UNITED NATIONS
Office on Drugs and Crime

Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters[1]

[1] The Manuals on the Model Treaties on Extradition and Mutual Assistance in Criminal Matters were reviewed in an Intergovernmental Expert Group Meeting, organized by the United Nations Office on Drugs and Crime (UNODC), in cooperation with the International Association of Penal Law (AIDP), the International Institute of Higher Studies in Criminal Sciences (ISISC) and the Monitoring Centre on Organized Crime (OPCO), and hosted by ISISC in Siracusa, Italy, from 6 to 8 December 2002. The new versions were further updated to include more comprehensive references to the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

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PART ONE

Revised Manual on the Model Treaty on Extradition

Introduction

1. The Model Treaty on Extradition is an important tool in international cooperation in criminal matters, because of both its contents and structure. Its provisions are the result of a careful assessment of the needs and difficulties of countries in extradition procedures. It imposes clear and concise obligations, and contains acceptable safeguards for the requesting State (to whom extradition cannot be arbitrarily refused), the requested State (which maintains sovereignty and rights to protect persons wanted and nationals from unacceptable detention or treatment) and the person wanted (who has ample opportunity to have his or her particular circumstances examined).

2. On recommendation of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, the Model Treaty was adopted by the General Assembly in resolution 45/116 of 14 December 1990. Subsequently, in 1995, in order to ensure that the Model Treaty continues to reflect the most recent trends in extradition practice, the Ninth United Nations Congress recommended to the Commission on Crime Prevention and Criminal Justice to convene an intergovernmental expert group to explore ways to increase the efficiency of extradition and related mechanisms of international cooperation in criminal matters. This recommendation was endorsed in ECOSOC resolution 1995/27, of 24 July 1995, in which the Secretary General was requested to convene an expert group for this purpose.

3. The International Association of Penal Law and the International Institute of Higher Studies in Criminal Sciences (ISISC) hosted the work of the intergovernmental expert group, which met at Siracusa, Italy (10-13 December 1996). In its report, the expert group proposed certain revisions to the Model Treaty, which were amended and endorsed by the sixth session of the Commission on Crime Prevention and Criminal Justice, and subsequently approved by the General Assembly in Resolution 52/88 of 12 December 1997. Following the General Assembly's adoption of the revisions to the Model Treaty, the U.S. Department of Justice provided funding for their printing in the official languages of the United Nations.

4. The revised Model Treaty is an important tool that should be carefully reviewed by States as part of their examination of their extradition relationships, to ensure that such relationships are up to date. Within the domestic legal framework, the revised Model Treaty should also be consulted by States implementing their extradition obligations under article 16 of the United Nations Convention against Transnational Organized Crime (2000) (hereinafter referred to as "the Palermo Convention") and article 44 of the United Nations Convention against Corruption (2003) (hereinafter referred to as "the Merida Convention") [2], as well as, inter alia, to implement UNSCR 1373 (2001) and its requirements of denying safe haven to those who finance, plan, support or commit terrorist acts, and ensuring that such persons are brought to justice. In reviewing the Manual, reference is also made, where necessary and for the purpose of providing a comparative approach, to the following international instruments:

[2] The Model Treaty will aid States Parties in meeting such obligations by concluding extradition treaties with other States Parties to the Conventions (see article 16, paragraph 5 (b) of the Palermo Convention and article 44, paragraph 6 (b) of the Merida Convention).

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Drug Convention).
- International Convention for the Suppression of the Financing of Terrorism (1999) (Terrorist Financing Convention).
- International Convention for the Suppression of Terrorist Bombings (1997) (Terrorist Bombing Convention).
- European Convention on Extradition (1957) (Council of Europe 1957 Convention).
- Convention on Simplified Extradition Procedure between the Member States of the European Union (1995) (EU 1995 Convention).
- Convention relating to extradition between the Member States of the European Union (1996) (EU 1996 Convention).

Notes on headings in the Manual

5. For each of the articles of the Model Treaty, the manual provides commentaries under the following headings: purpose, application, implementation and, where appropriate, suggestions. The purpose heading provides a review of the objective sought to be realized by the article. The application category is intended to provide guidance on issues that may require particular consideration during negotiations and potential drafting suggestions to address the needs of various legal systems. The implementation category is designed to provide guidance on the manner in which implementing legislation will have to be structured in order to carry out the treaty's terms. The suggestions category is designed to alert countries to other issues of interest that are not dealt with under the preceding headings.

6. It should be noted that this Manual is designed primarily to assist States with the negotiation and implementation of extradition treaties. However, it can also be a useful tool for the development of extradition legislation that allows for extradition without treaty as it provides information on principles and practice that may be very relevant to the drafting of extradition legislation generally.

