See 'Zambia and Mozambique sign MoU on the transfer of convicted persons' 26 July 2011, Lusaka Times, at <http://www.lusakatimes.com/2011/07/26/zambia-mozambique-sign-mou-transfer-convicted-persons/>.
 65. See 'Ghana, Nigeria to exchange prisoners' 12 January 2010, Modern Ghana News, at <http://www.modernghana.com/print/258677/1/ghana-nigeria-to-exchange-prisoners.html>.
 66. See Agreement between the Government of the United Republic of Tanzania and the Government of the Republic of Mauritius on the Transfer of Convicted Offenders, First Schedule to the Transfer of Prisoners (Republic of Tanzania) Regulations 2008, GN No.45 of 2008.
 67. See <http://www.gov.mu/portal/sites/mfamission/addisababa/news.htm>.
 68. See 'Nigeria seeks prisoner swap with South Africa' Premium Times, 17 May 2013 at <http://premiumtimesng.com/news/134749-nigeria-seeks-prisoner-swap-with-south-africa.html>.
 69. See Andrew Agbese, 'Nigeria: Thailand to Repatriate 500 Nigerian Prisoners' 4 December 2000, AllAfrica.com at <http://allafrica.com/stories/200012040126.html>.
 70. This treaty is referred to in the European Court of Human Rights judgement of Soumare v. France, 48/1997/832/1038, 24 August 1998.
 71. Many non-European countries have ratified this treaty. This development is attributable to the drafting history of this treaty. The Explanatory Report on the Convention on the Transfer of Sentenced Persons, para 11, states that: 'Unlike other conventions on international cooperation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftmen's opinion that the instrument should be open also to like-minded democratic states outside Europe. Two states – Canada and the United States of America, were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.'

72. The drafting history of the Ugandan Transfer of Convicted Offenders Act shows that Members of Parliament were of the view that no person shall be transferred to a country if there are reasons to believe that he would be subjected to torture. See Mujuzi (2012b, 609–612).
73. See Raymond Baguma, ‘UK Funds Luzira prison rehabilitation’ 4 September 2009, *The New Vision*, at <http://www.newvision.co.ug/D/8/13/693494>.
74. See ‘UK to Build Prisons in Nigeria, Plans to send Home 594 Prisoners’ <http://www.naijahot-testgist.com/2013/04/27/uk-to-build-prisons-in-nigeriaplans-to-send-home-594-prisoners/>.
75. The right to freedom from torture, or inhuman or degrading treatment is provided for under Article 3 of the European Convention on Human Rights which is domesticated in the UK by the Human Rights Act of 1998. See Feldman (2009, 390–397).
76. Article 10(3) provides that: ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.’
77. Although it provides for circumstances in which a non-national can become a citizen of Lesotho through marrying a citizen of Lesotho. See section 40. See also Article 16 of the Constitution of Cameroon (1996).
78. See also 34(3) of the Constitution of Ethiopia (1994).
79. Section 22(3).
80. See also section 25 of the Constitution of Zimbabwe (2013).
81. See ‘Nigerian lawmakers move ahead on anti-gay bill’ 14 November 2012 at <http://www.nation.co.ke/News/africa/Nigerian-lawmakers-move-ahead-on-anti-gay-bill/-/1066/1619634/-/1306f7v/-/index.html>; ‘Nigerian lawmakers pass anti-gay marriage bill’ 30 May 2013, CBS News at http://www.cbsnews.com/8301-202_162-57586886/nigerian-lawmakers-pass-anti-gay-marriage-bill/.
82. It has been observed that in the Certification Case, ‘the Constitutional Court pointed out that the South African Constitution does not recognise a universal right to family life and marriage . . . By refraining from entrenching the right to family life, the framers of the Constitution have avoided difficult arguments about the protection of the nuclear or the extended family. Human dignity, freedom and equality will, according to the Constitutional Court, play an important role in the protection of marriage and family life and prevent arbitrary State interference in the right to marry or to establish and raise a family. The Court emphasised the important role of the right to dignity in this regard.’ Clark (2004, 156). The Constitutional Court has invoked the right to human dignity to hold that foreign nationals, who are spouses of South African citizens, have the right to enter into and sustain permanent intimate relationships and therefore should have their temporary permits renewed as they await the outcome of their applications for permanent residence permits. See *Dawood and Another v. Minister of Home Affairs and Others*; *Shalabi and Another v. Minister of Home Affairs and Others*; *Thomas and Another v. Minister of Home Affairs and Others* 2000 (3) SA 936; 2000
83. (8) BCLR 837, para 36; In *Hattingh and Others v. Juta* 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) the Constitutional Court referred to human dignity in interpreting the meaning of ‘family life’ in the context of the rights of the land occupiers. In *C and Others v. Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) para 23, the Constitutional Court observed that ‘[u]ninvited intervention by the state into the private sphere of

family life threatens to rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community.’

