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.

CONTENTS

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).

---

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;

(c) If a prosecution in respect of the offence for which extradition is requested is pending in the requested State against the person whose extradition is requested;

(d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. 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;

(e) If the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

(f) If the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that 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 for the offence for which extradition had been requested;

(g) If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal;

(h) If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

Footnote to subparagraph (a): Some countries may also wish to consider, within the framework of national legal systems, other means to ensure that those responsible for crimes do not escape punishment on the basis of nationality, such as, inter alia, provisions that would permit surrender for serious offences or permit temporary transfer of the person for trial and return of the person to the requested State for service of sentence.

Footnote to subparagraph (d): Some countries may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence.

Footnote to subparagraph (f): Some countries may wish to make specific reference to a vessel under its flag or an aircraft registered under its laws at the time of the commission of the offence.

Commentary

Purpose

63. Article 4 sets out discretionary grounds that a State may rely on to refuse a request when appropriate. These grounds serve as possible bases for denial of extradition, but may not justify mandatory refusal of a request in every circumstance.

Application

64. As described in paragraph 35 above, the modern trend in extradition treaty practice is to reduce grounds for refusal; thus, States may wish to include such grounds for refusal in their extradition instruments only where absolutely necessary.

Implementation

65. The legislation will need to include a discretion for the appropriate body to refuse a request if one or more of the grounds in the treaty exist. Instead of listing each ground, there could be a general provision that provides that where a relevant treaty provides grounds such that extradition of a person may be refused, extradition may be refused if those circumstances exist.

Suggestions

66. Prosecuting authorities and bodies responsible for making extradition requests should be aware of the possibility (and where possible the likelihood) of refusal of a request on any of these grounds in a particular case. The authorities of a State that is seeking extradition may wish to contact the central or competent authority of the requested State in advance to discuss the likelihood that a potential ground for refusal may be invoked, and determine if it is possible to overcome it. Once such consultations have taken place, a decision can be made on whether to make an extradition request. It should be noted, however, that in certain cases it may be important to make an extradition request even where there is a significant chance of denial, as the making of a request may be a prerequisite to prosecution in the requested State in lieu of extradition (see paragraphs 75, 76 and 84).

Subparagraph (a): Nationality

Purpose

67. Subparagraph (a) enables a requested State to refuse extradition of its nationals, but includes a "domestic prosecution in-lieu of extradition" requirement if it does so[6].

[6] See, for example, article 16, paragraph 10 of the Palermo Convention and article 44, paragraph 11 of the Merida Convention. More information on the relevant provision of the Palermo Convention is included in the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, elaborated by UNODC in response to the request of the General Assembly to the Secretary General to promote and assist the efforts of Member States to become States Parties to the Convention (to be published soon).

68. While traditionally it was common law States that did not restrict the extradition of their nationals (in part on the grounds that they were not always prepared to exercise jurisdiction over such nationals for offences committed outside their respective territories), an increasing number of civil law States have adopted the same approach (see article 7 of the EU 1996 Convention, which applies to extradition among member States of the European Union). This trend may be explained in part by the complexity and resource implications of conducting domestic prosecutions in lieu of extradition based on foreign gathered evidence, and the concern that dangerous criminals may be able to remain at large in their societies.

69. Quite a few States of the civil law tradition have adopted a different view. They assert extraterritorial jurisdiction over nationals, so if nationals are not to be extradited (because of constitutional or policy prohibitions) they may be tried for extraterritorial offences. In respect of domestic proceedings trial in lieu of extradition States may wish to include in this article provisions to ensure the efficiency of such prosecutions in the requested state and to emphasize the need for close cooperation. The approach of making discretionary the extradition of nationals is a way of coordinating the different attitudes (see article 6 of the Council of Europe 1957 Convention). States may be able to assure other States that they would generally be prepared to extradite nationals, in which case this ground for refusal would be omitted. It would be recognized that parties that cannot do so would be expected to prosecute nationals under their own law, if so requested, for an offence committed in other States.

70. The term "taking appropriate action" refers not only to investigating the case, or bringing proceedings, but also to taking over responsibility for enforcing a sentence, or the remainder of it, imposed in the requesting State.

71. As an alternative to the traditional formula, States may consider such variants as extraditing their nationals for particularly serious offences, or surrendering their nationals temporarily for trial in the requesting State on the condition that any sentence imposed can be served in the requested State. In addition, if the legal systems permit, States could also consider including transfer of proceedings as an alternative where extradition is not possible because of the nationality of the person sought.

Application

72. States should consider whether they have flexibility under their legal system to either extradite their nationals, or adopt one of the alternative approaches described in paragraph 71.

Implementation

73. States that are prepared to extradite their nationals will not require a general provision in their national legislation to prosecute a national for extraterritorial offences or to have a foreign sentence enforced against a national. For States that do not extradite their nationals, the legislation should contain a provision enabling prosecution of the country's citizens for offences committed abroad, or enforcement of foreign sentences imposed on them. Alternatively, such States can craft their

domestic jurisdiction for such extraterritorial offences to apply only after extradition has been denied on grounds of nationality. Countries should ensure that their domestic law provides for jurisdiction in such circumstances to avoid safe haven for those who have committed serious crimes. In general, States that prosecute in lieu of extradition of nationals, will investigate and prosecute for the offence under their law that would have been applicable in an equivalent domestic case, and accordingly would wish the legislation to provide that the person who has committed an offence abroad is punishable in the same way as if it had been committed in the country.