Notes relating to implementation

7. Implementation of extradition treaty obligations must be tailored to the particular legal system of the State concerned. Some countries will not require extensive implementing legislation, as their legal systems provide for extradition treaties to be directly applied (either because they follow the "monist" tradition of international law by which international treaties to which such States are parties automatically become a part of their internal law without the need for additional legislation, or because the extradition treaty provides sufficient precision to make extensive legislation unnecessary). However, even in such cases, most States will require implementing legislation or regulations governing the procedure applicable to the conduct of extradition hearings when they are the requested State. While the general issue of procedures governing the conduct of the extradition hearing in the requested State is not extensively treated in this Manual, the implementation category nonetheless provides guidance to such States on particular procedural issues that they may wish their domestic legislation, regulations or jurisprudence to address.

8. In contrast, many States (sometimes known as "dualist" states) require

extensive legislation to implement extradition treaties. The focus of these treaties is the surrender of persons to another State, which involves the exercise of sovereign powers. Extradition is the delivery of a person by the authorities of the State where he or she is found to the judicial authorities of another State where he or she is wanted for purposes of prosecution or for the imposition or enforcement of a sentence. A dualist legal system would view such matters as requiring a detailed legislative grant of authority governing the process.

9. The optimum legislation in such dualist States is a general, self-contained instrument that can be used to implement all extradition treaties and conventions. The legislation should mirror the scope of the treaties (as set out in article 1) by establishing a scheme applicable to all offences included in the definition of "extraditable offence" in the treaties. It should set out the conditions whereby a particular State can make extradition requests to other States and can carry out its obligations under treaties when an extradition request is received from another State.

10. In essence, the legislation should provide for the matters in the treaty, having regard to what would be sought by a requesting State and what the requested State would be obligated to do. It should also be borne in mind that extradition treaties always refer, to some extent, to internal legislation or procedures (see article 10). States may therefore bear in mind the need for enacting an adequate internal legal framework in this field.

11. Ideally, the legislation should be structured to go logically through the extradition process and to delineate clearly the responsibilities of different authorities (e.g. judicial, prosecutorial, and foreign affairs) within a State. It should be noted, however, that traditionally sovereign States have had the right to request other sovereign States to surrender a person to be dealt with by the law. Any legislation dealing with the exercise of such a sovereign right should be carefully drafted to ensure that the State has the widest possible power to address an extradition request to any State, and to ensure that such a power is not unintentionally limited, taking into account the necessary human rights protections.

Article 1: OBLIGATION TO EXTRADITE

Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

Footnote: Reference to the imposition of a sentence may not be necessary for all countries.

Commentary

Purpose

12. Article 1 is the fundamental basis of the Model Treaty on Extradition. It creates the obligation to extradite for an extraditable offence (as defined in article 2). The obligation arises for the requested State upon receipt of a request to extradite and is subject to the provisions of the treaty. The obligation applies in respect of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in relation to an extraditable offence.

Application

13. Reference to imposition of a sentence may not be necessary for all States. A State with a system where the act of convicting the person goes together with sentencing may wish to delete the words "for the imposition of". A State where the process of convicting and sentencing may be separated in time will probably be unable to agree to such a deletion, because it will wish to ensure that the text of the treaty clearly provides for extradition of persons who have become persons wanted after being found guilty but before a sentence has been pronounced.

Implementation

14. As set forth in paragraphs 7 through 11, those countries that require implementing legislation need to ensure that the legislation is broad enough to provide for extradition of offenders for prosecution, imposition of a sentence, and enforcement of a sentence. Such legislation will enable extradition to proceed smoothly even with States that have a different procedure for finding accused persons guilty and imposing sentence.

Article 2: EXTRADITABLE OFFENCES

1. For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least [four/six] months of such sentence remains to be served.

2. In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:

(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the requesting State.

4. If the request for extradition includes several separate offences each of which is punishable under the laws of both Parties, but some of which do not fulfil the other conditions set out in paragraph 1 of the present article, the requested Party may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.

Footnote to paragraph 3: Some countries may wish to omit this paragraph or provide an optional ground for refusal under article 4.

Commentary

Paragraph 1: Double criminality/minimum punishment

Purpose

15. Article 2 defines the offences for which extradition may be granted under the treaty. It requires double criminality (discussed under paragraph 2) and adopts the minimum penalty definition of extraditable offences, as opposed - to the list-of-offences approach for establishing double criminality. Offences do not have to be specifically listed in order for extradition to be possible in relation to them. Defining extraditable offences in this manner obviates the need to renegotiate a treaty or supplement it if both States pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover an important type of criminal activity punishable by both States.

