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An Examination of Transfer of Prisoner Treaty/Agreement: A Benchmark in the Reform of the Criminal Justice System.

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Abstract. The consensus of opinion in international law is that a state does not have any obligation to surrender an alleged criminal to a foreign state, because one principle of sovereignty is that every state has legal authority over the people within its borders. Such absence of international obligation and the desire for the right to demand such criminals from other countries have caused a web of extradition treaties or agreements to evolve. When no applicable extradition agreement is in place, a sovereign may still request the expulsion or lawful return of an individual pursuant to the requested state's domestic law. This can be accomplished through the immigration laws of the requested state in some cases or other facets of the requested state's domestic law. Similarly, the codes of penal procedure in many countries contain provisions allowing for extradition to take place in the absence of an extradition agreement. Sovereign may, therefore, still request the expulsion or lawful return of a fugitive from the territory of a requested state in the absence of an extradition treaty, hence the focus of this paper to elucidate on the rights of prisoners, the transfer of prisoners, an examination of key international transfer of prisoners agreement/treaties/bills, and the procedure for transfer of extradition, and concludes with an advocacy of how transfer/extradition of prisoners can help improve the administration of the criminal justice system particularly in the area of prisoner decongestion, long period of awaiting trial, and the overall welfare of prisoners during the period of incarceration.

Keywords: Extradition, Prisoner, Rights, Transfer, Sentence, Administering, State.

1. Introduction

Transfer of prisoners or extradition as it synonymously called, is the official process whereby one country transfers a suspected or convicted criminal to another. Between countries, extradition is normally regulated by treaties. Where extradition is compelled by law, such as among sub-national jurisdiction, the concept may be known generally as rendition. Extradition is an ancient mechanism dating back to at least the 13th century BC when the Egyptians Pharaohs Ramessess II negotiated an extradition treaty with a Hattusili King III.

Through extradition process, a sovereign requesting state typically makes a formal request to another sovereign the requested state. If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process. The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested state.

The issue is whether due process requires a hearing before a prisoner is transferred from one

institution to another. A close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee ought to be considered. Essentially, no hearing need be held prior to the transfer from one prison to another in which the conditions were substantially the same or less favourable.

The state had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer would now become a punishment, but may be under prison regulations. The prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about. In most cases transfer hinges on medical grounds or trial convenience.

In some instances, transfer of a prisoner to a high security facility may be based on political status or the gravity of the offence committed by him. A mentally impaired prisoner may be transferred to a mental hospital pursuant to a statute authorizing the transfer if the prisoner suffers from mental disease or defect.

The international prisoner transfer is generally justified on humanitarian, rehabilitative and financial bases, thus enabling persons to be returned to their country of origin to serve their sentence, to further assist the reintegration into the community of prisoners participating in the transfer scheme. It also has positive benefits for the families of those prisoners. The re-absorption into the community of the prisoners is likely to be much more difficult if they served their sentences in a foreign community without the opportunity to obtain skills that may assist them to re-integrate into the community and without contact with their families.

2. Rights of Prisoners

Until recently, the view prevailed that a prisoner has as a result or consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. The prisoner for the time being becomes the slave of the state, in the case of PRICE VS. JOHNSTON, the court declared that lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, it was indicated that less than all and it was clear that the due process and equal protection clauses to some extent do apply to prisoners.

The analysis of these rights stemmed from the fact that in as much as the prison officials must be accorded latitude in the administration of prison affairs and that prisoner necessarily are subject to appropriate rules and regulations and therefore have the right to petition the government for redress of grievances.

Generally, the courts in America have treated challenges to prison conditions of confinement and pre-trial detainees as cruel and against the punishment clause of the Eight Amendment to the American Constitution. Thus in the American case of LEE Vs. WASHINGTON the court recognized the several rights of prisoners to include right to be free of racial segregation in prisons except for the necessity of prison security and discipline. They have the right to petition for the redress of grievances which is suggestive of access to courts for the purpose of presenting their complaints; and to bring actions in courts to recover for damages wrongfully done to them by prison administrator. Equally, they have a right, circumscribed by legitimate prison administration considerations to fair and regular treatment during their incarceration. Also, in the case of WASHINGTON Vs. HARPER, the United States Supreme Court held further that; prison inmate has liberty interests in avoiding the unwanted administration of antipsychotic drugs.

Furthermore, prisoners must have reasonable access to a law library or to persons trained in law. Establishing a right of access to law materials however requires an individualized demonstration of an inmate having been hindered in efforts to purse a legal claim. This will also facilitate prisoners' efforts in discovering grievances and to litigate effectively.

The problem in most cases is how to measure the level of deprivation of a prisoner's constitutional rights. When a regulation impinges on inmates constitutional rights, the regulation is valid only to the extent that it reasonably related to legitimate penological interest. Several factors must however, be taken into consideration in determining the reasonableness of a prison regulation. First, the must be a rational relating to a legitimate, content neutral objective, such as prison security, broadly defined that would warrant such an infringement. Secondly, are there other avenues for the exercise of the inmate rights?

For instance, a prisoner has no reasonable expectation of privacy in his prison cell protecting him from shakedown, searches designed to root out weapons, drugs, and other contraband. Also is limiting who may visit a prisoner for security reasons. What is paramount here is how to balance the prisoner's interest against the valid interest of the prison administration in maintaining security and order in the institution, and in protecting guards and prisoners against retaliation by fellow prisoners and in reducing prison tensions.