74. In order to be able to conduct an effective domestic prosecution in lieu of extradition, a State that does not extradite its nationals also requires a sufficient evidentiary, procedural and mutual assistance framework to enable its authorities to conduct investigations and proceedings based on foreign gathered evidence. Ideally it should be able to provide sufficient resources to such cases, which are often resource intensive, and pursue them in the same manner as domestic cases of a comparable nature. Without such a legal and resource framework, difficulties may arise in pursuing such cases.

75. A request to bring proceedings is a prerequisite to the exercise of such jurisdiction. This provides the State in which the offence took place with the flexibility to determine whether it wishes to pursue such domestic prosecution in lieu of extradition and submit the evidence it has gathered to the State of the wanted person's nationality.

Suggestions

76. If a requested State does not extradite its nationals by operation of a clause like article 4, paragraph (a), it may be necessary for the State in which the crime took place to make an extradition request to trigger submission in the requested State for domestic prosecution in lieu of extradition. The authorities of the State in which the person wanted is located should be consulted at the earliest opportunity on the potential for extradition, and the process of carrying out domestic investigation and prosecution in the requested State if extradition is not possible. The States concerned will need to cooperate closely in advance of and during any such proceedings, as most if not all of the relevant evidence will have to be gathered in and transferred by the requesting State.

Subparagraph (b): Requested State declining to prosecute

Purpose

77. Subparagraph (b) provides for extradition to be refused if the requested State, having jurisdiction, has decided to refrain from prosecuting the person for the offence in respect of which extradition is sought or has terminated its own proceedings in respect of such offence.

Application

78. The determination on whether to include this as a ground for refusal requires examination of other issues, in particular non bis in idem/double jeopardy. Where

proceedings have been terminated against a person wanted by the requested State for the same offence because of a final determination that guilt has not been proven, extradition is precluded by application of the non-bis in idem principle found in article 3, paragraph (d). In contrast, it is not clear whether a refusal to extradite should be extended to situations in which proceedings have been terminated for reasons unrelated to the guilt of the accused (such as technical reasons that do not bar further proceedings), since the result could be that the person wanted remains at large although no determination has been made in any country as to his or her guilt or innocence.

Subparagraph (c): Pending prosecution for the offence for which extradition is being requested

Purpose

79. Subparagraph (c) provides that extradition may be refused if there is a prosecution in respect of the relevant offence pending in the requested State.

Application

80. Here too, the determination on whether to include this as a ground for refusal requires examination of other issues, in this case, article 4, paragraph (d) pertaining to non bis in idem, and article 12 pertaining to postponed surrender. Where proceedings are pending against a person wanted in the requested State for the same offence, if they result in a final decision on guilt or innocence, article 3, paragraph (d) would bar extradition. As article 12, paragraph 1 permits extradition to be postponed until such determination has been made in the requested State, an additional ground for pending proceedings may not be necessary for many States.

Subparagraph (d): Death penalty

Purpose

81. Subparagraph (d) provides an optional ground for refusing extradition where the offence for which extradition is being sought carries the death penalty, unless the requesting State undertakes not to impose the death penalty or not to carry it out if it is imposed. As noted in the footnote to subparagraph (d), States may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence.

Application

82. The concept of death penalty assurances is well established in extradition law and should provide little ground for controversy, particularly if the text makes clear that assurances may only be sought if the requested State does not provide for the possibility of capital punishment itself with respect to such conduct. The option described in the footnote to subparagraph (d) is more controversial and not as widely accepted, since determinations of what the highest appropriate sentences should be for particular crimes may vary widely among legal systems. States considering insertion of assurances provisions should weigh the respective interests carefully in an effort to avoid an overly broad application that does not take into account the differences in penalties deemed appropriate in different legal systems.

Implementation

83. It is important to note that the provision as drafted requires the executive to exercise the prerogative of pardon or commutation if the death penalty is imposed. Extradition would not be granted unless the requested government can ensure that the prerogative of pardon or commutation will be exercised as a matter of standing practice by the requesting State or when required by the requested State. One way to provide assurance that the death penalty would not be imposed in such a case would be for States to incorporate into their domestic law a provision that assigns legal authority (and thus has binding force vis-a-vis the judicial authorities) to the conditions laid down by the requested State and agreed to by the executive of the requesting State.

84. If extradition is denied on this ground, the requested State must, at the requesting State's request, submit the case for domestic prosecution in lieu of extradition. Countries should ensure that their domestic law provides for jurisdiction in such circumstances to avoid safe haven for those who have committed serious crimes. The previous discussion at paragraphs 74-76 above is pertinent in this regard.

Subparagraph (e): Extraterritoriality

Purpose

85. The purpose of subparagraph (e) is to provide for the ability to refuse extradition where the exercise of jurisdiction by the requesting State is viewed as being overly broad.

86. For example, most States would not wish to extradite for an offence where the other State had asserted a ground of extraterritorial criminal jurisdiction that is clearly excessive under generally accepted standards of international law. However, the tradition of civil law States to assert extraterritorial jurisdiction over their nationals is a base of jurisdiction that most common law States would find acceptable and they would be prepared to exercise their discretion to extradite on that basis.

