



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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Government Notice

MINISTRY OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY

No. 392

2022

NOTICE OF RATIFICATION OF AGREEMENT ON TRANSFER OF SENTENCED PERSONS ENTERED INTO BY AND BETWEEN THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA: TRANSFER OF CONVICTED OFFENDERS ACT, 2005

In terms of subsection (3) of section 20 of the Transfer of Convicted Offenders Act, 2005 (Act No. 9 of 2005), I give notice that the National Assembly has, on 1 November 2022, ratified the Agreement on Transfer of Sentenced Persons entered into by and between the Government of the Republic of Namibia and the Government of the Republic of Botswana, the text of which is set out in the Schedule, entered into under subsection (1) of that section.

DR. A. KAWANA
MINISTER OF HOME AFFAIRS, IMMIGRATION,
SAFETY AND SECURITY

Windhoek, 18 November 2022

SCHEDULE



MEMORANDUM OF AGREEMENT

ENTERED INTO BY AND BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

AND

THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA

ON THE TRANSFER OF SENTENCED PERSONS

PREAMBLE

The Government of the Republic of Namibia and the Government of the Republic of Botswana (hereafter jointly referred to as the “Parties” and in the singular as a “Party”);

DESIRING to further develop bilateral cooperation in the field of prisons and legal enforcement;

CONSIDERING that such corporation should further the ends of justice and the social rehabilitation of the Sentenced Persons;

FURTHER CONSIDERING that these objectives require that foreigners who are deprived of their liberty because of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

BELIEVING that this aim can be achieved by having them transferred to their own countries.

HAVE AGREED AS FOLLOWS;

ARTICLE 1

OBJECTIVE

The purpose of this Memorandum of Agreement (hereinafter referred to as “MoA”) is to establish a framework within which the Parties set out modalities on how to conduct their relations in order to ensure interstate transfer of convicted and confined persons and matters connected thereto.

ARTICLE 2

DEFINITIONS

For the purpose of this MoA:

- a) “Administering State” means the state to which the Sentenced Person may be, or has been, transferred in order to serve his/her Sentence;
- b) “Appropriate Authority” means the person or institution responsible under an enactment for administering the transfer of convicted and Sentenced persons from the Sentencing State or the corresponding authority in the Administering State which shall facilitate the receipt of the Sentenced Person;
- c) “Judgment” means the final Judgment of a competent court of one of the Parties, in terms of which a person has been convicted and Sentenced;
- d) “Memorandum of Agreement” (MoA) means this Agreement;
- e) “Sentence” means any punishment or measure involving deprivation of liberty ordered by a court of competent jurisdiction of one of the Parties on account of a criminal offence;
- f) “Sentenced Person” means a person who has been convicted, Sentenced and deprived of his/her liberty by a Judgement of a court of competent jurisdiction; and
- g) “Sentencing State” means the state in which the Sentence was imposed on the Sentenced Person.

ARTICLE 3

GENERAL PRINCIPLES

- 3.1 The Parties shall afford each other the widest measure of cooperation in respect of the transfer of Sentenced Persons in accordance with the provisions of this Agreement.
- 3.2 A Sentenced Person in the territory of either Party may be transferred to the territory of the other Party, in accordance with the provisions of this Agreement in order to serve the Sentence imposed on him or her. To that end, the Sentenced Person may express his or her interest to the Sentencing State or the Administering State in being transferred under this Agreement.
- 3.3 Transfer may be requested by the Appropriate Authority of either Party or by the Sentenced Person or his representative or any interested party or institution.
- 3.4 Where there are changes of Appropriate Authority, the Party where the change has occurred shall, without undue delay, inform the other Party of such changes.

ARTICLE 4

CONDITIONS FOR TRANSFER

- 4.1 A Sentenced Person may be transferred under this MoA only on the following conditions:
- a) both the Sentencing State and the Administering State have enacted Legislation with regard to the transfer of Sentenced Persons;
 - b) if the Sentenced Person is, under the laws of that Administering State, a national or ordinary or permanent resident of that State;
 - c) if the Judgment in respect of the offence is enforceable, final and not subject to appeal or review;
 - d) if the acts or omissions on account of which the Sentence has been imposed constitute a criminal offence according to the law of the Administering State or would constitute a criminal offence if committed on its territory;
 - e) if the transfer is consented to by the convicted person or where in view of his or her age or his or her physical or mental condition one of the Parties considers it necessary by the Sentenced Person's legal representative; and
 - f) if the Sentencing State and Administering State agree to the transfer.
- 4.2 This MoA shall be applicable to the enforcement of Sentences imposed either before or after the date of its entry into force.
- 4.3 Notwithstanding any provision of this MoA, a person convicted and sentenced to death shall not be eligible for transfer.
- 4.4 The transfer may be refused if:
- a) the Sentencing State considers that the transfer of the Sentenced Person affects its sovereignty, security, public order or other essential national interests;

- b) the Sentenced Person has not fulfilled any financial obligations under judicial decision or if, in the opinion of the Sentencing State, no sufficient guarantees of compliance have been received from such obligations; and
- c) the Sentenced Person has pending criminal matters in the Sentencing State.

