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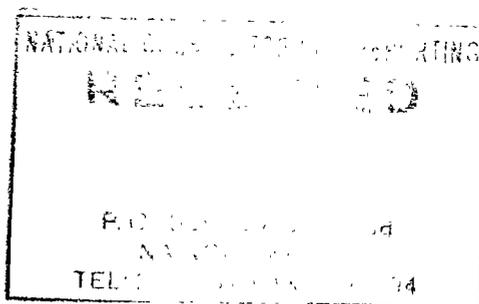
KENYA GAZETTE SUPPLEMENT

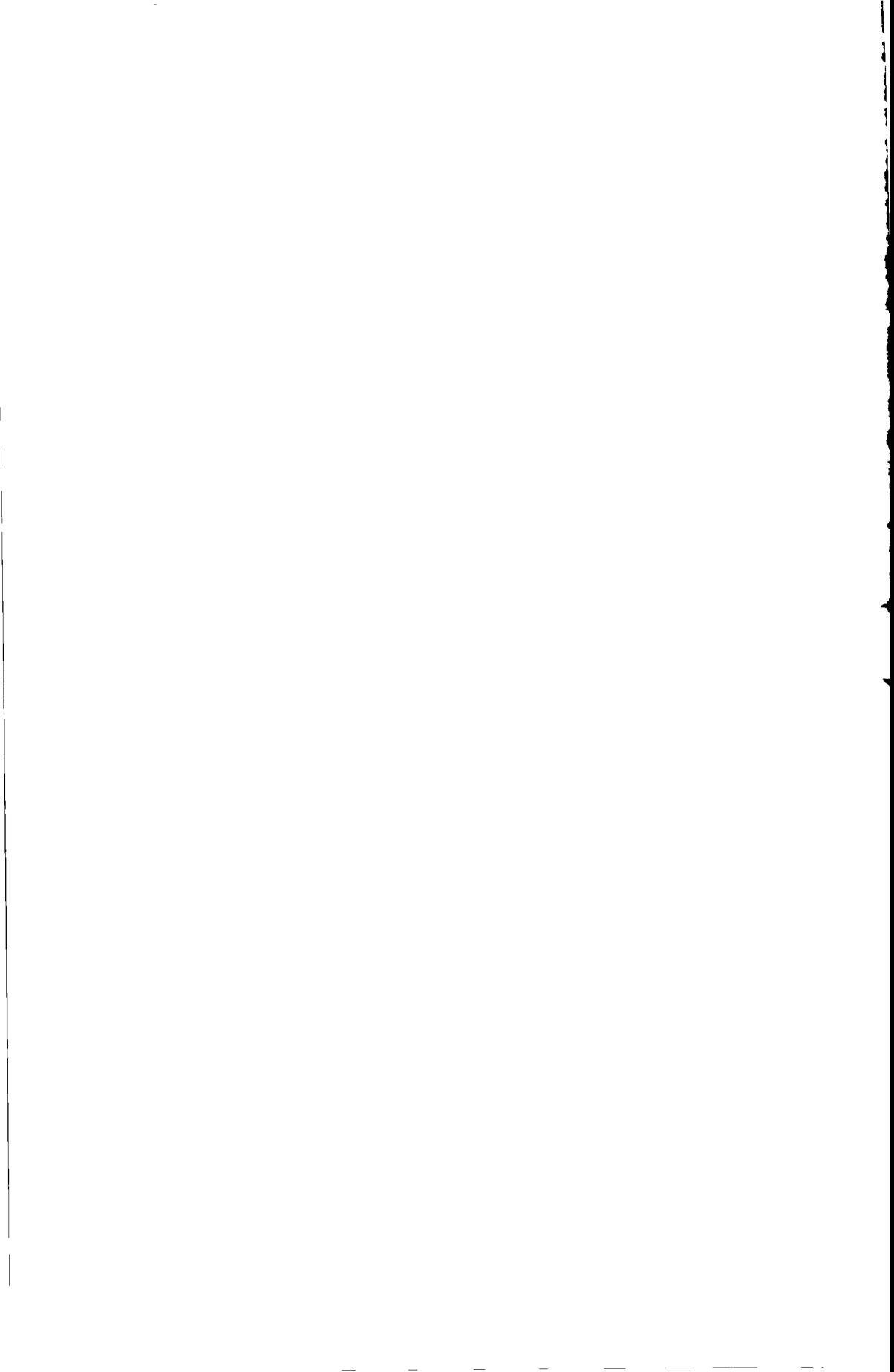
ACTS, 2015

NAIROBI, 12th October, 2015

CONTENT

Act—	PAGE
The Transfer of Prisoners Act, 2015	1677





THE TRANSFER OF PRISONERS ACT

No. 22 of 2015

Date of Assent: 8th October, 2015

Date of Commencement: By Notice

ARRANGEMENT OF SECTIONS

Section

PART I—PRELIMINARY

- 1— Short title and Commencement.
- 2— Object of Act.
- 3— Interpretation.
- 4— Application of Act.

PART II—TRANSFER OF PRISONERS

- 5— Attorney-General's consent required for transfer.
- 6— Consent of prisoner and prisoner's representative.
- 7— Conditions for transfer of prisoners.
- 8— Eligibility for transfer of prisoners to Kenya.
- 9— Conditions for transfer from Kenya.
- 10— Transfer to Kenya.

PART III—TRANSFER FROM KENYA

- 11— Application for transfer from Kenya.
- 12— Preliminary consideration of application for transfer of a prisoner from Kenya.
- 13— Formal request for transfer.
- 14— Information to accompany a formal request.
- 15— Government's consent to transfer from Kenya.
- 16— Issues of warrant for transfer from Kenya.
- 17— Warrants for transfer from Kenya.
- 18— Cancellation of warrant for transfer from Kenya.

PART IV—TRANSFER TO KENYA

- 19— Application for transfer.

No. 22

- 20— Transfer request from sentencing country.
- 21— Information to accompany request.
- 22— Enforcement of sentence by court in sentencing country.
- 23— Government's consent to transfer to Kenya.
- 24— Formal consent to transfer.
- 25— Issue of warrant for transfer to Kenya.
- 26— Warrants for transfer to Kenya.
- 27— Cancellation of warrant.
- 28— Effect of warrant on prisoner's sentence.

PART V—ENFORCEMENT OF SENTENCE