Application

16. In applying the treaty, States will need to decide whether they wish the maximum period to be one or two years or anything else. The threshold should be high enough that extradition is not invoked in *de minimis* cases, yet is available for a wide range of more serious conduct. The word "maximum" is used to qualify the length of imprisonment possible, since the law of some States imposes minimum as

well as maximum periods. The phrase "a more severe penalty" refers to offences punishable with a higher maximum, life sentence, or capital punishment. The use of this minimum penalty test goes a long way to ensure that the treaty will apply to all relevant serious offences. However, in drafting the article and deciding on the maximum period of imprisonment that will apply, countries need to take care to cover the offences which are the subject of a multilateral convention to which both of the contracting States are parties. This will be particularly important where one or other of the parties requires a bilateral treaty to extradite and the convention in question contains a prosecute or extradite obligation such as that contained in several of the counter terrorism conventions. When concluding extradition treaties, States should ensure that the offences established by the 1988 Drug Convention, the Palermo Convention, the Merida Convention and the ten United Nations counter-terrorism conventions and protocols[3] are punishable as extraditable offences.

17. With respect to the situation in which the person wanted is to be returned for service of sentence in the requesting State, the Model Treaty suggests that extradition be granted only if a certain minimum number of months remain to be served. This limitation, while minor in nature, is intended primarily as a matter of efficiency, so that the intrusive and resource intensive extradition process not be invoked where the penalty for which extradition is sought is de minimus in nature. In deciding on how much time must remain to be served on the sentence, the States will want to carefully consider factors such as the geographic distance between the two countries and transportation facilities, with the resulting cost implications for extradition, in determining a realistic time period. Nonetheless, States need not include this reference if they wish to ensure that the person wanted is also subject to extradition in order to serve a sentence involving deprivation of liberty short of imprisonment, such as house arrest, or supervised conditional release. Even without such a clause, the offence would still have to meet the "maximum period of imprisonment" threshold. In addition, given the manpower and costs that will necessarily be incurred by the requesting State in seeking extradition, it will generally be the case that extradition will not be sought for insignificant penalties.

Implementation

18. This article needs implementation only by those States in which treaties

[3] Two of the twelve United Nations anti-terrorism instruments do not themselves define offences. Although clearly aimed at unlawful aircraft seizures, the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) simply requires a State Party to establish jurisdiction over offences committed on board aircraft registered in that State. The Montreal Convention on the Marking of Plastic Explosives for the Purpose of Identification (1991) requires States Parties to take measures, which may but are not required to be penal in nature, to prohibit and prevent movement of unmarked explosives.
The other eight Conventions and two related Protocols obligate States Parties to establish criminal offences defined in the particular instrument (1970 Unlawful Seizure Convention, 1971 Civil Aviation Convention and its 1988 Airport Protocol, 1973 Diplomatic Agents Convention, 1979 Hostage Taking Convention, 1980 Nuclear Material Convention, 1988 Maritime Convention and its Fixed Platform Protocol, 1997 Terrorist Bombings Convention and the 1999 Financing of Terrorism Convention).
For more information on these instruments, see the United Nations Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols, elaborated in the context of the Global Programme against Terrorism that was launched in October 2002 by UNODC (htpp://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf).

cannot be directly applied. For such States, the legislation should have a definition ("extradition offence" or "extraditable offence") for those offences for which extradition may be granted. Caution should be exercised to ensure that any such legislation does not conflict with any older treaties that may be in force (e.g. treaties that authorize extradition exclusively for a list of specified offences).

19. Generally, to be an extraditable offence, the offence must carry under the law of the requested State and under the law of the requesting State a maximum penalty of imprisonment (or other deprivation of liberty) for not less than a certain minimum period. A minimum sentence of one year could be provided for in the legislation and it would always be possible in negotiating a treaty with a particular State to modify that requirement (e.g. to increase the minimum sentence up to two years for the extradition relationship with that particular State). When enacting a new criminal offence, States should consider whether the penalty should be made sufficient for the offence to be extraditable.

Paragraph 2: Determination of double criminality

Purpose

20. The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law. However, to militate against the possibility of an excessively formalistic application of the treaty based upon the semantic description of an offence (which will obviously differ depending on the legal systems and languages concerned) rather than its practical nature, paragraph 2 provides clarification as to the manner in which the double criminality standard is to be applied.

