

UNDCP MODEL EXTRADITION (AMENDMENT) BILL 2000

1. The object of this Bill is to ensure that the enacting State complies with its obligations under the drug control conventions in respect of extradition. The Bill would amend existing legislation on this topic. Most importantly, the Bill makes provision for what offences are to be deemed non-political and extraditable, in accordance with those activities listed as criminal offences in Article 3 of the 1988 Drug Control Convention. It also makes provision for persons whose extradition is sought to surrender without judicial determination of whether they are liable to extradition in certain circumstances, and for the temporary surrender of persons already the subject of proceedings or serving sentence. Where the enacting State refuses to extradite the person, the Bill imposes a requirement to submit a case for the purposes of prosecution in that country in certain circumstances.

PART I - PRELIMINARY

Clause 1 - Short title and commencement

Clause 2 - Definitions

2. The definition of "*foreign State*" is similar to that used in the Foreign Evidence Bill, the Mutual Assistance in Criminal Matters Bill, the Drug Abuse Bill, and the Witness Protection Bill, in covering every constituent part of the country including a territory, dependency or protectorate. It is immaterial for the purposes of this Bill for example whether or not the constituent part administers its own laws in relation to drug abuse, or in relation to international cooperation.
3. "*Proceedings*" has an identical definition to that in the Mutual Assistance in Criminal Matters Bill. "*Proceedings*" are defined very widely, in order to cover all the permutations of the differences of procedure between common and civil law system countries in handling investigations, inquiries and determinations of fact, whether undertaken by police, prosecutors or judges. It would thus cover for example investigations

led by the police in common law jurisdictions. “*Proceedings*” are not restricted to serious offences.

4. Clause 2(2) makes it clear that references to the laws of the enacting State and a foreign state include references to unwritten laws in force.

PART II - AMENDMENTS TO THE [EXTRADITION ACT]

Clause 3 - Extraditable offences

5. Article 6 of the 1988 Convention on extradition applies to the offences listed in Article 3. Provision is made in Part III of the Drug Abuse Act 2000 and Part II of the Money Laundering and Proceeds of Crime Act, 2000 to implement the obligation imposed by the Convention on parties to it to ensure that the activities referred to in Article 3 are criminal offences. In accordance with Convention obligations, clause 3(1) of the Bill provides that an offence against a provision of Part III of the Drug Abuse Act 2000 and Part II of the Money Laundering and Proceeds of Crime Act, 2000 (or other legislation which contains these terms, to be specified), is deemed to be an extraditable offence and not a political offence. This is important because a common ground for refusal to extradite a person in many states is that the offence in question is regarded as a political offence, or as an offence connected with a political offence.

Clause 4 - Consent surrender

6. Clause 4 allows for extradition without a determination by a named Court as to whether the person is liable to be extradited, provided that the person whose extradition is sought consents to the making of the extradition order without such a determination. Surrender by consent would have the advantage of saving Court time and resources, including manpower. However, given that important rights are at stake for the individual, chiefly rights of free movement, the Court must be satisfied that the person involved understands the implications of consent, and that the consent was given voluntarily. If so, it is to grant the order, but if not, must proceed to determine the person’s liability to be extradited.

Clause 5 - Temporary surrender

7. Clause 5 makes provision for where the person whose extradition is sought is the subject of criminal proceedings, or is serving or undergoing sentence in the requested State for an offence against the law of that State. In those circumstances, the specified Court can order the temporary surrender of the person to the foreign State where it is satisfied as to three conditions, specified in clause 5(1)(i)-(iii). Clause 5(1)(ii) refers to “*the interests of the administration of justice*”. Such interests will depend on a number of factors, for example the severity of the offence committed in the foreign State, the stage of proceedings reached, or the length of sentence being served, and the person’s fitness to stand trial.

7. Undertakings in relation to the trial of the person in the foreign State referred to in Clause 5(1)(iii)(a) may be procedural or substantive. They may include for example that the person has access to defence counsel, or that if the proceedings are conducted in a language that person does not understand, translation facilities are available. Undertakings might also be given about the levels of security during the trial. In accordance with Clause 5(1)(iii)(b) and (c), undertakings should also be given as to the return of the person to the requested State for the purpose of completion of the proceedings or the sentence being served, and the custody of the person while traveling to and from, and while in, the foreign State. Clearly a requested State would be unwilling to surrender a person if these assurances could not be given.

8. Clause 5(2)(a) is important in providing the legal authority, where otherwise none would exist, for the release of the person into the custody of the appropriate authorities of the foreign State for the purposes of the temporary surrender, and to be taken back into custody on return. Clause 5(2)(b) provides that a person extradited under this provision can add any time spent in such custody outside the requested State to the time served under sentence in the requested State. This would include time spent in custody while traveling to and from, and while in, the foreign State.

Clause 6 - Requirement to submit case for the purposes of prosecution if extradition refused on certain

grounds

9. Clause 6 makes provision for the submission of cases for prosecution purposes in the requested state, where that state refuses the request to extradite the individual concerned. The principle of dual criminality is reflected in clause 6(1), (ie the relevant act should be a crime in both the requesting and requested State before extradition is possible). Looking at the grounds for refusal by the requested State, many states, by constitution, law or practice, prohibit the extradition of nationals. Clause 6(1)(b)(i) also refers to the ground that the person is a habitual resident of the requested State. Grounds falling under clause 6(1)(b)(ii) would include those referred to in Article 6(6) of the 1988 Convention, which provides that a requested State may refuse to extradite a person where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions.
10. In most instances, countries which do not extradite nationals will have domestic jurisdiction to prosecute nationals for offences committed in the territory of another State. Clause 6(1)(b) obliges the Attorney-General, (or other designated senior law officer with responsibility for prosecutions), to submit the case to the Director of Public Prosecutions, (ie the person who institutes and undertakes criminal proceedings in important or difficult cases, under the superintendence of the Attorney-General, or equivalent person to be designated by the enacting State), where extradition has been refused on the ground that the fugitive is a national or habitual resident of that State. The obligation on the Attorney-General is that of submission of the case only; there is no duty on the Director of Public Prosecutions to prosecute, but s/he would be under a duty to review the case for prosecution. The Attorney-General has a discretion to submit cases where the request is refused on any other ground.
11. Article 4(2) of the 1988 Convention provides that a party is to take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3(1), ‘*when the alleged offender is present in its territory and it does not extradite him to another Party on the ground ... (ii) that the offence has been committed by one of its nationals*’. Article 6(9)(a) provides that where

a Party does not extradite on those grounds, (inter alia) it is obliged to submit the case to its competent authorities for the purpose of prosecution, “*unless otherwise agreed with the requesting Party.*” The possibility of such agreement is not referred to in the model legislation, but this would be factor to be taken into account by the Director of Public Prosecutions when making a decision whether or not to prosecute.

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