ARTICLE 5

APPROPRIATE AUTHORITIES

The Appropriate Authorities empowered with the implementation of this MoA are:

- 5.1 for the Government of the Republic of Botswana, Botswana Prisons Service; and
- 5.2 for the Government of the Republic of Namibia, Namibian Correctional Service.

ARTICLE 6

OBLIGATION TO FURNISH INFORMATION

- 6.1 A Sentenced Person to whom this MoA may apply shall be informed by the Sentencing State of the subsistence of this MoA.
- 6.2 If the Sentenced Person has expressed an interest to the Sentencing State in being transferred under this MoA, the Sentencing State shall so notify the Administering State as soon as practicable after the Judgement has become final and enforceable and no longer appealable or reviewable.
- 6.3 For the purpose of enabling a decision to be made regarding the request for the transfer of the Sentenced Person, the Appropriate Authority of the Sentencing State shall send the following information to the Appropriate Authority of the Administering State:
 - a) the date and place of birth of the Sentenced Person;
 - b) the address, if any of the Sentenced Person in the Administering State;
 - c) next of kin's address, if any, of the Sentenced Person in the Administering State;
 - d) a certified copy of the Judgement which the Sentence was based; and
 - e) the nature, duration and date of commencement of the Sentence.
- 6.4 If the Sentenced Person has expressed his interest to the Administering State in being transferred under this MoA, the Sentencing State shall on request, communicate to the Administering State the information referred to in Paragraph 8.2.
- 6.5 The Sentenced Person shall be informed in writing of any action taken by the Sentencing State or by the Administering State under paragraph 7.4, as well as of any decision taken by either Party on a request for transfer.
- 6.6 The Parties shall exercise their right to give consent to a request for transfer of a Sentenced Person freely and voluntarily with knowledge of the legal consequences thereof.

ARTICLE 7

REQUESTS AND REPLIES

- 7.1 Requests for transfer and the replies thereto shall be made in writing.
- 7.2 Requests, applications, replies and any other communication under this MoA shall be conducted through the diplomatic channel and shall be addressed to the Appropriate Authorities of the Parties. However, in case of urgency, the Appropriate Authority may use the direct channel while original documents take the normal diplomatic channel.
- 7.3 Copies of requests, replies and other correspondence relating thereto shall be sent to the respective Appropriate Authorities.
- 7.4 The Sentencing State shall promptly inform the Administering State of its decision whether or not it agrees to the requested transfer.

ARTICLE 8

SUPPORTING DOCUMENTS

- 8.1 The Administering State, if requested by the Sentencing State, shall furnish the request with:
- a) a document or statement indicating that the Sentenced Person is a national of that State; and
 - b) a copy of the relevant law of the Administering State which provides that the acts or omissions on account of which the Sentence has been imposed in the Sentencing State constitute a criminal offence according to the law of the Administering State, or would constitute a criminal offence if committed on its territory.
- 8.2 If a transfer is requested, the Sentencing State shall provide the following documents to the Administering State, unless either State has already indicated that it will not agree to the transfer:
- a) a certified copy of the Judgement and the legislature creating the offence;
 - b) a statement indicating how much of the Sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the Sentence;
 - c) a document containing the express consent of the Sentenced Person; and
 - d) where appropriate, any medical or social reports on the Sentenced Person, information about treatment in the Sentencing State, and any recommendation for further treatment in the Administering State.
- 8.3 All documents sent for the purpose and in accordance with this Agreement shall be duly authenticated.
- 8.4 Either Party may request to be provided with any of the documents referred to in paragraphs 8.1 and 8.2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

ARTICLE 9**EFFECTS OF TRANSFER**

- 9.1 The actual taking into charge of the Sentenced Person by the Appropriate Authorities of the Administering State shall have the effect of suspending the enforcement of the Sentence in the Sentencing State.
- 9.2 The Sentencing State may no longer enforce the Sentence if the Administering State considers enforcement of the Sentence to have completed.