Application

87. Several considerations apply in determining how to structure such a clause. Between countries that have a clear understanding and acceptance of each other's jurisdictional approaches, such a clause may not always be necessary. States will also want to have regard to the recognition of, and in some instances requirements for, the extension of jurisdiction, through international conventions, such as the 1988 Drug Convention (article 4, paragraph 1 (b)), the Palermo Convention (article 15, paragraph 2), the Merida Convention (article 42, paragraph 2) and several counter terrorism conventions, as well as the Security Council resolution 1373(2001) with respect to some of the mandated offences. The parties will want to ensure that the treaty is sufficiently flexible to allow for extradition in cases where jurisdiction has been extended in accordance with such conventions or resolution. One possible approach would be to draft the provision in a way that expressly bestows discretion on the requested State to grant extradition even in cases in which the basis of jurisdiction relied upon by the requesting State is not available under the requested State's law.

This would provide the necessary flexibility and still ensure sufficient protection to the requested State to guard against excessive claims of extraterritorial jurisdiction.

Subparagraph (f) Claim of requested State to jurisdiction over the offence

Purpose

88. Subparagraph (f) is related to subparagraphs (b), (c) and (e). In essence, it enables a requested State with territorial jurisdiction to take precedence over claims by the requesting State to exercise extraterritorial jurisdiction. Again, there is a provision allowing for prosecution or enforcement instead of extradition in such circumstances.

Application

89. The discussion relating to subparagraphs (b), (c), and (e) found above in paragraphs 78, 80 and 87 is pertinent. States should review other available bases for refusal and postponement in determining whether to include such a provision.

Subparagraph (g): Extraordinary or ad hoc tribunal

Purpose

90. Subparagraph (g) provides an extra safeguard by enabling extradition to be refused where a court or tribunal of an irregular and fundamentally unfair nature has been, or is to be, specially set up to try or sentence the person in the requesting State.

Application

91. If this ground is to be included, the Parties should reach a clear understanding regarding the types of proceedings to which it applies. Clearly, it is not meant to apply to tribunals established by binding UN resolution, as in the case of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, or international treaty to which the State concerned is Party. Nor is this clause intended to be invoked to preclude extradition for purpose of regularly constituted military court martial adjudicating ordinary crimes committed by military personnel.

Subparagraph (h): Humanitarian exception

Purpose

92. Subparagraph (h) contains a discretionary provision that provides additional safeguards in view of humanitarian considerations such as the advanced age or severe illness of a person for whom extradition was sought might be a ground for refusal. Such humanitarian considerations should not be confused with the human rights exceptions underlying article 3, subparagraphs (b) and (f).

Application

93. States should review the other bases of refusal to be included in the treaty before determining whether to include a further ground in the nature of subparagraph (h). It may be possible to ensure consideration for, e.g., serious health concerns through other means than denial, such as appropriate arrangements for medical care made by the requesting State. States should be extremely precise with respect to the factors that would justify refusal of extradition, in order to preserve predictability and reciprocal trust in their treaty relationships.

Article 5: CHANNELS OF COMMUNICATION AND REQUIRED DOCUMENTS

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.

2. A request for extradition shall be accompanied by the following:

(a) In all cases,

(i) As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

(ii) The text of the relevant provision of the law creating the offence or, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

(b) If the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission;

(c) If the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgement or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

(d) If the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of the present article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

(e) If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

3. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested State or in another language acceptable to that State.

Footnote to title: Countries may wish to consider including the most advanced techniques for the communication of requests and means which could establish the authenticity of documents emanating from the requesting State.

Footnote to paragraph (2)(b): Countries requiring evidence in support of a request for extradition may wish to define the evidentiary requirements necessary to satisfy the test for extradition and in doing so should take into account the need to facilitate effective international cooperation.

Commentary

Paragraph 1: Form of request and channels of communication

94. Paragraph 1 sets out the procedures for conveying extradition requests, supporting documents and communications. It is flexible to take account of the requirements and preferences of different States. The parties may define the channels of communication for treaty requests (communications may be transmitted through the diplomatic channel, between the ministries of justice or any other authorities designated by the parties). Each State should decide the appropriate ministry or agency that will be responsible for receiving and transmitting requests.

95. The authority chosen for this function need not be responsible for the execution or creation of the requests. It is responsible for receiving the requests from foreign States, working with such States on identifying and, if possible, addressing legal problems that may arise in the making of such requests, forwarding them to an executing authority, following up on execution of the request, transmitting the results to the foreign State, ensuring rapid and effective communications for purposes of obtaining provisional arrest (see article 9) and, where extradition is granted, arranging for the person wanted to be transported to the requesting State. In the opposite case, this authority is responsible for transmitting requests to the foreign State and to pursuing execution of the request with the foreign State.

96. By deciding on the appropriate channel and advising other States as soon as possible, the parties will have an identified channel through which to pursue requests. The establishment of those direct channels will enhance the effectiveness of the treaty and will help to avoid any confusion between inappropriate authorities, or more than one authority, dealing with requests in a particular State. The nature of extradition means that it is important that the chosen authority can execute its responsibilities speedily and efficiently. In many States, the designated channel is the Ministry of Justice, court or the office of the Attorney-General or equivalent, but this is a matter

to be decided by each State.

Implementation

97. It will be a matter of domestic law whether implementing legislation must designate the responsible authority for extradition treaties. In many States, the authority could be designated as a matter of policy without the necessity to legislate.