The prisoners must also be afforded the right to a counsel of his own choice, an advance notice of the claimed violation by him, and a written statement of the fact findings as to the evidence relied upon and the reasons for action taken; also the prisoner should be allowed to call witnesses and present documentary evidence in his defence.

Other identifiable rights of prisoners include the right to be housed in humane facilities. Prisoners must be free from inhuman conditions because they constitute cruel and unusual punishment which include drawing and quartering, emboweling alive, beheading, public dissecting, and burning alive among other things. Any punishment that can be considered inhumane treatment or that violates the basic concept of a person's dignity may be found to be cruel and unusual.

Furthermore, prisoners have the right to be free from sexual crimes, including sexual harassment. For example, a Federal Court in the District of Columbia found prison officials liable of the systematic sexual harassment, rape, sodomy, assault, and other abuses of female inmates by prison staff members. In addition, the court found that the prison facilities were dilapidated, that there was a lack of proper medical care available, and that the female inmates were provided with inferior programs as compared to male inmates within the same system.

Also, prisoners have the right to complain about prison conditions and voice their concerns about the treatment they receive. They should also have a right of access to the courts to air these complaints. Equally, prisoners are entitled to medical care and attention as needed to treat both short term conditions and long term illness. The medical care provided must be adequate.

Under the American Constitution First Amendment, prisoners can retain those rights such as freedom of speech which are not inconsistent with their status as inmates and which are in keeping with legitimate objectives of the penal corrections system, for instance preservation of order, discipline and security. In this regard, prison officials are entitled to open mail directly to inmates to ensure that it does not contain any illegal items or weapons, but may not censor portions of correspondence which they find merely inflammatory or rude.
Equally, prisoners should have the right to be free from racial segregation in prisons, except where necessary for preserving discipline and prison custody. Reasonable expectations of privacy in their prison cells are minimally guaranteed except in cases of search for weapons, drugs, or other contraband. Under the Due Process Clause to the American Constitution First Amendment, prisoners are entitled free and unauthorized and intentional derivation of their personal property by prison officials.

3. Why Do Prisoners Get Transferred?

It is curious to ask why some prisoners get transferred. Though, it is realisable that some

prisoners have to move due to request from their countries or on account of questionable behaviour. In some cases too, others might be moved for no particular reason, in most of these instances, it has to do security issues where the security category has changed.

Prisoners may be transferred because of overcrowding, threat to institution, threat to inmate, 'swap' with other prisoners. Occasionally, a prisoner may be transfer closer home for instance if he/she is serving the final weeks of his/her sentence or to a more appropriate prison to handle any special needs he has, or to complete a course which is not available at the prison they are in.

Another reason might be to keep inmates from being too complacent. For instance, if an inmate is at camp too long, and he isn't really doing anything, no job, not earning gain time, the feeling is that he/she will get too complacent and start trouble, or he/she is behaving in a disruptive way. Also inmates are transferred time to time to get things mix up, i. e to drugs program, or to avoid bulling from fellow inmates.

A times transfer might be influenced due to logistic problems. For instance, availability of bed space, security programming, health care facilities, mental health care needs, sufficiency of prison supporting staff. Others may include the desire to facilitate visitation with family and friends.

The English Prison Act of 1952 provides that a prisoner can be held in any prison. Usually it is up to the Governor whether they are transferred. The Prison service does have a location policy stating that contact between a prisoner and his/her family should be encouraged and that harmful effects of being removed from normal life are minimized, this may not be available in case of hardened prisoners or those being kept on account of capital offences. The prison also has an obligation to take reasonable steps to keep a prisoner safe, which may include a transfer if they are being bullied.

Equally, a prisoner can request a transfer through the request/complaint system, or on a special form provided by the prison for requesting transfer. Transfer will normally only be considered after the prisoner has served a few months at the prison they wish to leave. In addition to this, though the initial request must come from the prisoner, families can write to the Governor outlining why it is difficult for them to maintain contact, but only once an application for transfer has already been made by the prisoner. Supporting letters from social worker or other professional in support of the application can also be sent.

Where an application is refused, the prisoner can make an appeal through the same request/complaints system again and is entitled to a reply from Prison Service Headquarters within six weeks. If the prison authority is not still not yet satisfied with the reasons given, the can be referred to the Prison Ombudsman for a final decision. If this avenue fails, the only option left would be a judicial review which allows the High Court to deal with unlawful decisions by Prison Service, but then the prisoner must establish exceptional circumstances.

Worthy of examination is the celebrated English case of IAN BRADY'S who was convicted for the murder of Moors, be transferred from hospital to jail. The application was rejected for his own health and safety. Brady, 76, was told last June that he is to remain a patient at maximum security Ashworth hospital, Merseyside, after a week-long metal health tribunal hearing.

Brady, who murdered five children in the 1960's with his lover Myra Hindley, was jailed for life. Brady and Hindley lured children and teenagers to their deaths, before burying four youngsters on Saddleworth moor above Manchester The child-killer's £250,000 taxpayer –funded legal aid bid to be transferred was the first time he had been seen in public for decades by victims' families who said it was a circus and a complete waste of taxpayer's money.

At the end of the hearing, the panel said Brady should remain in Ashworth on the grounds that he is insane and hospital staff is best placed to treat his psychosis. According to the trial Judge, the tribunal concluded that it has been demonstrated by evidence that it is necessary in the interest of his own health and safety that he be detained in the hospital for treatment.