ARTICLE 10**CONTINUITY ENFORCEMENT**

The Administering State shall be bound by the legal nature and duration of the Sentence as determined by the Sentencing State.

ARTICLE 11**NON BIS IN IDEM**

Once transferred, the Sentenced Person shall not be tried or convicted in the Administering State for the same offences by virtue of which the Sentence was applied in the Sentencing State.

ARTICLE 12**PARDON, AMNESTY, COMMUTATION AND PAROLE**

The Administering State shall apply their respective laws on pardon, amnesty, or commutation and parole.

ARTICLE 13**REVIEW OR APPEAL**

The Administering State shall have no right to decide on any application for review or appeal of the Judgment.

ARTICLE 14**INFORMATION ON ENFORCEMENT**

The Administering State shall provide information to the Sentencing State concerning the enforcement of the Sentence indicating:

- 14.1 when the enforcement of the Sentence has been served in full;
- 14.2 if the Sentenced Person has escaped from custody before enforcement of the Sentence has been served;
- 14.3 if the Sentencing State requests a special report on enforcement;
- 14.4 when pardon, or amnesty, or release on parole is granted or sentence is commuted; or
- 14.5 upon the death of a Sentenced Person before enforcement of the Sentence has been completed.

ARTICLE 15**TERMINATION OF ENFORCEMENT**

The Administering State shall terminate enforcement of the Sentence as soon as it is informed by the Sentencing State of any decision or measure as a result of which the Sentence ceases to be enforceable.

ARTICLE 16**LANGUAGE AND COSTS**

- 16.1 The notifications and information referred to in Article 6 and the requests and information referred to in Article 8 shall be furnished in the English language.
- 16.2 The costs of the transfer of a Sentenced Person shall be borne by the requesting State. In a situation of a request from the Sentenced Person, the cost shall be borne by the Sentenced Person or his/her family.

ARTICLE 17**RETROSPECTIVE APPLICATION**

This Agreement shall be applicable to the enforcement of Sentences imposed either before or after its entry into force.

ARTICLE 18**ENTRY INTO FORCE**

- 18.1 This MoA shall enter into force on the date of the last notification in writing through diplomatic channels by either Party informing the other Party of the fulfilment of internal formalities for entry into force.
- 18.2 This Agreement shall remain in force for a period of five (5) years from the date upon which it enters into force. Thereafter, this Agreement shall continue to be in force until either Party gives written notice to the other Party of its intention to terminate pursuant to Article 23 (1).

ARTICLE 19**AMENDMENT**

- 19.1 Any amendment to this MoA shall be mutually agreed between the Parties and shall be effected in writing.
- 19.2 Any amendment shall enter into force in accordance with the provisions of Article 18.

ARTICLE 20**DISPUTE RESOLUTION**

Any dispute between the Parties arising from the interpretation, application and implementation of this MoA shall be resolved amicably through consultation or negotiations between the Parties and shall not be referred to a tribunal or third party for settlement.

ARTICLE 21**CONFIDENTIALITY**

The Parties shall not disclose or release or transmit in any way, information, including any intellectual property rights, information exchanged between them under this MoA, to a third party without first obtaining the written consent of the other Party.

ARTICLE 22**COMPLIANCE WITH NATIONAL AND INTERNATIONAL LAWS**

- 22.1 The Parties shall ensure that the Appropriate Authorities delegated under this MoA comply with the national laws and regulations of the State where they perform their duties or any other activities under this MoA.
- 22.2 Nothing in the present MoA shall affect the Parties' obligations under the existing international treaties and obligations arising from regional or international organisations to which the Parties are members.

ARTICLE 23**TERMINATION**

- 23.1 Either Party may terminate this MoA at any time by notification through diplomatic channels to the other Party. The termination shall be effective six (6) months after the date of receipt of such notice.
- 23.2 At the termination of this MoA, its provisions and provisions of any separate protocols, addenda, contracts or agreements made in respect thereof, shall continue to govern unexpired or existing obligations or ongoing transfers commenced thereunder.
- 23.3 Any such obligations shall be carried to their completion as if this MoA is still in existence.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this MoA in two originals in the English Language and both texts equally authentic.

DONE at Gaborone on this 9th Day of September 2022.

**FOR AND ON BEHALF OF THE
GOVERNMENT OF THE
REPUBLIC OF BOTSWANA**

Hon. Thomas Kagiso Mmusi

Minister of Defence and Security

**FOR AND ON BEHALF OF THE
GOVERNMENT OF THE
REPUBLIC OF NAMIBIA**

Hon. Dr Albert Kawana MP

Minister of Home Affairs, Immigration,
Safety and Security