Suggestions

98. An important step in establishing an effective extradition programme is the establishment of a central authority. A main aim of the officials within a central authority should be to establish a good working relationship with other central authorities. Lines of communication should be established through which requests may be received and executed or sent to the foreign State. A central authority should be equipped with telephones and telefacsimile machines as speed of communication is important in extradition cases. As reflected in the footnote, as technology continues to develop, there will be other expedited means of communications (e.g. secure electronic mail) that can be used for communications between the Parties. Such communication methods can enhance the speed and efficiency of the extradition process, as well as facilitate communications on urgent matters, such as provisional arrest requests or the need for supplemental documentation sought by the requested State.

99. A central authority should also have established lines of communication domestically. For example, in a federal State, assuming a federal government department acts as the central authority, there should be contact persons in each state who can help with or execute requests. Similarly, if there is one Government involved in execution, it would be helpful to have contact persons in each department that may be called upon to execute requests.

100. For requests to a foreign State, there should be a similar system of contact persons, for example in each police or prosecuting organization that may generate a request. In this way, information on the preparation of requests, channels of communication and other essential advice can easily be distributed through these contact persons.

Paragraph 2: Required documents

Purpose

101. Paragraph 2 sets out the information required to be incorporated in an extradition request. The list reflects the essential information that most States require to execute extradition requests.

102. In summary, the request must contain a precise description of the person sought; a copy of the applicable legal provisions (or a statement of the relevant law), a statement of the penalty that can be imposed for the offence; proof of the enforceable sentence or of the warrant of arrest (as the case requires) and any other documents having the same force; and an exposition of the facts for which extradition is

requested (including a description of the acts or omissions constituting the alleged offence and an indication of the time and place of its commission). A reference to the basis of jurisdiction has been found to be useful. Additional requirements apply where the person has been convicted of an offence in his or her absence and where the person has been convicted of an offence but no sentence has yet been imposed. Texts relating to lapse of time should also be transmitted, where lapse of time is a ground for refusal under that treaty.

103. This paragraph provides the parties with an opportunity to outline in detail the required information for execution of requests. The model list can be expanded or reduced as necessary to meet the needs of the parties. To obtain speedy and efficient execution of requests, article 5 should provide a precise description of the information to be included in the request. The treaty will then act as a guide for those who are called upon to provide the information.

Application

104. Article 5 is usually difficult to settle as each State generally has precise requirements to be followed. In addition, the procedures of a particular State may be detailed and difficult to understand and follow. It is usually necessary to deal with these matters in face-to-face negotiations so that details of procedures and requirements can be exchanged. It may also help if a State makes available in the preliminary stages of treaty negotiation or note explaining its requirements.

105. If the documentary requirements of each State are irreconcilable, then it may be necessary to use the approach of specifying in the treaty separate requirements for each State. Quite often the requirements of each State in this area will differ.

106. It should be noted that for some common law States, the wording used in subparagraph 2 (a)(ii) may be essential. Unless the criminal law of such States is entirely codified, they must be in a position to provide not the text of the law but a description of the law. Such States are likely to have to explain to a State that is not a common law State what a common law offence is, how it is created and why the words in subparagraph 2 (a)(ii) are needed.

107. Subparagraph 2 (b) is where States should deal with their evidential requirements if any. Common law States should bear in mind that civil law States often do not have laws that enable them to collect evidence in the way common law States might consider essential to make it admissible in their extradition proceedings. Each State needs to explain precisely what it needs during the negotiations and it may be wise for the treaty to specify any evidentiary standard required for extradition to be granted. As reflected in modern instruments (see article 16, paragraph 8 of the Palermo Convention, article 44, paragraph 9 of the Merida Convention), States should ensure that to the extent possible their evidentiary requirements for extradition can be met by authorities in requesting States operating under different legal systems.

108. Common law and civil law often differ as to the nature of extradition and, therefore, as to the documents required to be presented to the requested State. For example, in most European States, extradition is considered an act of international legal cooperation, the purpose of which is to further criminal investigations conducted

abroad. Courts dealing with extradition cases abstain from examining the evidence of guilt against the person wanted, as they feel this examination is incumbent exclusively upon the judicial authorities of the requesting State. For extradition to be authorized, it suffices that the formal and material requirements provided for by the treaty be present. Some common law States have recently changed their law and practice in this regard and have followed the approach of civil law States. In other States influenced by common law the magistrate will examine whether the request contains reasonable grounds to believe (sometimes referred to as probable cause to believe) that the person wanted committed the crime charged, or whether the requests provides prima facie evidence of guilt as if the accused were charged with the same alleged offences in that State. In such States, if the magistrate holds that the evidence produced by the requesting State is sufficient to justify committal for trial should the facts be prosecuted in that State, extradition will be granted, assuming that the other legal requirements are met. The Model Treaty does not require, and Parties should not insist, that the requesting State provide enough proof to justify the conviction of the person under the law of the requesting State.

109. Finally, countries wishing to insert authenticity requirements for extradition documents (such as the attestation of judicial or other officials of the requesting State as to the authenticity of the documents provided) may do so either here or in article 7. In the absence of such a provision, article 7 would operate to require no general authentication unless otherwise specified in the treaty (an example of such a specific provision is the requirement of the original or certified arrest warrant or judgment of conviction in article 5, paragraphs 2, (b) and (c)).

Implementation

110. The content of requests is generally not a matter specifically included in legislation. The implementing legislation will influence article 5, however, to the extent that it establishes what information must be presented to the court in extradition cases. These essential ingredients of a request should be reflected in article 5.