- 29— Prisoner transferred from Kenya taken to be prisoner of transfer Country.
- 30— Pardon, amnesty or commutation of sentences of imprisonment of prisoners transferred from Kenya.
- 31— Sentence enforcement in Kenya.
- 32— Duration and nature of enforced sentence.
- 33— Directions concerning enforcement of sentence.
- 34— No appeal or review of sentences of imprisonment imposed by the transfer country, etc.
- 35— Prisoners who are transferred to Kenya.
- 36— Pardon, amnesty or commutation of sentences of imprisonment of prisoners transferred to Kenya.

PART VI—MISCELLANEOUS

- 37— Recovery of costs and expenses of transfer.
- 38— Prisoner and prisoner's representative to be kept informed.
- 39— Power of Attorney –General to delegate powers under this Act.
- 40— Transit of prisoners through Kenya.
- 41— Arrest or persons escaping from custody.
- 42— Prisoner being transferred to or from Kenya under warrant in lawful custody.
- 43— Power to make regulations.

THE TRANSFER OF PRISONERS ACT

AN ACT of Parliament to facilitate the implementation of arrangements made for the transfer of persons serving sentence of imprisonment for criminal offences committed in Kenya or in countries outside Kenya, pursuant to subsisting agreement

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Transfer of Prisoners Act, 2015 and shall come into operation on such date as the Attorney-General may, by notice in the *Gazette*, appoint.

Short title and commencement.

2. The object of this Act is to facilitate the transfer of prisoners between Kenya and countries with which Kenya has entered into agreements for the transfer of prisoners to enable the prisoners to serve out their sentences of imprisonment in the countries of their nationality or in countries with which they have community ties.