Application

21. The treaty provision should require differences in the names of offences, as well as different categorizations, to be disregarded in determining double criminality. The introduction of such explanatory clauses to reinforce a generic double criminality standard explicitly minimizes the significance of the particular legislative language used to penalize certain conduct and encourages a more pragmatic focus on whether the underlying factual conduct is punishable by both contracting States, even if under differently named statutory categories. Many difficulties that arise because of the need to make highly technical distinctions between different crimes (for example theft, fraud, embezzlement; malversation and breach of trust; degrees of homicide; financial misconduct by public officials; or various forms of participation in organized criminal activities) are thereby avoided. In extradition treaties between civil and common law States, what otherwise could be difficult double criminality issues could be preempted by specific provisions on how common law offences such as attempt and conspiracy relate to the civil law concepts of criminal association[4].

[4] Article 2 paragraph 2 of the Model Treaty provides that it shall not matter whether "the laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology" or "the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account". This language means that the requested State should not analyze the conduct for which extradition is requested only by reference to a domestic offence having the same name, or even

Implementation

22. If States have enacted legislation to give effect to extradition treaties, it may be useful to furnish guidance to judicial officials making extradition decisions by including a provision that applies the approach set forth in paragraph 2. Such a provision will require the relevant authority in the requested State to look at the totality of the conduct and to decide whether any combination of those acts and/or omissions would constitute an offence against a law in force in the requested State.

Paragraph 3: Fiscal offences

Purpose

23. Historically many extradition treaties precluded extradition for fiscal offences (i.e. offences against laws relating to taxation, customs duties, foreign exchange control or other revenue matters) as an expression of the sovereignty of the State which imposes fiscal obligations on its citizens. However, with the phenomena of money laundering, corruption and the infiltration of criminal proceeds into national economies, there has been a clear trend away from this ground of refusal with many modern treaties not providing for such a "fiscal offence" exception. The Model Treaty reflects this approach with paragraph 3 specifically recognizing extradition for fiscal offences and going further to ensure that there is sufficient flexibility in the dual criminality requirement to allow for extradition even though the types of taxation may vary between the two countries. However the position on this point is not completely settled. Some States may still seek to exclude pure fiscal offences from the treaty or will not want to specifically provide, as in paragraph 3, that extradition will be available in the face of differing types of taxation. In such cases the contracting parties may decide not to include paragraph 3 or to go further and make fiscal offences subject to a discretionary ground of refusal. This issue will need to be fully canvassed between the contracting parties and they may also wish to have regard to the position taken in recent international instruments on the question of fiscal offences. In particular, with the penalization of money laundering under the 1988 Drug Convention (article 3, paragraph 1 (b), (c) (i) and (iv)), the Palermo Convention (article 6) and the Merida Convention (article 23), all these conventions contain specific provisions that address the fiscal offence exception. The 1988 Drug Convention states in article 3, paragraph 10 that the crimes covered by that Convention shall not be considered by the parties thereto as fiscal offences for which cooperation may be denied. The Palermo Convention provides in article 16, paragraph 15 that extradition may not be refused on the sole ground that the offence is also considered to involve fiscal matters. A similar provision is also included in the Merida Convention, which covers a broad range of criminal offences related to corruption (article 44 paragraph 16).

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by reference to offences which have the same elements but may be characterized differently, such as fraud rather than theft. Instead, the requested State's extradition authorities should look at all the evidence of acts or omissions presented by the requesting State, and in appropriate circumstances should even inquire if additional proof is available which would assist in the determination of whether those acts or omissions would be an offence under any law of the requested State.

Application

24. The ideal position from the point of view of States willing to extradite for fiscal offences is to include a provision such as the one in paragraph 3.

25. While the footnote to paragraph 3 provides for the possibility of either including no reference to fiscal offences (so that they would be extraditable based on the general rule of double criminality spelled out in article 2, paragraph 1) or including the exception as a discretionary bar on extradition (in article 4), States should examine the viability of the latter approach in view of the abovementioned United Nations instruments which expressly rule out such an approach.

Implementation

26. For States willing to extradite for fiscal offences, the term "offence" could be defined in the legislation to include "an offence against a law relating to taxation, customs duties or other revenue matter or relating to foreign exchange control." States should take care to ensure that their implementing legislation does not conflict with the obligation, under the above-described UN conventions, to extradite for tax or fiscal offences.

Paragraph 4: Accessory extradition

Purpose

27. Paragraph 4 makes possible "accessory extradition" which means surrender for lesser offences. It allows a State to seek extradition for offences not carrying the minimum penalty.

28. Article 2, paragraph 1, provides that extradition can only be granted for offences carrying a specified minimum penalty (imprisonment for at least [one/two] year(s)). People whose extradition is sought may, however, also be wanted in the requesting State for other offences, including lesser offences. Under article 2, paragraph 4, extradition for such lesser offences is permitted. The rationale for this exception to the general rule is that, while a person should not face compelled dislocation for exclusively minor conduct, once extradition is granted for more serious conduct and the person will be rendered to the requesting State in any event, there is no reason not to also bring him or her to justice for additional charges that meet all of the other requirements for extradition.