Suggestions

111. A well-drafted and complete extradition request is the key to effective extradition practices between States. Authorities preparing requests must include the information outlined in this section of the treaty. This should be done in a clear and concise fashion so that the request is understandable. This process is facilitated by maintaining frequent contact between the central authorities in the requesting and requested States before and during the extradition process, in order to identify and address potential problems at the earliest opportunity.

112. It should be remembered that the request will be read and executed by officials in a foreign State that may have a different language (translation difficulties may arise) and an entirely different legal system. Therefore, the law relevant to offences should be explained as simply as possible. In describing the conduct (acts or omissions) constituting offences, the focus should be on providing only relevant facts, and not necessarily all of the facts known about the case.

Paragraph 3: Language

Purpose

113. Paragraph 3 provides that the supporting documentation for an extradition request must be accompanied by a translation into a language decided by the requested State.

Implementation

114. This paragraph requires no implementation by legislation.

Suggestions

115. A State should ensure that it has access to translation facilities for extradition requests. A competent authority preparing a request should always keep in mind the time required for translation. As the translation will be the working document for the requested State, it is essential that the translation is accurate.

Article 6: SIMPLIFIED EXTRADITION PROCEDURE

The requested State, if not precluded by its law, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

Footnote to title: Countries may wish to provide for the waiver of specialty in the case of simplified extradition.

Commentary

116. Article 6 provides a simplified extradition procedure. It allows the requested State to grant extradition (if not precluded by its law) even if the documentary requirements in article 5 have not been complied with, if the person sought consents to extradition (compare the relevant provisions of the EU 1995 Convention).

Application

117. Article 6 is highly desirable. Many persons wanted are quite willing to return to the requesting State and would prefer not to be put to the trouble of contesting an extradition hearing with the time and expense that it is likely to entail.

118. The provision on waiving the requirements if the person consents to be extradited may not be acceptable to some States. The provision could still be included, as those States would not have to grant extradition in such cases if their law precludes it. It would simply mean that the process when they request extradition may be simplified. Such matters should be discussed at the time of treaty negotiation.

119. As reflected in the footnote, countries may wish to provide for waiver of specialty in the case of simplified extradition (see article 14). For some States, the

determination of whether specialty applies will depend on whether the person wanted has consented to forego protection of the rule of specialty (see article 9 of the EU 1995 Convention). For others, the consent of the person wanted is irrelevant. Depending on the approach agreed upon between the States negotiating the treaty, a clause can be inserted on the effect of the simplified extradition determination on the application of the rule of specialty.

Implementation

120. Implementing legislation is necessary to enable this simplified extradition procedure to be used. Such legislation would provide that if a person consents to extradition, there is no need to examine whether the formal requirements have been complied with. States may also wish to stipulate in their legislation that the consent needs to be given voluntarily and that the person sought needs to understand the circumstances and the consequences. Such consequences may imply that the person can no longer rely on the protection under the rule of specialty (see article 14). There may be a requirement for a judicial officer to explain such things to the person sought before consent can be given and to provide the person with the right to be assisted by a lawyer in consent procedures.

Article 7: CERTIFICATION AND AUTHENTICATION

Except as provided by the present Treaty, a request for extradition and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication.

Footnote: The laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts and, therefore, would require a clause setting out the authentication required.

Commentary

Purpose

121. Article 7 provides that no certification or authentication of requests for extradition, and documents relating thereto, is required under the treaty. This is intended to simplify the extradition process by keeping formalities (such as the necessity for seals, ribbons and certificates) to a minimum.

Application

122. While this article seeks to keep formalities to a minimum, it is recognized that this will not always be possible. As stated in the footnote, many States (in particular, common law ones) may require certification or authentication before documents transmitted from other States can be admitted in their courts. The article may not be acceptable to such States. In those cases, a clause would be required setting out the authentication required. As described in the commentary to article 5, countries may agree to insert general authenticity requirements for extradition documents either in

article 5 or article 7, if desired.

123. Such a clause may be difficult to settle. Each State would generally have precise requirements to be followed and, in addition, the procedures of a particular State may be detailed and difficult to understand and follow. Legal processes particular to a State will be foreign to another State and therefore difficult to understand, particularly where there are translation problems with specialized words and legal phrases.

124. It should be noted that the Model Treaty dispenses with certification or authentication requirements, "[e]xcept as provided by the present Treaty . . ." Thus, specific certification provisions in article 5, paragraphs 2, (b) and (c) pertaining to the providing by the requesting State of the original or certified arrest warrant or judgment of conviction, are not prejudiced by this article. States, however, may even wish to dispense with such certification requirements.

125. As mentioned in the commentary under article 5, if the certification and authentication requirements of each State are irreconcilable, it may be necessary to resort to the approach of specifying separate requirements.

Implementation

126. No domestic legislation is required to implement article 7 for a State that does not require certification or authentication requirements.

127. For those States with certification and authentication requirements, however, each State's legislation will set out its own particular requirements and these will need to be reflected in the treaty provision.

Suggestions

128. Where the treaty requires certification and authentication, authorities preparing requests must ensure that any documents transmitted to the other State are certified and authenticated according to the treaty provision.

Article 8: ADDITIONAL INFORMATION

If the requested State considers that the information provided in support of a request for extradition is not sufficient, it may request that additional information be furnished within such reasonable time as it specifies.