Object of Act

3. (1) In this Act, unless the context otherwise requires—

Interpretation

“administering country” means the country of origin of a prisoner serving a sentence in Kenya;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for immigration;

“Cabinet Secretary concerned” means the Cabinet Secretary responsible for matters relating to the matter for which the sentence has been imposed;

“community ties” shall have the meaning assigned to it by subsection (4) and (5);

“continued enforcement method” in relation to a sentence of imprisonment, means enforcing the sentence—

- (a) without modifying the duration of the sentence of imprisonment or its legal nature; or
- (b) with only such modifications to the duration of the sentence or its legal nature as the Attorney-General may consider are necessary to ensure that enforcement of the sentence is consistent with the law of Kenya;

“escort officer” in relation to a prisoner, means the police officer, prison officer or other person specified in the

warrant authorizing the transfer of the prisoner under this Act as the escort officer for the prisoner;

“extradition country” means any country that is declared by the regulations to be an extradition country;

“foreign law” means a prisoner who is a citizen of an administering country;

“Kenyan citizen” shall have the meaning assigned to it under the Kenyan Citizenship and Immigration Act, 2011;

“mental illness” shall have the meaning assigned to it under the Mental Health Act;

“mental impairment” includes senility, intellectual disability, mental illness, damage or severe personality disorder;

“mentally impaired prisoner” means—

- (a) a person serving a sentence of imprisonment, who is acquitted for an offence on the ground of mental impairment; or
- (b) a person serving a sentence of imprisonment because the person has been found mentally unfit to stand trial;

“national” in relation to a country, means a person who is a citizen of the country under that country’s law;

“non-parole period” in relation to a sentence of imprisonment, means the part of the term of imprisonment for that sentence during which the person is not to be released on parole, whether that part of the term is fixed or recommended by a court or fixed by operation of law;

“police officer” means a member of the National Police Service;

“prison officer” means a person appointed or employed to assist in the management of a prison;

“prisoner” means a person who is serving a sentence in a country outside Kenya and includes—

- (a) a mentally impaired prisoner; and
- (b) a person who has been released on parole;

“prisoner’s representative” means a person whom the prisoner has authorized to consent to the prisoner’s transfer as set out to in section 6;

“Regulations” means regulations made under this Act and in force;

“release on parole” means any form of conditional release in the nature of parole, and includes—

- (a) release on probation; and
- (b) release on licence to be at large;

“responsible authority” means the authority responsible for matters related to correctional services in a sentencing country;

“sentence” means any punishment or measure involving deprivation of liberty ordered by a court for a determinate or indeterminate term in the exercise of its criminal jurisdiction, and includes any direction or order given or made by the court with respect to the commencement of the punishment or measure;

“sentencing country” means a country in which a sentence of imprisonment is imposed and the prisoner is held in custody;

“superintendent” in relation to a prison means the person for the time being in charge of the prison;

“transfer country” means a foreign country whose citizen or with which a person with community ties is imprisoned in Kenya;

“treaty” includes a convention, protocol, agreement or arrangement.

(2) For the purposes of this Act, the following persons shall be deemed to be serving a sentence of imprisonment—

- (a) a person who has been released by a court from serving the whole or a part of a sentence of imprisonment upon giving a security, with or without sureties by recognizance or otherwise, that the person will comply with conditions relating to the person’s behavior and in relation to whom action can no longer be taken because of a breach of a condition of the security or because of the expiration of the security;
- (b) a person who, through the exercise of the prerogative or mercy or other executive prerogative or discretion given by law, is no

longer required to serve the whole or part of a sentence of imprisonment;

- (c) a person on whom a sentence of imprisonment has been imposed but which has not yet begun.

(3) If a sentence of death imposed on a person has been commuted to a term of imprisonment or to imprisonment for life, this Act shall apply to and in relation to the person as if the sentence of death had been a sentence of imprisonment for that term or for life.