The 116 page ruling must be taken into consideration, this is important because he will spend the rest of his life either in hospital or in prison. There is no possibility of him being discharged into the community. According to appeal tribunal, the benefit of retrospection Brady should have been transferred to hospital for treatment before he had served 19 years in various prisons.

According to the appeal tribunal, Brady is now a 75 year's old man. When he was in prison he was much younger, now he is now physically much weaker, but his notoriety has not diminished. Further that the inmates of a prison would not be selected as the other patients on the ward are, that would create a significant risk to his safety, even though the prison officers are acknowledged to have the skill to deal with such issues. The appeal tribunal accepted that Brady is suffering from chronic psychotic illness but there were differences in eminent medical opinion demonstrating the complexity of his condition.

According to his medical history as quoted by a senior physician, he described Brady to a ruthless individual, cold and unemotional, without conscience or remorse; he showed a pathological admiration of power and unscrupulousness.

Brady told the hearing that he was merely a petty criminal and described his crimes as recreational killings which were part of an existential experience. Brady's legal team argued that despite his severe personality disorder, he is not mentally ill and therefore no longer fulfils the legal criteria for detention in hospital. Brady suggested that if he is allowed to go back to jail he would be free to end his own life by starving himself to death.

Last year's tribunal heard that Brady, who claim to have been on a hunger strike since 1999 and is fed through a tube in his nose, in fact eats toast and soup and that this is simply a protest rather than suicidal. It was suggested that Brady legal aid showed his pathological need for control and to challenge authority and a craving for the public spotlight.

Hospital records showed that Brady has hallucination, talks to himself while alone, he has been violent and abusive to other patients and staff, and leads a largely nocturnal existence, leaving his room at night only, and shunning other patients and staff he regards as beneath him.

Hindley died in jail in November, 2002, aged 60.

4. Bars To Transfer Of Prisoners

By enacting laws or in concluding treaties or agreements, countries determine the conditions under which they may entertain or deny extradition request. The common bars to extradition include:

i) failure to fulfil dual criminality requirement. Generally the act for which extradition is sought must constitute a crime punishable by some minimum penalty in both the requesting and requested states;

ii) political nature of the alleged crime. Most countries refuse to extradite suspects of political crimes. For instance, Section 3 of the Nigerian Extradition Act, provides that a fugitive criminal shall not be surrendered if the Attorney General or a court dealing with the case is satisfied that the offence in respect of which his surrender is sought is an offence of a political nature. A case in point is the case of ATTORNEY GENERAL OF EGYPT VS. AHMED MANSOURwhere the Attorney General demanded for the extradition of Aljazeera staff Ahmed Mansour for extradition to Egypt for torture charges. The INTERPOL turned down the request because it was politically motivated even though Mansour was detained at a prison in Berlin, Germany for two days, but has since been released.

iii) the possibility of certain forms of punishment. Some countries refuse extradition on grounds that the person, if extradited, may receive capital punishment or face torture, this may cover all punishment that the requested state themselves would not administer. Section 3(2) of the Nigerian Act, went further to state that, a fugitive shall not be surrendered if it appears to the Attorney General or a court dealing with the case that the request for his surrender, although purporting to be made in respect of an extradition crime, was in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political consideration or was otherwise not made in good faith or in the interest of justice; or he is likely to be prejudiced at his trial;

iv) furthermore, where the nature of the offence is so trivial, or the passage of time since the commission of the offence, the Attorney General shall refused to surrender a fugitive criminal. In the same vein, subsection 4 of section 3 provides that a fugitive shall equally not being surrendered if the Attorney General or a court dealing with the case is satisfied that, whether in Nigeria or elsewhere, he has been convicted of the offence for which his surrender is sought; or has been acquitted thereof and he is not unlawfully at large. This is in line with international human rights best practices.

v) in line with the principle of criminality too, a fugitive who has been charged with an offence under the law of Nigeria or any part thereof, not being an offence for which his surrender is sought; or who is serving a sentence imposed in respect of any such offence by a court in Nigeria, shall not be surrendered until such time as he has been discharged whether by acquittal or on the expiration of his sentence or otherwise;

vi) death penalty. For countries that have abolished capital punishment, will not allow extradition if the death penalty would be imposed on the prisoner unless they are assured that the death sentence will not be passed or carried out. i. e countries like Australia, Canada, New Zealand and most European countries who have abolished capital punishment in the penal system.

It should be note that these general provisions above does not apply to cases where the fugitive criminal has committed an offence under the military law or relating to military obligations.

vii) torture, inhuman, or degrading treatment. Many countries would refuse extradition if there is risk that a requested prisoner will be subjected to torture, inhuman, or degrading treatment or punishment. Thus in the case of SOERING VS. UNITED KINGDOM, in this case, the European Court of Human Rights held that it would violate Article 3 of the European Convention on Human Rights to extradite a person to the United States from United Kingdom in a capital case. This was due to the harsh conditions on death row and the uncertain time scale within which the sentence would be carried out;

viii) lastly, but not the least is the issue of jurisdiction. Jurisdiction over crime can be invoked to refuse extradition, in particular, the fact that the person in question is a nation's own citizen. For instance, countries like Brazil, France, Germany, china, to mention a few, forbid extradition of their own nationals because they often have laws in place that give them jurisdiction over crimes committed abroad by or against citizens. By virtue of such jurisdiction, they prosecute and try citizens accused of crimes committed abroad as if the crime had occurred within the country's borders.