Commentary

Purpose

129. Article 8 provides that additional information may be sought by the requested State if necessary to make an extradition decision.

Application

130. This article is a straightforward one that does not usually give rise to substantial difficulties. It is highly desirable because it provides just that little bit of time for rectifying simple errors or for seeking and providing additional information.

131. States may wish to consider adding words to the effect of “in accordance with this Treaty" after "not sufficient”, so that it is made clear that a State may not request further information that the treaty does not oblige the requested State to provide. States may also wish to specify a channel of transmission for such material more rapid than used for full extradition requests.

132. The time limit set for the receipt of such material must be “reasonable” in light of the material requested, the time required for translation, the nature of the channels through which the material must be transmitted, and any authentication or certification steps that must be taken.

133. States may also wish to set out what will happen if the additional information is not sufficient or is not received within the specified time; for example: "The person may be released from custody and the requested State shall notify the requesting State as soon as practicable". It could be stated that such release would not preclude the requesting State from making a fresh request for the extradition of the person.

Implementation

134. No implementing legislation is necessary for article 8, unless it is necessary to provide for the possibility to stay extradition proceedings while holding the person in detention for a certain period. However, the judicial official conducting the extradition proceedings may already have general authority to hold the person wanted in custody, with discretion to release him or her on bail under various circumstances, thereby obviating the need for specific legislation on this point.

Suggestions

135. It is in the requesting State's interests to provide any additional information requested. If the information is available, it should make all efforts to provide it as soon as possible, and at least within the time specified by the requested State.

Article 9: PROVISIONAL ARREST

1. In case of urgency the requesting State may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. The application shall be transmitted by means of the facilities of the International Criminal Police Organization, by post or telegraph or by any other means affording a record in writing.

2. The application shall contain a description of the person sought, a statement that extradition is to be requested, a statement of the existence of one of the documents mentioned in paragraph 2 of article 5 of the present Treaty,

authorizing the apprehension of the person, a statement of the punishment that can be or has been imposed for the offence, including the time left to be served and a concise statement of the facts of the case, and a statement of the location, where known, of the person.

3. The requested State shall decide on the application in accordance with its law and communicate its decision to the requesting State without delay.

4. The person arrested upon such an application shall be set at liberty upon the expiration of [40] days from the date of arrest if a request for extradition, supported by the relevant documents specified in paragraph 2 of article 5 of the present Treaty, has not been received. The present paragraph does not preclude the possibility of conditional release of the person prior to the expiration of the [40] days.

5. The release of the person pursuant to paragraph 4 of the present article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

Commentary

Paragraph 1: Urgent requests

Purpose

136. Paragraph 1 enables a State to apply for provisional arrest in cases of urgency pending a formal extradition request. It is aimed at situations where it is urgent to arrest the person sought (e.g. the requesting State has reason to believe that the person is about to flee the requested State) but there is not enough time to compile all the documents required under article 5 for a formal extradition request. The application may be made by any means, as long as there is a record in writing.

Application

137. The use of the Interpol channel and/or the direct transmission of provisional arrest requests between central authorities for extradition established in the Justice Ministries or their equivalent is discussed in paragraphs 139 and 140 below. Countries may wish to specify the authority of such ministries to make and receive provisional arrest requests, in addition to Interpol.

Implementation

138. The implementing legislation will need to enable provisional arrests to be made, before the receipt of the formal request and supporting documents. Conditions for the issue of a provisional arrest warrant will depend upon each individual State, but may stipulate that a warrant is in force for the arrest of the person in relation to an extraditable offence, or that the person has been convicted of an extraditable offence, and that there is an intention to impose a sentence, or that part of the sentence remains to be served. There should also be a provision to cancel the warrant or to release the

person after arrest, e.g., if a formal extradition request is not received at all, or within the appropriate time as set in article 9, paragraph 4, or for other compelling reason.

Suggestions

139. Provisional arrest requests are, by their very nature, urgent and avoiding delays at this stage can be crucial to the success of an extradition. It is therefore important to process provisional arrest requests in the most speedy and efficient manner possible. States should establish procedures for communicating and carrying out provisional arrest requests expeditiously. States with a central authority for extradition should devise a system to ensure that it is immediately aware of any request transmitted.

140. It should be noted that application by a State for an Interpol diffusion or red notice may not always be considered by other States to be the equivalent of a request for provisional arrest, as it may not contain the degree of evidentiary detail or be in a form acceptable to every country to which it may be distributed. Accordingly, in many situations an ICPO/Interpol notice can only serve to locate a person wanted and a separate request for provisional arrest must often follow in order to permit an arrest and initiate the process towards extradition.

Paragraph 2: Contents of provisional arrest requests

Purpose

141. Paragraph 2 sets out the information required to accompany a request for provisional arrest. The list contains the information that most States require to execute provisional arrest requests. It includes information enabling the requested State to locate and identify the person, an assurance that extradition is to be requested and a statement of the existence of an arrest warrant or other document in relation to the person authorizing the apprehension of the person.

Application

142. The model list can be expanded or reduced as necessary to meet the needs of the parties. As with article 5, paragraph 2 (on documentary requirements for extradition requests), to obtain speedy and efficient execution of requests, article 9 should provide a precise description of the information to be included in the request. It will be used as a guide for those who are called upon to provide the information and should therefore be as clear as possible. Such precision in treaty language is particularly important with regard to countries that require an evidentiary demonstration to justify provisional arrest.