(4) For the purposes of this Act, a prisoner has community ties with a transfer country if—

- (a) the prisoner's principal place of residence immediately before being sentenced to imprisonment in Kenya was in the transfer country;
- (b) the prisoner's parent, grandparent or child has a principal place of residence in the transfer country;
- (c) the prisoner has a close continuing relationship involving frequent contact and a personal interest in the other person's welfare with anyone whose principal place of residence is in the transfer country.

(5) For the purposes of this Act, a prisoner has community ties with Kenya if—

- (a) the prisoner's principal place of residence immediately before being sentenced to imprisonment in the transfer country was in Kenya;
- (b) the prisoner's parent, grandparent or child has a principal place of residence in Kenya;
- (c) the prisoner is married to anyone whose principal place of residence is in Kenya;
- (d) the prisoner has a close continuing relationship, involving frequent personal contact and a personal interest in the other person's welfare with anyone whose principal place of residence is in Kenya.

4. This Act shall apply in case where an agreement for the transfer of prisoners subsists between Kenya and a sentencing country.

Application of the
Act

PART II—TRANSFER GENERALLY

5. (1) A prisoner may be transferred upon a request or application—

Attorney-General's
consent required for
transfer

- (a) to the government of Kenya by the sentencing country;
- (b) by the Government of Kenya as the sentencing country; or
- (c) by or on behalf of the prisoner to the Attorney-General, and subsequent action by the Attorney-General.

(2) Upon application made in writing to the Attorney-General by a prisoner serving a sentence of imprisonment in a prison of a sentencing state, the Attorney-General shall communicate such application to the sentencing state for consideration.

(3) If the Attorney-General is informed by the responsible authority of a sentencing country that it agrees with a request or an application for transfer of a prisoner to Kenya, the Attorney-General shall advise the responsible authority as to whether or not the Government of Kenya agrees to such transfer, and if both governments agree thereto, the Attorney-General shall initiate the transfer procedure.

6. (1) A prisoner may consent to being transferred under this Act only if the prisoner is an adult and capable of so consenting.

Consent of prisoner
and prisoner's
representative

(2) Where a prisoner is a minor, or is incapable of consenting to a transfer under this Act, such consent may be given by the prisoner's parent, guardian or legal representative.

(3) A prisoner or prisoner's representative has a right to be informed, in a language, including sign language or Braille, in which the prisoner or prisoner's representative is able to communicate with reasonable fluency, of the legal consequences of transfer of the prisoner under this Act before consenting to the transfer.

(4) In the case of a prisoner in a transfer country, a person who has not reached the age that under the law of that country is the age at which a person is considered for

legal purposes to be an adult, such person shall not give any consent under this Act.

7. A prisoner may be transferred between Kenya and a transfer country under this Act if the following conditions are satisfied—

Conditions for
transfer of prisoners

- (a) the prisoner is eligible for transfer from or to Kenya;
- (b) Kenya and the transfer country have an agreement for the transfer of the prisoner under this Act;
- (c) the prisoner or the prisoner's representative has consented in writing to the transfer on the agreed terms;
- (d) the appropriate consent in writing has been given to transfer on the agreed terms;
- (e) the relevant conditions for transfer of the prisoner are satisfied;
- (f) the transfer of the prisoner is not likely to prevent the surrender of the prisoner to any extradition country—
 - (i) known by the Attorney-General to have requested the extradition of the prisoner or to have expressed interest in extraditing the prisoner; or
 - (ii) that, in the opinion of the Attorney-General, is reasonably likely to request the prisoner's extradition.

8. (1) A prisoner shall be eligible for transfer to Kenya from a sentencing country under this Act if the prisoner—

Eligibility for
transfer of prisoners
to Kenya

- (a) is a Kenyan citizen;
- (b) is permitted to travel to, enter and remain in Kenya indefinitely under the Kenya Citizenship and Immigration Act, 2011 and has community ties with Kenya; and
- (c) the offence for which the sentence is imposed is punishable under Kenyan law.