Application

29. Under article 2, paragraph 4, the requested State may grant extradition in respect of lesser offences. Extradition may only be granted if the person is to be extradited to the requesting State for at least one extraditable offence; thus, extradition does not lie for lesser offences only. It applies also in cases where a person has been sentenced to a series of short-term prison sentences, or to imprisonment and a pecuniary sanction, at the same time. While extradition for such minor offences is not mandatory under paragraph 4, States should note that a number of modern extradition treaties make the provision mandatory.

Implementation

30. The legislation will need to provide for the relevant authority of the requested State to grant extradition in relation to lesser offences if the person is to be extradited for at least one extraditable offence.

Suggestions

31. Before initiating extradition proceedings by way of a request to another State, the appropriate bodies should satisfy themselves that the crime of which the person is accused or convicted is an offence for which the extradition may be granted by the requested State under the applicable treaty or law.

32. The authorities of the requesting State should be asking the following question prior to proceeding with the request: Are there any non-extraditable offences for which the person is to be tried, or for which he or she has to serve a sentence, once he or she returns to the country? Article 2, paragraph 4, allows the State to seek extradition for accessory offences. If the requested State grants such a request, the person can be returned for both extradition and accessory offences, to be tried or to serve sentences for both. Unless extradition is sought for accessory offences, the person cannot be dealt with for such offences on his or her return unless he or she loses protection by one of the recognized means (see article 14).

33. A request for extradition should therefore refer to all offences for which prosecution or enforcement is sought.

Article 3: MANDATORY GROUNDS FOR REFUSAL

Extradition shall not be granted in any of the following circumstances:

(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature. Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition;

(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;

(c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law;

(d) If there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person's extradition is

requested;

(e) If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;

(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;

(g) If the judgment of the requesting State has been rendered in *absentia,* the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence;

Footnote to subparagraph (a): Countries may wish to exclude certain conduct, e.g., acts of violence, such as serious offences involving an act of violence against the life, physical integrity or liberty of a person, from the concept of political offence.

Footnote to subparagraph (e): Some countries may wish to make this an optional ground for refusal under article 4. Countries may also wish to restrict consideration of the issue of lapse of time to the law of the requesting State only or to provide that acts of interruption in the requesting State should be recognized in the requested State.

Footnote to subparagraph (f): International Covenant on Civil and Political Rights, General Assembly resolution 2200 A (XXI), annex.

Footnote to subparagraph (g): Some countries may wish to add to article 3 the following ground for refusal: "If there is insufficient proof, according to the evidentiary standards of the requested State, that the person whose extradition is requested is a party to the offence" (see also footnote to article 5 paragraph 2 (b)).

Commentary

Purpose

34. Article 3 sets out the circumstances in which extradition shall not be granted. If established, the circumstances operate as a complete bar to extradition. Mandatory grounds for refusal are included because extradition is always considered inappropriate in these cases (there are also discretionary grounds in article 4 that a State may rely on to refuse a request as it deems appropriate in a given case).

35. The mandatory grounds for refusal set forth in article 3 represent commonly applied grounds found in current extradition practice, although, as it will be described in further detail below, they are not universally applied, given that the modern trend is to reduce impediments to extradition to the greatest degree possible (see the Terrorist Bombing and Terrorist Financing Conventions). Those grounds for refusal that are

included should be viewed as exceptions to the general duty to extradite, which are justified by fundamental concepts of justice of the particular States establishing the treaty relationship. The appropriate exceptions will thus vary, depending on the legal systems and circumstances of the treaty partners involved.

36. In an attempt to classify the various grounds for refusal commonly found in customary international law and national laws, the Model Treaty distinguishes five categories of exceptions, relating to: (1) the nature of the offences; (2) the personal status or situation of the offender; (3) the protection of the individual against the possibility of an unfair trial or inhuman or degrading punishment in the requesting State; (4) the priority of the jurisdiction of the requested State in cases where the offence also constitutes a breach of the law of the requested State; and (5) the maintenance of reciprocity in extradition relations. Provision is also made in the footnotes for the contracting parties to agree on various means of further limiting these grounds for refusal.

Application

37. Different States will have different views on the importance of, and the need for, some of these grounds. States may wish to add to this list of mandatory grounds for refusal, or to reduce the list, or to have some listed as optional grounds instead (i.e. in article 4). Each State should review the guidance set forth below on the advantages and disadvantages of including a given ground for refusal in determining whether such ground is appropriate to its circumstances.