5. An Examination of International Transfer of Prisoners Bill

As a reference point, the Writer in the discourse here will examine in point the Australia International Transfer of Prisoners Amendment Bill 2004 (hereinafter referred to as the 'Bill') which amended the International Transfer of Prisoner Act, 1997. The amendment was in response to the situation of two Australian prisoners David Hicks and Mamdouh Habib, who are being held at Guantanamo Bay by the United States and who may be tried by a United

States Military Commission. The Bill outlines the international prisoner transfer scheme.

For any country to participate in this transfer it must have keyed into the scheme of transfer. The International Transfer of Prisoner Act, 1997 contains the Commonwealth Legislative Framework for participation in the international transfer scheme. It enables prisoners convicted by the international war crimes tribunal to participate in the scheme. In addition the states and territories concerned must have also passed legislation to give effect to the transfer scheme allowing the commonwealth law to operate in their jurisdiction. A large number of countries including the United States of America, Canada, and the United Kingdom are very supportive of this international prisoner transfers and have been participating in the scheme for a number of years.

The principal Act i. e the International Transfer of Prisoners Act, 1997 enables foreign nationals imprisoned in overseas to be returned to their home countries to complete their sentences. The basis for the transfer is mainly on constitutional affairs i. e to promote their better rehabilitation.

There are certain eligibility requirements that must be satisfied before a prisoner can be transferred. Firstly, the prisoner must be a citizen of the recipient country of the country in which transfers is being sought or permanently resident there. Also neither the sentence nor the conviction can be subject to appeal under the law of the transfer country. There is addition the requirement of dual criminality; thus the offence for which a prisoner has been sentenced in the transfer country must have been an offence in the recipient country. If the sentence is for a fixed length, there must be at least six months of the sentence still to be served, but this requirement may be waived by the Attorney General.

Secondly, the possibility of enforcement of sentence in the receiving country is yet another factor. Hereunder, there are two methods sentence enforcement. The first method is called continued enforcement, this is done without any adaptation of the sentence of imprisonment or with only such adaptations to the duration of the sentence, or its legal nature as the Attorney General of the receiving country may consider necessary to ensure that enforcement of the sentence is consistent with laws of the receiving country.

The second method is the converted enforcement in which are different sentence is substituted for the sentence of imprisonment. This would involve the prisoner being bound so far as possible by the legal nature and the duration of the sentence determined by the other country such that a prisoner would bring with him or her, the sentence from the sending country minus the any time served or remissions earned in the sending country, up to the date of transfer. Note however, that the Attorney General can only give limited directions in ordering a sentence to be served under either method.

An area worthy of examination too, is the issue of whether a prisoner transferred can have his/her sentence reviewed or quashed by the receiving country? Section 45 of the International Transfer of Prisoners Act, provides that a transferred prisoner cannot appeal either against the sentence handed down by the court of the transfer country or against the decision of the Attorney General concerning the enforcement of the sentence. However, under Section 49 of the Act, provisions are made for pardons, amnesties, and commutation of sentences when a prisoner is transferred. The caveat is that a prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment only if there exist such provision in the law of the receiving country as if the particular offence had been committed there.

Note however that, there is no express provision in the Act for the review of convictions if fresh evidence emerges or bias is shown to have affected the sentencing court.

6. Procedure for Transfer (the case of David Hicks and Mamdouh Habib examined)

The Writer's discussion here will focus on the Guantanamo Bay's episode as a locus-classicus

example. Two Australian, David Hicks and Mamdouh Habib are being detained by the United States at Guantanamo Bay. Detainees held by United States during and after the war in Afghanistan as Taliban fighters or members of al-Qaeda were first housed at Guantanamo Bay in a temporary detention centre called Camp x-Ray constructed in 2002.

Recent reports are that around 640-650 people detained in Guantanamo Bay under United States President's Military Order. The Detainees came from over 40 countries, are being held on suspicion of links to the Taliban regime or al-Qaeda terror network and, at least at one stage, included 3 teenage boys ages 13-15.

The two detainees have been charged each with a single count of conspiracy to commit war crimes and will face a US Military Commission. The two have been described by the Pentagon as personal bodyguards to Osama Bin Laden. Some countries negotiated or are in the process of negotiating the release of their nationals from Guantanamo Bay. 100 prisoners have either been moved out of Guantanamo Bay facility since it opened in January 2002, with 88 sent back to their home countries for release and 12 transferred for continued detention in Saudi Arabia, Spain and Russia.

One time British Foreign Minister jack Straw had said at all times the Government had insisted that the Americans should either try the detainees in accordance with international standards or send them to the United Kingdom.

David Hicks was captured by coalition forces in Afghanistan in early December 2001. He apparently has no known criminal record and has not been previously come to notice in a security context. He appears to have travelled to Europe in mid-1990 to join the Kosovo Liberation Army, then returned to Australia after a couple of months and commenced studying Islam. He left Australia in November 1999. In January 2002, Australia was advised that he had been transferred to the US Military facility at Guantanamo Bay in Cuba.

In the case of Habib, he was reportedly arrested by Pakistani authorities on 5 October 2001 before the US aerial bombing of Afghanistan commenced on 7 October 2001. Later that year he was transferred to Egypt, but by April 2002 he was in the custody of coalition forces in Afghanistan. In May, 2002 Australia was advised that Mr Habib had been transferred to Guantanamo Bay too.