(2) If a request is made for the transfer of a prisoner to Kenya, the Attorney-General shall consult with the Cabinet Secretary responsible for immigration about whether the prisoner—

- (a) is eligible under subsection (1) for a transfer to Kenya; or
- (b) is likely to be eligible under subsection (1) for a transfer to Kenya at a future time specified by the Attorney-General.

9. (1) The conditions for the transfer from Kenya of a prisoner, other than a mentally impaired prisoner, shall be as follows—

Conditions for
transfer from Kenya

- (a) neither the sentence of imprisonment imposed by the Kenyan court nor the conviction on which it is based is subject to appeal; and
- (b) subject to subsection (3), the acts or omissions constituting the offence in relation to which the prisoner is serving the sentence in Kenya would, if the acts or omissions had occurred in the transfer country, have constituted an offence in transfer country; and
- (c) in a case where the sentence of imprisonment is determinate, on the day of receipt of the request for transfer—
 - (i) at least six months of the prisoner's sentence remains to be served, whether or not the prisoner has been released on parole; or
 - (ii) a period shorter than six months remains to be served and the Attorney-General has decided that, in the circumstances, transfer for a shorter period is acceptable.

(2) The conditions for transfer from Kenya of a mentally impaired prisoner shall be deemed to be satisfied if—

- (a) neither the sentence of imprisonment imposed by the Kenyan court nor the acquittal or finding of unfitness to stand trial on which it is based is subject to appeal; or
- (b) subject to subsection (3), the acts or omissions constituting the offence-
 - (i) in respect of which the prisoner was charged but acquitted on the ground of mental impairment or found unfit to stand trial; and

(ii) in relation to which the prisoner is serving the sentence in Kenya.

would, if the acts or omissions had occurred in the transfer country, have constituted an offence in the transfer country; and

(c) in a case where the sentence of imprisonment is determinate, on the day of receipt of the request for transfer—

(i) at least six months of the prisoner's sentence remains to be served, whether or not any review affecting the duration of the sentence is pending; or

(ii) a period shorter than six months remains to be served, and the Attorney-General has decided that, in the circumstances of the case, transfer for a shorter period is acceptable.

(3) The Attorney-General may exempt particular cases from the requirements of subsection (1) (b) or (2) (b).

10. (1) The conditions for the transfer to Kenya of a prisoner, other than a mentally impaired prisoner, shall be as follows—

Transfer to Kenya

(a) neither the sentence of imprisonment imposed by the court in sentencing country nor the conviction on which it is based is subject to appeal under the law of that country;

(b) subject to subsection (3), the acts or omissions constituting the offence in relation to which the prisoner is serving the sentence in the sentencing country would, if the acts or omissions had occurred in Kenya, have constituted an offence in Kenya; and

(c) in a case where the sentence of imprisonment is determinate, on the day of receipt of the request for transfer—

(i) at least six months of the prisoner's sentence remains to be served (whether or not the prisoner has been released on parole); or

(ii) a period shorter than six months remains to be served and the Attorney-General has decided that, in the circumstances, transfer for a shorter period is acceptable.

(2) The conditions for transfer to Kenya of a mentally impaired prisoner shall be as follows—

- (a) neither the sentence of imprisonment imposed by the sentencing country's court nor the acquittal or finding of unfitness to stand trial on which it is based is subject to appeal under the law of the sentencing country; and
- (b) subject to subsection (3), the acts or omissions constituting the offence—
 - (i) in respect of which the prisoner was charged but acquitted on the ground of mental impairment or found unfit to stand trial; and
 - (ii) in relation to which the prisoner is serving the sentence in the sentencing country.

would, if the acts or omissions had occurred in Kenya, have constituted an offence in Kenya; and

- (c) in a case where the sentence of imprisonment is determinate, on the day of receipt of the request for transfer a period of six months or less of the prisoner's sentence remains to be served, whether or not any review affecting the duration of the sentence is pending, and the Attorney-General had decided that, in the circumstances, transfer for a shorter period is acceptable.