Implementation

143. The content of provisional arrest requests is generally not a matter specifically included in the implementing legislation. However, the legislation will influence article 9 to the extent that it establishes what information must be presented to the court in order for a provisional arrest warrant to be issued. The essential ingredients for a provisional arrest request listed in the legislation should be reflected in article 9.

Suggestions

144. It is important to contain all the required information in provisional arrest requests because there may not be time for a second chance. Authorities preparing requests must therefore include the information outlined in article 9, paragraph 2. Identification evidence will depend on what is available, but the following should be included: the wanted person's nationality, date of birth, place of birth, passport number, physical description (race, height, weight, identifying features, photographic evidence, fingerprints etc.).

145. The information should be presented in as clear and concise a fashion as possible. The request will be read and executed by officials in a foreign State that may have a different language and an entirely different legal system. The information should be set out as simply as possible; a statement of the facts of the case should include only relevant facts, and not necessarily all of the facts concerning the case. Direct contact between the central authorities responsible for extradition will also facilitate the provision of the relevant information in a speedy manner.

Paragraph 3: Deciding on provisional arrest requests

146. Paragraph 3 provides that provisional arrest requests will be decided on according to the law of the requested State and that the decision of the requested State on the request is to be communicated to the requesting State without delay.

Application

147. This provision permits the requested State to apply its evidentiary standards for the purpose of securing the arrest of the person wanted. Further discussion on this issue is provided in paragraphs 139, 140 and 142 above.

148. With respect to the issue of communication of the requested State’s decision on the request, States may wish to specifically include a requirement to communicate reasons for the decision where a provisional arrest request is refused.

Implementation

149. The nature of the implementing legislation is referred to in the commentary under article 9, paragraph 1.

Suggestions

150. Again, establishing efficient communications is essential, both domestically (to enable a requested State to make and communicate a decision on the application as quickly as possible) and in relation to the foreign State (to reduce the delay in the transmission to the requested State of sufficient evidence to secure arrest).

Paragraph 4: Time-limit for maintaining provisional arrest

Purpose

151. The provisional arrest mechanism permits the requesting State a specified period between apprehension of the person sought and presentation of the formal request and supporting documentation. Paragraph 4 sets out what will happen if the formal extradition request is not received within the specified period.

Application

152. The substance of paragraph 4 is generally accepted. The only real difference will probably be the length of the period after which a person may be released. The length of the period is usually within the range of 40-60 days (although periods up to 90 days are not uncommon). In deciding the appropriate period, States should allow for the efficiency of their communication system. States with frequent international connections may be able to have a relatively short time. Given the time it can take to comply with the evidentiary requirements of the requested State, as well as translation, certification and transmission requirements, States should ensure that the time period for submission of a formal extradition request after provisional arrest would be reasonable and adequate.

Implementation

153. As referred to in the commentary under paragraph 1, the implementing legislation should contain a provision to cancel the provisional arrest warrant or to release the person after arrest. It need not specify particular circumstances in which a person would be released (e.g., if a formal extradition request is not received within the time specified in the treaty), but it should clearly be broad enough to cover such a situation (e.g. if the appropriate authority considers for any reason that the provisional arrest warrant should be cancelled). The possibility also exists of releasing the person on bail or subject to other specific conditions such as turning in his or her passport or regular reporting; although before releasing the person under such conditions, the requested State should weigh the potential risk that the person wanted may abscond and not be available for subsequent extradition (see article 16, paragraph 9 of the Palermo Convention, article 44, paragraph 10 of the Merida Convention).

Suggestions

154. It is prudent to get into the practice of not making a provisional arrest request unless it is urgent and the requesting State is confident that an extradition request can be compiled according to article 5 within the time specified in article 9, paragraph 4. Given the time it can take to comply with complex documentary requirements, 60 days is generally not an excessive period. The documents should always be prepared by the requested State as soon as possible because once the documents have been sent difficulties may arise that may be impossible to rectify within the required time. Given the time-frame and the possibility that the authorities may appear irresponsible if an extradition request is not forthcoming after a person has been provisionally arrested, provisional arrest requests should only be made when absolutely necessary.

Paragraph 5: Effect of release of a provisionally arrested person

Purpose

155. Paragraph 5 provides that if the request and supporting documents are not received within the specified period and the person is subsequently released, it will not prevent the taking of further extradition proceedings if the request and supporting documents are subsequently received.

Implementation

156. Paragraph 5 requires no implementing legislation.

Suggestions

157. States should not rely on paragraph 5 as a justification for making provisional arrest requests lightly, as doing so might create an impression that the authorities concerned were acting irresponsibly by failing to follow a provisional arrest request with an extradition request. Doing so might also have a detrimental effect on bilateral extradition relations. Furthermore, if a person is released after provisional arrest, the requested State may not have another chance to arrest him or her.

Article 10: DECISION ON THE REQUEST

1. The requested State shall deal with the request for extradition pursuant to procedures provided by its own law, and shall promptly communicate its decision to the requesting State.