Various allegation have been made about the activities of Messrs Hicks and Habib, for instance, in November 2003, Foreign Minister Downer said:

"Our intelligence services have advised us that both these people, Hicks and habib, participated in training with al-Qaeda. Al-Qaeda is the world's most egregious terrorist organization. We are at war with al-Qaeda, and these people have been detained in that manner that you would detain prisoners, you would detain combatants at war".

According to Hicks lawyer Stephen Kenny; in early 2001 after pursuing his interest in the Islamic religion at an Islamic College in Pakistan, he entered Afghanistan and his family believes associated with the Taliban Army, that he trained with the Pakistan based Islamic group Lashkare-Taliban. Also according to a report, David was detained at a Northern alliance roadblock in Northern Afghanistan on December 9, 2001. He was not armed at the time and nor was he captured on a battlefield. None of the approximately 9 people training with him at that time was detained.

The family of Habib said he had gone to Pakistan to search for a school for his two teenage sons; the family wanted to give their children an experience for a year or two in an Islamic environment. The fate of these two men remain unresolved as they remained in custody in Guantanamo Bay without yet being charged, brought to trial or convicted. The Government advice is that neither man has committed an offence against Australian law and so neither can be returned to Australia to be tried there. In coming to this conclusion, the Government's legal adviser considered a number of commonwealth statutes including Geneva Convention Act, 1957, the Crimes Biological Weapon Act, 1976, the Chemical Weapon

Prohibition Act, 1976, the Crimes Foreign Incursion and Recruitment Act, 1978, and the recently enacted Commonwealth Terrorism Offences Act.

In the interim, the United States Centre for Constitutional Rights, filed two habeas corpus petitions which challenged the indefinite detention of foreign nationals at Guantanamo Bay by the United States Government without due legal process as unconstitutional and a violation of international law. A number of Lower Courts decision rejected the petition on the ground that habeas corpus is not available for non-united states citizen detained outside United States.

The International Transfer of Prisoners Amendment Bill, 2004 ensures that international transfer of prisoner arrangements can be executed in relation to colonies and protectorate as well. It also enables prisoners convicted and sentenced by a United State Military Commission to be transferred to Australia, in particular to facilitate the transfer of David Hicks and Mamdouh Habib, if they are convicted and if they consent, from Guantanamo Bay to serve their sentences in Australia. The essence is to serve the purposes of rehabilitation and humanitarian aspect of punishment.

The principal Act, requires the prisoner to consent to his transfer, and stipulates that he or she must be informed of the legal consequences of the transfer before consenting to the transfer. Illustrative is the case of *The St. Albans Raid* in this case, the prisoner's counsel had endeavour to procure a removal of the place of the proceedings to Montreal and this was opposed by the counsel to the Federal authority. The as far as the preliminary proceedings were concerned, was denied by the Judge. The next day preliminary hearing was proceeded with, and testimony was heard relative to the murder of one Morrison, the assault with intent to kill, the robbery and horse stealing.

Upon due consultation, it was decided for reasons satisfactory to all interested on behalf of the Federal authority, that the prisoner be removed to Montreal, and that further proceedings in the case should take place in that city. As soon it was decided to remove the prisoners, the Judge telegraphed for a special train; and they, with the counsel and witnesses were quickly carried to station, from whence they were transferred. The removal was conducted so noiselessly and they were well confined. The prisoners initially did not seem at all concerned at the aspect of their affairs.

Down home, Section 6 of the Extradition Act, provides for the procedure for transfer of prisoners through a request procedure. It provides that a request for surrender of a fugitive criminal of any country shall be made in writing to the Attorney General by a diplomatic representative or consular officer of that country and shall be accompanied by a duly authenticated warrant of arrest or certificate of conviction issued in that country.

Where such a request is made to him, the Attorney General may by an order under his hand signify to a magistrate that such a request has been made and require the magistrate to deal with the case accordingly. The Attorney General shall however, may refused to make an order in respect of any request if he decides on the basis of information then available to him that the surrender of the fugitive falls under any the provisions of section 3 of the Act i. e on bars to surrender of fugitive criminal.

The Act also contains a sweeping provision when it provides that except in so far as an extradition agreement in force between Nigeria and the requesting country, the Attorney General may refuse to make an order in respect of any fugitive criminal who is a Nigerian.

An illustrative case on the Nigerian Extradition Act is most recent case of BURUJI KASHAMU VS. NDLEA, in this case, the operatives of the NDLEA agency had on Saturday, May 23, 2015 besiege Kashamu's home in lekki area of Lagos-State, placing the newly Senator elected representing Ogun East Senatorial District under house arrest.

The agency said it only withdrew from Kashamu's house when it officially received a

copy of the order from the court on Thursday May 28, 2015. According to a statement signed by the NDLEA spokesperson, Mr. Mitchell Ofoyeju, on Friday, Kashamu's attorney signed an undertaking to produce him in court for hearing. The NDLEA said this is not the end of the case as the NDLEA has filed a formal extradition process at the Federal High Court. The agency is following the due process of law and will ensure that national interest is balanced against the constitutional rights of Kashamu.