(3) The Attorney-General may exempt any particular cases from the requirements of subsection (1) (b) or (2) (b).

PART III—TRANSFER FROM KENYA

11. A prisoner serving a sentence of imprisonment in Kenya, or the prisoner's representative, may apply to the Attorney-General, in the manner prescribed by the regulations, for transfer of the prisoner to a transfer country to complete serving the sentence on terms agreed in accordance with this Act.

Applications for transfer from Kenya.

12. (1) The Attorney-General shall forward a copy of an application received under section 11 to each Cabinet Secretary, is any, who has or is likely to have an interest in the transfer.

Preliminary consideration of application for transfer of a prisoner from Kenya.

(2) A Cabinet Secretary to whom an application is forwarded shall advise the Attorney-General of any matter that the Cabinet Secretary considers relevant to the processing of the application.

(3) A Cabinet Secretary to whom an application is forwarded may request the Attorney-General to obtain from the transfer country information that is relevant to the Cabinet Secretary's assessment of the application.

(4) The Attorney-General—

- (a) shall notify a transfer country of an application for transfer to that country; and
- (b) may request the transfer country to indicate its provisional views on the application, including the method by which it is likely that the sentence of imprisonment would be enforced by the transfer country if, following a formal request for transfer, it consents to the transfer.

Cap 76

(5) The Attorney-General may provide the transfer country with—

- (a) details of any request for extradition of the prisoner that has been made under the Extradition (Contiguous and Foreign countries) Act or the Extradition (Commonwealth countries) Act or of any expression of interest in extradition made by another country or of any country that, in the opinion of the Attorney-General, may wish to extradite the prisoner; and
- (b) any other information that the Attorney-General considers may assist the transfer country in giving its provisional views on the proposed transfer.

13. (1) The Attorney-General may make a formal request in writing for the transfer of a prisoner from Kenya to a transfer country.

Formal request for transfer

(2) In deciding whether to make a formal request under subsection (1), the Attorney-General may take into account any matter the Attorney-General considers relevant, including any matter advised by a Cabinet Secretary.

(3) Any transfer granted under this section shall be subject to the provision of section 8.

14. A formal request for transfer from Kenya to a transfer country shall be accompanied by—

Information to accompany a formal request.

- (a) information required to be provided in accordance with arrangements made with the transfer country; and
- (b) any other available information which the Attorney-General considers relevant to the request and that may appropriately be provided.

15. (1) The Attorney-General shall notify the prisoner or the prisoner's representative and any Cabinet Secretary who appears to the Attorney-General to be responsible for matters which relate to the transfer—

Government's
consent to transfer
from Kenya

- (a) of the decision of the transfer country with respect to the request;
- (b) where the consent is given, of the proposed method by which the sentence of imprisonment shall be enforced by the transfer country; and
- (c) any other proposed terms of the transfer.

(2) The prisoner or prisoner's representative and the Cabinet Secretary concerned shall advise the Attorney-General as to whether they consent to the transfer on the terms proposed by the transfer country.

(3) The Attorney-General shall—

- (a) decide whether or not consent should be given for the transfer of a prisoner on the terms proposed by the transfer country; and
- (b) notify the transfer country whether consent—
 - (i) has been given for the transfer of the prisoner on those terms; or
 - (ii) shall be given if the transfer country agrees to vary the terms proposed in a particular way.

16. The Attorney-General may, subject to Part II, issue a warrant, in the form prescribed by the regulations, for the transfer of a prisoner from Kenya to a transfer country if written consent has been given by the prisoner or the prisoner's representative—

Issues of warrant for
transfer from Kenya

- (a) on the terms proposed by the transfer country; or
- (b) where the transfer country has agreed to vary the terms, on the terms as varied.

17. (1) A warrant for the transfer of a prisoner from Kenya shall authorize the transfer of the prisoner from Kenya to the transfer country to complete serving the sentence of imprisonment in accordance with terms agreed under this Act.