Implementation

38. Where the treaty would not be directly applicable, the legislation will need to ensure that extradition is not permissible (or shall not be granted by the relevant authority of the requested State) if grounds listed in article 3 exist. Each ground will not need to be listed separately, because the provision could refer to the fact that if a relevant treaty lists grounds under which extradition shall be refused, then extradition shall not be granted in cases where those circumstances exist. However, States may wish to specifically include certain grounds in their legislation under which extradition must be refused. This would be a matter of policy for each State and would obviously need to be taken into account in any treaty negotiations.

Suggestions

39. Before making a request for extradition, all of the circumstances of the case should be examined by the requesting State to decide whether any of the grounds are, or are likely to be, established. If one or more of the grounds exist, usually there would not be much point in making a request. However, if it is likely or possible that a ground may be established, then a decision will have to be made about whether to go ahead with a request, balancing the likelihood of success with the likelihood of refusal based on one of the grounds.

40. Before making a formal request, a State will often find it useful to informally approach the appropriate authorities in the State to be requested (as designated by the parties (see article 5, paragraph 1)).

Subparagraph (a): Political offence

Purpose

41. Subparagraph (a) provides protection against extradition for certain criminal activities undertaken in a political context that are regarded by the requested State as offences of a political nature. Extradition for a non-violent, "pure" political offence, such as prohibited criminal slander of the Head of State by a political opponent or banned political activity, might embroil the requested State in the domestic politics of the State requesting extradition, where today's dissidents may be tomorrow's governing class. Values of political tolerance and free speech may make a government reluctant to grant extradition for such offences. The community of nations has generally accepted without undue complaint a refusal to extradite for such non-violent purely military or political offences, pursuant to treaty or domestic legislation.

42. The same degree of international acceptance cannot be found with respect to refusals to extradite based upon the political offence exception when the conduct in question is violence committed for asserted political goals, and which therefore contains all of the elements of common crimes such as bombing and murder. The history of the political offence exception is an interesting study in the progression of efforts to accommodate legitimate political change, while increasingly denying sanctuary to perpetrators of violence. Traditional domestic legal tests to define and fix the limits of the political offence exception were in part historical reactions to anti-democratic, authoritarian regimes in which armed resistance was considered perhaps the only viable means of securing a change of government. With the increasing global trend towards the succession of governments through democratic elections, international law and public opinion are becoming progressively more intolerant of political violence, and treaty provisions to an increasing extent exclude violent conduct from the benefit of the exception (see UNSCR 1373, paragraph 3(g) calling upon all States to ensure "that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists).

43. The second sentence of subparagraph (a) was added in the 1997 revision. It is intended primarily to ensure that persons who have carried out acts that are established as criminal offences in, *inter alia*, the United Nations counter-terrorism instruments, cannot avoid extraditions by invoking the political offence exception to prevent extradition (see, for example, the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (111) A, article 7); the Inter-American Convention against Terrorism (2002) article 11; the Terrorist Financing Convention, article 14); the Terrorist Bombing Convention, article 11).

Application

44. The question of what constitutes "an offence of a political nature" is a complex one. Its interpretation may vary from one State to another. However, in recognition of the fact that justifications that may once have excused political violence no longer exist between treaty partners with democratic systems in which political change can be achieved by peaceful means, both the second sentence of

subparagraph (a) and the additional footnote thereto encourage States negotiating extradition treaties to narrow the scope of this ground of refusal.

45. For example, certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition. Such crimes may also constitute breaches of international legal norms (see paragraph 43). States may consider the inclusion of such categories in the treaty. They may also consider adding other forms of violent crime to the list of conduct to which the political offence exception does not apply (e.g., murder, kidnapping, etc.).

Implementation

46. The detail of definition will be up to each State. In preparing their legislation, States are advised to ensure that their legislation prohibits the denial of extradition on political offence grounds, at least with respect to crimes established under the UN counter-terrorism instruments and other appropriate international conventions to which they are parties, and that it permits such other limitations as may be agreed to with particular treaty partners.

Subparagraph (b): Prejudice (race, religion, nationality, ethnic origin etc)

Purpose

47. Subparagraph (b) covers an exception to extradition when it might enhance discriminatory practices in the requesting State. It is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world. Inspired by the principle of non-refoulment contained in the Convention relating to the Status of Refugees, it enables a party to refuse extradition if it determines that the extradition request is discriminatory in its purpose or if the subject of the request may be prejudiced because of one of the enumerated discriminatory grounds.