An approval had been given by the Attorney General of the Federation on the 25th May, 2015 to NDLEA to extradite the Ogun State East Senatorial District senator elect to the United States of America over narcotic related issues. The request for extradition of the senator elect was made by the United States Authorities following new evidence made available to it by a Nigerian national leader. The approval was given because Nigeria had a treaty with the United States on extradition.

The agency went further to state that its mission is not and has never been to abduct him, but to engage the extradition process to ensure that he Kashamu is available to stand trial as required by law. To this end, the agency has obtained a provisional warrant of arrest on him as well as a formal request for his extradition. The honourable thing for him Kashamu to do is to submit to the due process of the law as pledged. The agency further reiterated that it will comply with all court orders and not forcefully abduct and take him to the United States for trial, and that the court had not prevented it from embarking on an extradition process against Kashamu.

However, the a Federal High Court in Lagos State had on Wednesday 27th May, 2015 restrained the Inspector General of Police (IGP), Attorney General of the Federation and Nine others from arresting him for an onward extradition to the United States of America over alleged drug related offences. In a related development, the NDLEA had on the 2nd May, 2015 went before the Federal High Court, Abuja to commence an extradition process on the Senator elect. A notice of application for the extradition of the Senator elect to the United States and he was officially served in line with the Extradition Act.

7. Main Convention on the Transfer of Sentenced Persons.

At the 11th conference of the European Ministers of Justice held at Copenhagen, 21-22 June, 1978, the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. This discussion eventually resulted in the adoption of Resolution 1, by which the Council of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problem (CDPC, to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member states and in their relation with non-member states too.

At the 350th meeting of their Deputies in September 1982, the Committee of Ministers approved the text of the convention. At the 354th meeting in December 1982, the Ministers Deputies decided to open it for signature on 21st March 1983. This Convention was aimed at facilitating and ensuring the rapid transfer of foreign prisoners. The Convention was also informed by the desire to do away with the inevitable administrative complexities of the defunct European Convention on the International Validity of Criminal Judgment of 1970. The Convention provides a simple, speedy and flexible mechanism for the repatriation of prisoners.

It worthy of note that the Convention in its bid to facilitate the easy transfer of foreign prisoners, took into consideration the modern trend in crime and penal policy. For instance, the Convention reckoned with the fact that an improved means of transportation and communication have led to a greater mobility of persons, and in consequence an increased internationalization of crime. Furthermore, modern penal policy now focused on social rehabilitation of offenders as opposed to the retributive or punitive theory. In this regard, it is

of better importance that the sanction imposed on the offender is better enforced in his home country rather than in the state where the offence was committed and the judgment rendered.

This approach was also buttressed by humanitarian considerations, i. e. language barriers, alienation from culture and customs, and the absence of contacts with relatives which may have detrimental effects on the prisoner.
This Convention has made some major departure from the administrative difficulties associated with the defunct European Convention on the International Validity of Criminal Judgment in four principal respects: a) in its practical application, it provides a more simplified procedure for transfer of foreign prisoners in that the procedures therein are less cumbersome than that laid down in European Convention on the International Validity of Criminal Judgement; b) a transfer may be requested for not only by the sentencing state i. e the state which imposed the sentence on the offender, but also by the state of which the sentenced/offender is a national i. e administering state, thus facilitating the administering state to repatriate its own national; c) the transfer is subject to the consent of the offender/sentenced person; d) the Convention provides the procedural frame work for transfer only, devoid of any obligation on the sentencing to comply with a request for transfer, neither was it necessary too to list any grounds for refusal nor to require the requested sate to give reason(s) for its refusal to agree to a requested transfer, under the European Convention on the International Validity of Criminal Judgment only the sentencing state is entitled to make the request.

Also under the Convention, certain conditions must be fulfilled before a transfer could be effected; a) the person to be transferred must be a national of the administering state. However reference to national of the administering state also include national of the contracting or signatory states who may decide to apply the convention when appropriate; b) the judgment must be final and enforceable, i. e all available remedies must have been exhausted or the time limit for lodging a remedy has expired without the parties having availed themselves of it; c) the length of sentence still to be served must be of a duration of at least six months at the time of receipt of the request for transfer or indeterminable. The rational for this is derived from the fact that since the Convention is conceived as an instrument to further the offender's social rehabilitation; this objective can usefully be pursued only where the length of sentence still to be served is sufficiently long. In addition to, is the system's cost-effectiveness? The transfer of a prisoner is costly, and considerable expenses incurred by the state concerned, hence this may not be proportionately achieved where the prisoner concerned has only a short sentence to serve.

d) The transfer must be consented to by the prisoner concerned, thus transfer of prisoner without his consent would be counter-productive in terms of rehabilitation. Equally, consent may be given by the sentenced prisoner's legal representative and also where necessary in view of the age, physical or mental condition of the sentenced person. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the Convention. It was therefore deemed necessary to impose an obligation on the sentencing state to ensure that the consent is given voluntarily and with the full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering state an opportunity to verify that consent has been given in accordance with these conditions.

e) Also, the principle of dual criminal liability must be complied with. i. e the act which give rise to the judgment in the sentencing state would have equally be punishable if committed in the administering state, and if the person who performed the act could under the law of the administering state have had a sanction imposed on him. Note that for the condition of dual criminal liability to be fulfilled, it is not necessary that the criminal offence be precisely be the same under both law of the administering and sentencing states. It would suffice only, if the essential constituent elements of the offence should be comparable under the law of both

states regardless of differences in the wordings and legal classification.