(2) A warrant for transfer from Kenya shall—

(a) specify the name and date of birth of the prisoner to be transferred;

(b) specify the transfer country to which the prisoner is to be transferred; and

(c) confirm that both the prisoner's representative and the transfer country have consented to the transfer.

(3) If the prisoner is a prisoner other than a prisoner who has been released on parole, the warrant shall—

(a) require the superintendent of the prison, or the person in charge of the hospital or other place in which the prisoner is serving the sentence of imprisonment, to release the prisoner into the custody of a person specified in the warrant; and

(b) authorize the person to take the prisoner to a place in Kenya and, if necessary, to detain the prisoner in custody for the purpose of placing the prisoner in the custody of an escort officer for transport out of Kenya;

(c) authorize the escort officer to transport the prisoner in custody out of Kenya to the transfer country for surrender to a person appointed by the transfer country to receive the prisoner.

(4) If the prisoner has been released on parole, the warrant shall—

(a) specify any approvals, authorities, permissions or variations to the parole or other order or licence that have been made under any Kenyan law; and

(b) specify any procedures for the transfer of the prisoner to the transfer country that have been agreed on with the transfer country and give any necessary authorisation and directions.

(5) The Attorney-General may take any action that is necessary to ensure that the warrant is executed in accordance with its intended effect.

18. (1) The Attorney-General may cancel a warrant for transfer from Kenya at any time before the prisoner to whom it relates leaves Kenya.

Cancellation of
warrant for transfer
from Kenya

(2) Without prejudice to the generality of subsection (1), the Attorney-General shall cancel the warrant if the prisoner or prisoner's representative or the transfer country concerned, withdraws consent to the transfer.

PART IV—TRANSFER TO KENYA

19. An application for transfer of a prisoner to Kenya may be made by the prisoners or by the Attorney-General in accordance with section 5.

Application for
transfer.

20. The Attorney-General may consent to a request from a sentencing country for the transfer of a prisoner serving a sentence of imprisonment in that country to Kenya to complete serving the sentence on terms agreed under this Act, if the Attorney-General is satisfied that such a transfer fulfils the conditions set out in section 9.

Transfer request
from sentencing
country

21. Before consenting to the transfer of a prisoner to Kenya under this Part, the Attorney-General may request the sentencing country to provide—

Information to
accompany request

- (a) details of any request for the transfer of the prisoner that has been made to the sentencing country or of any country that has expressed interest in extradition of the prisoner or that is likely, in the opinion of the transfer country, to request extradition; and
- (b) any other information which the Attorney-General considers relevant to the assessment of whether consent should be given for the transfer of the prisoner to Kenya.

22. Before consenting to the transfer of a prisoner to Kenya under this Part, the Attorney-General shall—

Enforcement of
sentence by court in
sentencing country

- (a) decide, in accordance with Part V, the method by which the sentence of imprisonment imposed by the sentencing country will be enforced in Kenya if the prisoner is transferred ; and
- (b) advise the sentencing country of this and of any other proposed terms on which consent is proposed to be given to the transfer.

No. 22

23. (1) The Attorney-General shall provide each Cabinet Secretary concerned with—

Government's
consent to transfer to
Kenya

- (a) any information that the transfer country has given to the Attorney-General; and
- (b) particulars of—
 - (i) the method by which the Attorney-General considers the sentence of imprisonment imposed by the transfer country could be enforced by Kenya; and
 - (ii) any other proposed terms of the transfer.

(2) Each Cabinet Secretary concerned shall advise the Attorney-General in writing as to whether the Cabinet Secretary consents to the transfer on the terms proposed as soon as possible after receiving the notification.

24. The Attorney-General shall—

Formal consent to
transfer

- (a) formally notify the sentencing country as soon as possible after all appropriate consents to the transfer have been given; and
- (b) ask the sentencing country to formally consent to the transfer on the terms proposed by Kenya and to confirm the prisoner's formal consent to transfer on those terms.