85. Chairperson of the Immigration Selection Board v. Frank and Another (SA8/99, SA8/99) [2001] NASC 1 (5 March 2001).
86. By June 2013, 14 countries had legalised same-sex marriages. See Steven Erlanger, ‘Hollande Signs French Gay Marriage Law’ The New York Times, 18 May 2013 at http://www.nytimes.com/2013/05/19/world/europe/hollande-signs-french-gay-marriage-law.html?_r1=40.
87. Concluding observations of the Human Rights Committee on the situation of civil and political rights under the International Covenant on Civil and Political Rights in Malawi in the absence of a report at its 2846th meeting, CCPR/C/MWI/CO/1, 18 June 2012, para 7.
89. See Rex Chikoko, ‘Foreign Governments Protest as Gays Get 14 Years’ at <http://allafrica.com/stories/201005200863.html>.
90. See ‘Cameroon acquits two men sentenced for “looking gay”,’ 7 January 2013, Reuters, at <http://www.reuters.com/article/2013/01/07/us-cameroon-homosexuality-idUSBRE9060XL20130107>.
91. See Jack Doyle, ‘Prisoner allowed to father a child from jail because of “human right to a family life”’ 1 June 2011, Mail online at <http://www.dailymail.co.uk/news/article-1392885/Prisoner-allowed-father-child-jail-human-right-family-life.html>.
92. Mary Karugaba, ‘Inmates to enjoy conjugal rights in prison’ 25 June 2008, The New Vision at <http://www.newvision.co.ug/PA/8/13/635565>.
93. See Christopher Majaliwa, ‘Tanzania: Conjugal Rights to Be Granted to Prisoners’ 2 November 2012 at <http://allafrica.com/stories/201211030279.html>.
94. Constitution of Uganda (Articles 23 (5)(b) and 4(b)); section 35(2)(f)(i) and (ii) of the Constitution of South Africa; section 42(1)(d) of the Constitution of Malawi; and Article 16(6)(a) of the Constitution of Lesotho.
95. It should be noted that in the cases of offenders who have been transferred to serve their sentences in their countries, there is no guarantee that such offenders will be imprisoned in prisons close to their families so that they can be visited by their family members. In *Clive Butcher v. The Minister for Justice and Equality* supra at para 44 the Court observed that ‘[i]t is . . . true that the applicant cannot prove to the respondent that a transfer will result in closer contact with his family since the UK authorities cannot guarantee that he will be placed near them. In my view all that needs to be said about that is that, presumably, the “best efforts” of the UK authorities are more likely to put him in proximity to Essex than the Irish authorities.’
96. Section 78 of the Prisons Act of Uganda (2006); section 13 of the Correctional Services Act, 111 of 1998 (South Africa); section 66(1)(a) of the Prisons Act, 17 of 1998 (Namibia); Rule 21(4) and (5) of Prison Regulations 1989 (Mauritius); section 28(2) of the Prisons Act, Cap. 7:11 (Zimbabwe); section 17(2) of the Prison Act, (Malawi), see also section 14 of the Prisons Bill, 2003 (Malawi); Regulations 39–42 of the Prison Regulations, 1965 (Botswana); and Article 112(3) of the Criminal Code, 2004 (Ethiopia).
97. Section 82 of the Prisons Act (Uganda); section 13(5) of the Correctional Services Act 111 of 1998 (South Africa); Section 14(6) of the Prisons Bill, 2003 (Malawi).

98. Article 9(1) of the Constitution of Ethiopia; Article 1(2) of the Constitution of Nigeria (1999); section 2(1) of the Constitution of Zimbabwe (2013); Article 2(2) of the Constitution of Uganda (1995); Article 1(3) of the Constitution of Zambia (1996); Article 2 of the Constitution of Kenya (2010); section 1(6) of the Constitution of Namibia; section 2 of the Constitution of Lesotho; Article 5 of the Constitution of Seychelles; section 2 of the Constitution of South Africa; Article 2 of the Constitution of Mauritius; and section 2 of the Constitution of Swaziland.
99. For the jurisprudence on the transfer of offenders between the United States of America and other countries see Abbell (2010). For the jurisprudence and practice of the United Kingdom see van Zyl Smit and Spencer (2010, 25–26). The European Court of Human Rights has also handed down decisions on the transfer of offenders. See, for example, *Smith v. Germany*, Application no. 27801/05, judgement of 1 April 2010; *Buijen v. Germany*, Application no. 27804/05, judgement of 1 April 2010.
100. This does not mean that these are the only cases available. There could be other cases but the author did not know of their existence at the time of writing.
101. See *Banja v. Republic* (Misc Criminal Case No.136 of 2000)[2000]MWHC 31 (17 November 2000).
102. Section 22(1).
103. *R v. Machava and Others* [2010] SZHC 204 (Judgement of 29 January 2010).
104. *Patricia Gerber v. Government of the Republic of South Africa and Others* (51128/09)[2010] ZAGPPHC 240 (9 December 2010).
105. The case shows that attempts by the applicant to persuade the South African government to sign a prisoner transfer agreement with Mauritius had failed. See *ibid.* para 16. The Agreement between Uganda and the UK provides in the preamble that the offender shall be treated with respect for their human rights. Article 9 of the Agreement between the UK and Rwanda and the Agreement between Uganda and the UK provides that: ‘Each Party shall treat all sentenced persons transferred under this Agreement in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.’
106. See, for example, *Drozd and Janousek v. France and Spain*, Application No. 12747/87, 26 June 1992, and *Samantha Orobator v. Governor of HMP Holloway and Secretary of State for Justice* *supra*.
107. It has been argued that although in the past prisoner transfer agreements were meant to alleviate the suffering experienced by foreign prisoners, ‘[h]owever, it would appear that these treaties are now also seen as a method by which the sentencing country can expel foreign prisoners and relieve itself of a considerable financial strain, which is a motive which runs contrary to the humanitarian goals of these treaties.’ See Bassiouni Cherif (2008, 588).
108. Paragraph 9 of the Preamble to the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union provides that ‘Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the

competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.' See also Article 3(1).

109. 107. For example, see section 4(4) and (5) of the Australian International Transfer of Prisoners Act No. 75 of 1997 which defines community ties to include family members.

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