Implementation

48. This ground for refusal of extradition is included in numerous international instruments such as the 1988 Drug Convention (article 6, paragraph 6), the Palermo Convention (article 16, paragraph 14), the Merida Convention (article 44, paragraph 15) and the recent counter terrorism conventions. At the same time, it may occur that persons wanted will make non-meritorious claims that they will face such treatment. Thus, in preparing its legislative scheme implementing such a provision, a State should consider how to deal with such claims as a procedural matter, such as: (a) how a person whose extradition is requested can secure consideration of such a claim, and what means of proof should be advanced to support the claim; (b) how a requesting State can and should respond to such allegations; (c) how the requested State or its judicial authorities can obtain information themselves relevant to the merits of such a claim, what evidence should be considered by the authority who will decide the issue, and whether responsibility for deciding the issue should reside with the Government or with the judiciary; and (d) whether there should be a presumption of regularity in connection with any regularly presented request unless contested by the person to be

extradited, and what criteria should be followed in determining when that presumption should be considered to be overcome. States may also wish to consider whether the providing of particular assurances by the requesting State may in close cases enable extradition to be granted, while providing an acceptable degree of protection.

Subparagraph (c): Military offence

Purpose

49. It is a recognized principle that extradition is not possible for military crimes that are not otherwise subject to criminal sanction. Subparagraph (c) prevents extradition for offences that are only offences against military law, such as desertion and insubordination. Offences that, although offences under military law, would also be offences under the non-military law of parties would be extraditable according to the Model Treaty (see, for example, the discussion in paragraphs 41 and 45 above).

Subparagraph (d): Non bis in idem/Double jeopardy

Purpose

50. Subparagraph (d) applies the rule against double jeopardy, or *non bis in idem,* by providing a bar on extradition if the person has already been tried in the requested State for the offence for which extradition has been sought.

Application

51. States may wish to also apply the principle of non bis in idem/double jeopardy in cases involving the requesting State or a third State where the person has been subject to a final judgement and has served his sentence. This could be an optional exception to extradition rather than a mandatory ground if desired.

Implementation

52. States should be aware that this ground for refusal does not apply to cases involving pardon or amnesty in the requested State, which instead is dealt with in subparagraph (e) (see paragraphs 53 and 54 below). In preparing implementing legislation, States may wish to consider what criteria and evidentiary information are appropriate and necessary to measure whether a second prosecution is for the same offence, particularly in complex and continuing group crimes. Where a criminal group may be carrying out activities in more than one State simultaneously, as part of an overall enterprise, all States may have legitimate law enforcement interests to vindicate. Accordingly it can be beneficial for States to consult in advance of prosecution so that the charges brought by one State do not unnecessarily increase the likelihood that a subsequent extradition request will be precluded by the principle of *non bis in idem*. Thus, a prosecution of the manager of a trafficking organized criminal group could charge a broad criminal enterprise involving the domestic recruitment, trafficking of women into a foreign country and organization of the prostitution activity in the "exploitation stage" of the trafficking process carried on in that jurisdiction, together with participation in its profits. Conviction or acquittal

based upon such an expansive charge could well preclude extradition for foreign offences involving the organization of and sharing in the profits of the organized criminal group. If, on the contrary, the domestic charge is limited to the offences committed, for example, in the context of the recruitment stage, then extradition could be granted for all the other offences perpetrated in the subsequent stages of the trafficking process, which are much more linked to the foreign jurisdictions of the transit and destination countries[5].

Subparagraph (e): Lapse of time or other immunity from prosecution

Purpose

53. Subparagraph (e) provides protection from extradition if the person cannot be prosecuted or punished under the law of either party for any reason, including lapse of time or amnesty. In recognition of potential difficulties that may arise through application of this ground for refusal, the footnote to this subparagraph advises that consideration may be given to restricting its application.

Application

54. As noted above, the footnote suggests alternative approaches to the mandatory refusal of extradition in cases involving amnesty, lapse of time and other forms of immunity. With respect to amnesty, States should consider whether the unilateral granting of amnesty by a requested State, which may often be based on purely domestic legal and policy considerations, should always operate to bar extradition to a requesting State which may have significant prosecutive interests quite independent from those of the requested State. Some of the same issues described in paragraph 52 with respect to application of the non-bis in idem/double jeopardy ground for refusal will be pertinent in such cases. With respect to denying extradition when the person wanted has "under the laws of either Party, become immune from prosecution", here too, some countries may wish to make this an optional ground for refusal under article 4, or omit it, as such a provision raises comparable issues, as well as practical difficulties for the requested State of how to be sure that it has correctly read and interpreted the requesting State's law.