Lastly but not the least, the transfer must conform with the basic principles of transfer agreement between the states concerned. For instance, Article 9 of the Convention which grants the administering state a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing state as to which of these two procedures it will follow. The general rule is therefore, that the administering state may choose between the two enforcement procedures in each individual case.

The Convention specifies the form and the channels of transmission to be used for requests for transfers and replies thereto. Both the requests and replies must be in writing, be transmitted between respective Ministries of Justice, but signatory state may declare that they will use other ways of transmission as for instance, the diplomatic channel. In line with the Convention's aim to provide a procedure for the speedy transfer of sentenced persons, it requires the requested state promptly to inform the requesting state whether it agrees to the requested transfer.

To avoid the sentenced person's serving a sentence for the same acts or omission more than once, the enforcement in the sentencing state is suspended at the moment when the authorities of the administering state take the sentenced person into charge and that the sentencing state may no longer enforce the sentence once the administering state considers enforcement to have been completed.

Concerning the enforcement of the sentence in the administering state, the general principles are concerned in Articles 10 and 11. The administering state may choose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order, or convert the sentence through a judicial or administrative procedure into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing state. Signatory states may however in a general way, exclude the application of these procedures. If requested, the administering state must inform the sentencing state as to which of these two procedures it intends to apply. This obligation has been imposed on the administering state because the information may have a bearing on the sentencing's state decision on whether or not to agree to a requested transfer.

The basic difference between the continued enforcement and conversion of sentence (commonly called 'exequatur') procedures is that, in the case of continued sentence, the administering state continues to enforce the sanction imposed in the sentencing state, whereas, in the second case, the sanction is converted into a sanction of the administering state, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing state. Note that, though, the administering state solely is responsible for the enforcement of sentence including any decision related to it, suspended sentence, pardon, amnesty or commutation of the sentence may be granted by either the sentencing or administering state, in accordance with its constitution or other laws.

On this aspect, by way of concluding note, the sentencing state has the right to take decision on application for review of the judgment. The exclusive competence of the sentencing state to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new element of fact. As the sentencing state alone is competent to re-examine the material facts, it follows necessarily that only that state has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issues.

The sentencing state's competence to decide on any application for review should not be interpreted as discharging the administering state from the duty to enable the sentenced person to seek a review of the judgment. Both states must, in fact, take all appropriate steps to guarantee the

effective exercise of the sentenced person's right to apply for a review.

Other conventions on transfer of foreign prisoners or sentenced prisoners are:- i) the International Prisoner Transfer Program 1977 of the United States wherein the U.S Government negotiated the first in a series of treaties to permit the transfer of prisoners from countries in which they had been convicted of crimes to their home countries. The program is designed to relieve some of the special hardships that fall upon offenders incarcerated far from home, and to facilitate the rehabilitation of these offenders. Prisoners may be transferred to and from those countries with which the United States has a treaty.

Others by way of passing remarks, to mention just a few include; ii) European Convention on the Punishment of Road Traffic Offences; iii) European Convention on the Transfer of Proceedings in Criminal Matters; iv) European Convention on Extradition; v) European Convention on Mutual Assistance in Criminal Matters; vi) European Convention on the Suppression of Terrorism.

At our local/national level here in Nigeria, where the author had first information report, we have the Extradition Act, which was made applicable to Nigeria by virtue of Section 12 of the Constitution, which provides that no treaty between Nigeria and any other country shall have the force of law except to the extent to which such treaty has been domesticated enacted into law by the National Assembly. The Act provides in its Section 1 that shall apply to any agreement made by Nigeria with any other country for the surrender of persons wanted for prosecution or punishment.

The Act is also applicable to every separate country within the Commonwealth i. e each sovereign and independent country within the commonwealth together with such country's dependent territories as the President may by Order published.

8. **The Principle of Aut Dedere Aut Judicare**

This principle is of great importance and implication in international law especially in transnational criminal law. This principle is to the fact that states must either surrender a criminal within their jurisdiction to a state that wishes to prosecute the criminal or the offender in its own courts. Many international agreements contain provisions for this principle which comprised of four conventions namely: a) the 1949 Geneva Convention; b) the United Nations Convention for the Suppression of Terrorist Bombings, c) the United Nations Convention Against Corruption, d) the Convention on the Suspension of the Seizure of Aircraft, e) the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, f) the Convention for the Protection of Cultural Property in the Event of Armed Conflict, and g) the International Convention for the Suppression and Punishment of the Crime of Apartheid.

Some contemporary scholars have opined that this principle is not an obligation under customary international law, but rather a specific conventional clause relating to specific crimes and accordingly an obligation that only exists when a state has voluntarily assumed the obligation. The refusal of a country to extradite suspects or criminals to another country may lead international relations being strained. Often the country to which extradition is refused will accuse the other country of refusing extradition for political reasons regardless of whether it is justified or not. For instance, the case of IRA EINHORN, in which some United States commentators pressured President Jacques Chirac of France, who does not intervene in legal cases, to permit extradition when the case was held up due to differences between French and American Human Rights Law.