25. The Attorney-General may issue a warrant, in the form prescribed by the regulations, for the transfer of the prisoner from a transfer country to Kenya if written consent has been given by the prisoner or prisoner's representative, or, where the transfer country has agreed to vary the terms, on the terms as varied.

Issue of warrant for
transfer to Kenya

26. (1) The sentencing country shall issue a warrant to authorize the transfer of the prisoner from the sentencing country to Kenya to complete serving the sentence of imprisonment imposed by the sentencing country in accordance with terms agreed under this Act.

Warrants for transfer
to Kenya

- (2) A warrant for transfer to Kenya shall—
 - (a) specify the name and date of birth of the prisoner to be transferred;
 - (b) specify the sentencing country from which the prisoner is to be transferred; and

(c) confirm that—

- (i) the prisoner's or prisoner's representative; and
- (ii) the transfer country.

have each given their written consent to the transfer.

(3) If the prisoner is a prisoner other than a prisoner who has been released on parole, the warrant shall—

- (a) authorize an escort officer to collect the prisoner from a place, whether in Kenya or the sentencing country specified in the warrant;
- (b) if the place is in the transfer country-
 - (i) authorize the escort officer to transport the prisoner in custody to Kenya for surrender to a person appointed by the Attorney-General to receive the prisoner; and
 - (ii) if appropriate, authorize the escort officer to escort the prisoner to the prison, hospital or other place, in Kenya, for the prisoner to begin serving the remainder of the sentence of imprisonment in accordance with this Act;
- (c) if the prisoner is escorted to a prison, require the superintendent of the prison to take the prisoner into custody to be dealt with in accordance with the terms agreed under this Act; and
- (d) if the prisoner is escorted to a hospital or other place, authorize the detention of the prisoner in that hospital or place to be dealt with in accordance with the terms agreed under this Act.

(4) If the prisoner has been released on parole, the warrant shall—

- (a) specify the procedures (if any) for the transfer of the prisoner to Kenya that have been agreed upon with the sentencing country; and
- (b) give any necessary authorization and directions.

(5) The Attorney-General may give any other direction or approval necessary to ensure the warrant is executed in accordance with its terms.

27. (1) The Attorney-General may cancel a warrant for transfer to Kenya at any time before the prisoner to whom it relates leaves the sentencing country.

Cancellation of warrant

(2) The Attorney-General shall cancel the warrant if the prisoner or the prisoner's representative or the sentencing country concerned, withdraws consent to the transfer.

28. The prisoner to whom a warrant relates shall be entitled to be released when the prisoner has completed serving the sentence of imprisonment in accordance with this Act unless any other law authorizes the prisoner's detention in respect of an offence other than that in relation to which the sentence of imprisonment was imposed.

Effect of warrant on prisoner's sentence

PART V—ENFORCEMENT OF SENTENCE

29. On transfer of a prisoner from Kenya under this Act, the sentence of imprisonment is taken for all purposes in the transfer country, and the prisoner is a prisoner of the transfer country.

Prisoner transferred from Kenya taken to be prisoner of transfer country

30. (1) During the period in which a sentence of imprisonment is served in a transfer country by a prisoner transferred from Kenya under this Act, the prisoner's conviction may be quashed or otherwise nullified and the prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Kenyan law as if the prisoner were serving the sentence of imprisonment in Kenya.

Pardon, amnesty or commutation of sentences of imprisonment of prisoners transferred from Kenya

(2) If, during the period in which the sentence of imprisonment is served by a prisoner transferred from Kenya under this Act to a transfer country, the prisoner's conviction is quashed or otherwise nullified or the prisoner is pardoned or granted amnesty or commutation of sentence of imprisonment under Kenyan law, the Attorney-General shall immediately notify the transfer country that the prisoner should no longer be detained in custody or otherwise subjected to detention or supervision only because of the sentence of imprisonment.

31. The Attorney-General may direct a sentence of imprisonment imposed on a prisoner by a court of a sentencing country to be enforced on transfer of the prisoner to Kenya under this Act by means of—

Sentence enforcement in Kenya

(a) the continued enforcement method; or