55. With respect to lapse of time, the 1997 revisions offer States several alternative approaches to the traditional provision. This reflects the increasing awareness that domestic legal frameworks governing lapse of time often vary widely, with various formulae for calculating the expiration of the statutory period, and that

[5] In countries with a system of discretionary prosecution, a prosecutor can simply elect to charge only those offences which are clearly distinguishable from those for which his counterpart in a foreign jurisdiction intends to seek extradition. In countries which follow the principle of mandatory prosecution, and require that all domestic offences be charged for which evidence is available, coordination is more difficult but still possible. In an atmosphere of due respect for national sovereignty, prosecuting only those offences which have a clear geographic locus in the mandatory prosecution state can facilitate extradition for other activities of the same group which violate the laws of another state and are committed on that state's territory. Focusing on the processing of illegal drugs in the source country as contrasted to their importation into the consuming country, choosing different victims or different schemes of a fraudulent telemarketing group, or charging the actual execution of a terrorist attack as opposed to the criminal association or conspiracy which planned and organized the attack in another foreign country, can reduce the likelihood of a successful *non bis in idem* defense.

application of the laws of both requesting and requested States may lead to unintended consequences. For example, it may be difficult for law enforcement authorities of a State that is searching for a person wanted to anticipate which actions they should take to stop expiration of the statute of limitations of other countries to which the person wanted may flee, in order to guard against potential expiration of the statute of limitations in another State. If States negotiating an extradition treaty desire to include a lapse of time ground for refusal, the preferred way of resolving the above described problem would be to apply the lapse of time laws of the requesting State alone (a variant of this option could be to omit lapse of time as a ground for refusal where there can be a high degree of confidence that the requesting State would not have sought extradition if it would be subsequently barred from prosecuting the person wanted due to lapse of time). A fallback option would be that, where the lapse of time provisions of the requested State are to be considered, the acts that interrupt the expiration under the law of the requesting State should be applied.

56. States should ensure that, in concluding their extradition treaties, provisions drafted with respect to Article 3 (e) and 4 (b) should be consistent despite discrepancies in the language used in the Model Treaty itself.

Subparagraph (f): Torture, cruel, inhuman or degrading treatment or punishment and minimum guarantees in criminal proceedings

Purpose

57. Subparagraph (f) contains human rights exceptions to extradition and takes account of some basic requirements in the International Covenant on Civil and Political Rights. It is included as a mandatory bar on extradition to justify refusal to extradite where a punishment of mutilation or other corporal punishment may be imposed or where a person may not receive the minimum guarantees in criminal proceedings, as contained in the Covenant. Subparagraph (f) does not apply to capital punishment, which is dealt with separately in article 4, subparagraph (d).

Application

58. Many of the considerations described in paragraph 48, above, are pertinent to the application of this ground for refusal. Here too, States may wish to consider whether the providing of particular assurances by the requesting State may, in close cases, enable extradition to be granted, while providing an acceptable degree of protection.

Subparagraph (g): Judgment rendered in absentia

Purpose

59. Subparagraph (g) provides further protection from extradition where (1) the judgement of the requesting State has been rendered in absentia, (2) the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence, and (3) he or she has not had or will not have the opportunity to have the case retried in his or her presence.

Application

60. All three of the conditions set forth above must be met to constitute mandatory grounds for refusal of extradition. If the first condition is understood simply as the physical absence of the accused from the court proceeding, interpretative issues may arise where the accused was present at the commencement of his or her trial, and fled prior to its completion. Some legal systems do not consider convictions obtained in such cases to be "in absentia", while others do. Interpretative issues should not arise when an accused person who is physically disruptive is detained in a separate room with an audio or audio-visual connection to the court room, or is otherwise provided with access to the ongoing proceedings through counsel. The lack of notice condition can present more complex issues, particularly when a legal system imposes a comprehensive residential registration system and imputes knowledge to a person from certain legally prescribed procedures for giving notice, and provides for appointed counsel to represent a non-appearing accused. The third condition, the opportunity for retrial, is an obvious means of overcoming any prior difficulties and may be relatively simple and cost-effective in systems which permit the taking or testing of evidence at an appellate level or in a review procedure. Some States subject the granting of extradition in these cases to an undertaking by the requesting State to provide the opportunity to have the case retried in the presence of the person sought.

Further grounds for refusal

61. States may wish to add to article 3 the following further mandatory grounds for refusal: "If there is insufficient proof, according to the evidential standards of the requested State, that the person whose extradition is requested is a party to the offence" (see also articles 7 and 14).

62. This may be used by States that continue to require the submission of a prima facie case against the person wanted (where the sufficiency of evidence is decided in the requested State) before surrender will be granted. The issue can be dealt with here or in the required documents (see article 5) or, for an abundance of caution, in both (see the discussion under article 5, paragraph 2).

Article 4: OPTIONAL GROUNDS FOR REFUSAL

Extradition may be refused in any of the following circumstances:

(a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;

(b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;