Under extradition too, the question involved may be complex especially when the country from which suspects are to be extradited is a democratic republic with a rule of law. Typically, in such countries, the final decision to extradite lies with the national executive. However, such countries typically allow extradition defendants recourse to the law with multiple appeals. These may significantly slow down procedures. On the other hand this may lead to unwarranted international difficulties, as the public, politicians and journalists from the requesting state will ask their executive to put

pressure on the executive of the country from which extradition is to take place, while that executive may not in fact have the authority to deport the suspect or criminal on their own. On the other hand, certain delays or unwillingness of the local prosecution authorities to present a good extradition case before the court on behalf of the requesting state, may possibly result from the unwillingness of the country's executive to extradite.

For instance, even though the United States has an extradition treaty with Japan, most extraditions are not successful due to Japan's domestic law. In order for the United States to be successful, they must present their case for extradition to the Japanese National. However, certain evidence is barred from being in these proceedings such as the use of confession, searches, or electronic surveillance. In most cases involving international drug trafficking, this is the bulk of the evidence gathered in the investigation on a suspect for a drug related charge; therefore, this usually hinders the United States from moving forward with the extradition of a criminal. For instance, in 2013, the United States submitted extradition request to many nations from the National Security Agency employee Edward Snowden, it criticized Hong Kong for allowing him Snowden to leave despite an extradition request. Nevertheless, the United States impeded Snowden's travel by cancelling his passport.

Issues of international law relating to extradition have proven controversial in cases where a state has abducted and removed an individual from the territory of another state without previously requesting permission, or following normal extradition procedures. Such abductions are usually in violation of the domestic law of the country in which they occur, as an infringement of laws forbidding kidnapping. Many also regard abduction as violation of international law in particular of a prohibiting or arbitrary detention. Kidnapping usually circumvent the normal formal process of extradition.

9. Conclusion

It is evident that most of the underlying considerations in prisoners/ criminal fugitives or sentenced persons transfer, apart from the political consideration, have to do with the entire welfare of the prisoners while in custody in other countries. It is also revealing that prisoners undergo a lot of challenges ranging from physical, mental illness, psychological torture, social degradation, risk of contracting communicable diseases.

These factors were known to have taken a toll on prisoners' population in the past. Long period of expected of a prisoner to serve as sentence is yet another incarceration in foreign countries. It means each year in year out prisoners are been released back into their community after being on exile prisoner with pangs of separation from loved ones.

The aim of transfer of prisoner among others is to facilitate the social rehabilitation of convicted persons by ensuring that they serve their sentences in their home country. This has led to development of a system for transferring of prisoners back to their country of nationality, habitual residence or another country with which they have close ties. This has equally led to the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty.

Against these backdrops it is recommended as follows:

(i) That the transfer of prisoners' treaties or agreements could be used as a yardstick in the introduction of a limit sentencing practice. This suggests that when prisoners are transferred to their home country, the overall cost of sentencing is reduced, especially when one compared the cost of probation and community treatment of prisoners. The transfer agreement could be used to scrutinize carefully what offences result in prison terms and the length of sentences that are imposed for violations of crimes in both the transfer and the administering states. This would avoid situations for prosecuting people for obscure offences

especially those that lack adequate mens rea requirement i e. conducts that are not morally blameworthy; for instance a low level drug user to support his own habits.

(ii) Another reform likely to be brought about by the transfer of prisoners agreement is through the introduction of an expanded earned time credit. Under this head, a prisoner must serve certain number of years in prison before he/she could be eligible for transfer. This will provide an opportunity for inmates to shave off a small amount of time from their sentences through good time credits by following prison rules and behaving themselves well while being incarcerated with a view to reduce the risk of recidivism upon transfer.

(iii) Imprisonment could also prove counterproductive since most offenders leave prisons far more dangerous than ever before. Through a transfer of prisoners' agreement, a kind of community corrections programme could be drawn up between the transfer and the administering states by introducing a pre-trial diversion in which an alleged offender can get pending charges dismissed upon the completion of a community based programme in the transferring state by diverting then away from prison cells, which are therefore kept for violent and repeat offenders; thus providing conditions of release and suitable re-entry for those leaving the transferring state to administering state.

(iv) Specialized courts is yet another area of criminal justice reform where transfer of prisoners agreement need to focus on. The function of the specialized courts is to focus on targeted groups of offenders sharing certain common characteristics in ensuring that the offenders comply with community corrections programmes before their extradition. Specialized courts have shown great promise in addressing offenders who suffer from mental illness or dependency issues or both. Specialized courts can be utilized as an alternative or adjunct court to more traditional court process at any point in the criminal justice process through a pre-trial diversion, at the pre-trial or pre-sentence stage or following a parole. The goal of the specialized is to reduce criminal recidivism among offenders who suffer in particular from substance abuse dependency through risk and needs assessment.

(v) Lastly, but not the least is collateral consequences. There are some lasting disabilities that accompany a criminal conviction, these are referred to as collateral consequences. Collateral consequences of conviction have steadily increased over the years. Collateral consequences may be imposed on offenders and ex-offenders as well, which may be legitimate or to serve public interests, such as prohibition against violent felons possessing guns or prohibition against drug dealers from becoming licensed pharmacists. It is difficult for ex-offenders who are indigent to make it in the outside world. Many offenders who are transferred owed fines to the transferring state and restitution to their victims, not to mention family obligations. So, collateral consequences can be in-built into transfer agreement so much so that offenders either before their transfer to the administering state would have remained in a stable environment with less likelihood of re-offending again, through social safety net. Ex-offenders assimilation and reintegration ought to be a principal goal of the justice system. those

who have committed a crime and paid their debts to the society should be given a second chance to become productive, law abiding citizens.

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