2. Reasons shall be given for any complete or partial refusal of the request.

Commentary

Paragraph 1: Handling of request and notification of decision

Purpose

158. Paragraph 1 provides for the requested State to execute and decide on an extradition request according to its own law and to promptly communicate its decision to the requesting State.[7]

Implementation

159. The legislation should specify the procedures applicable to dealing with extradition requests. No implementing legislation is often required in relation to the communication of decisions, however, as this will be done according to the article in

[7] States may wish to include in extradition treaties a provision in accordance with article 16, paragraph 16 of the Palermo Convention or article 44, paragraph 17 of the Merida Convention, that before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information regarding the reasons for refusal.

the treaty.

Suggestions

160. Established methods of efficient communication are essential, both domestically (to enable a requested State to make and execute a decision on extradition requests according to its law as quickly as possible) and in relation to the foreign State (to enable the decision to be promptly communicated to the requesting State). The parties should agree at least informally on the channel for notification which could be e.g. the same channel through which it was received. If extradition is denied and the person wanted may be preparing to leave the requested State, the fastest possible notification is preferable, to enable consideration of potential legal redress that may be available (include the possibility of making a new request for extradition supplemented by additional information) before the person wanted has left the territory of the requested State. This would suggest direct communication with the requesting State's central authority for extradition, with formal confirmation through the diplomatic channel.

Paragraph 2: Obligation to give reasons

Purpose

161. Paragraph 2 obliges the parties to provide reasons for the complete or partial refusal of an extradition.

Application

162. States may wish to also specify that copies of pertinent judicial decisions shall be provided upon the requesting State's request. This will aid in its analysis of whether, inter alia, the reasons for denial can be overcome in a new extradition request.

Implementation

163. No implementing legislation is required.

Suggestions

164. The decision maker in the requested State will need to ensure that extradition procedures have taken place according to the law of the State and according to the treaty and that any partial or complete refusal of an extradition request can be justified.

165. The notification of refusal should clearly show the basis of the refusal and should identify all of the facts upon which the decision is based. This will provide the requesting State with a clear understanding and an opportunity to correct or clarify any facts as required in a new request if appropriate.

Article 11: SURRENDER OF THE PERSON

1. Upon being informed that extradition has been granted, the Parties shall, without undue delay, arrange for the surrender of the person sought and the requested State shall inform the requesting State of the length of time for which the person sought was detained with a view to surrender.

2. The person shall be removed from the territory of the requested State within such reasonable period as the requested State specifies and, if the person is not removed within that period, the requested State may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited, it shall notify the other Party. The two Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of the present article shall apply.

Commentary

Paragraph 1: Arrangement of surrender of the person sought

Purpose

166. Paragraph 1 requires the parties to arrange surrender of the person sought as soon as possible after the requested State has decided to grant extradition. It also requires the requested State to inform the requesting State of the period for which the person has been detained with a view to surrender.

167. One function of this paragraph is to ensure that the requesting State has details of the time spent in custody during the extradition process. This time is normally considered for the purposes of calculating the remaining part of any sentence imposed.

168. The provision also imposes on both parties an obligation to arrange the removal of the person sought from the requested State. It is therefore important for the requesting State's planning for the picking up of the person from the requested State.

Application

169. States may wish to refer to the procedures of surrender. Many treaties, for example, stipulate that the person sought should be delivered to officials of the requesting State at a place of departure convenient to those officials. Some States require an agreed fixed time-limit for release of the person concerned. The time-limit can be mutually agreed between the two parties on a case-by-case basis.

Implementation

170. The legislation should provide some mechanism for ensuring that a person can be physically moved in custody to the requesting State. It does not usually specify most particular details and steps, since these are more administrative in nature and can

be decided between the two States, although legislation may be required if a State is willing to permit authorities of the requesting State sent to pick up the person wanted from the place of imprisonment in the requested State (see paragraph 174 below).

171. With respect to the formalities of authorizing removal of the person wanted, all that is usually required in the implementing legislation is a document authorizing removal from custody in the requested State. This could be a surrender warrant signed by the decision maker, which is presented to authorities at the place at which the person sought is held in custody. That document would authorize the release of the person. It would be up to each State to decide on the details of the surrender warrant. Concerning the bringing of persons into the requesting State, it is not usually necessary for the legislation to detail any procedure following surrender. It is generally enough to stipulate that the person should be brought into the country and delivered to the appropriate authorities according to law.

Suggestions

172. Arrangements for surrender should be made as soon as possible after an extradition has been granted.

173. Although details will vary, the surrender warrant referred to above will usually expressly permit the necessary directions and authorizations for the person to be transmitted in custody from the part of the requested State where he or she is being held to the place from where he or she will leave the country. This should be included if the treaty includes a provision similar to that referred to in paragraph 169 above, that is a provision stipulating that the person should be surrendered at a place of departure convenient to the requesting State.

174. Usually, it will be necessary for police officers of the requested State to take custody of the person sought from the jailer and to deliver the person to the place of departure. Even if the foreign escort officers are prepared to travel to the place of imprisonment to collect the person sought, in most States they would have no right to exercise any control over the person in the requested State and therefore must be accompanied by a person authorized under the law of the requested State to exercise lawful control (i.e. a police officer of the requested State) or be empowered by legislation as referenced in paragraph 170.

Paragraph 2: Time of surrender

Purpose

175. Paragraph 2 requires the requesting State to remove a person sought from the requested State within a reasonable period (specified by the requested State), and failure to do so may result in release of the person and refusal to extradite for the same offence.

Application

176. The paragraph gives the requested State a discretion to release the person, and to refuse to extradite for the same offence, if he or she is not removed within a

reasonable period. States may wish to make these decisions mandatory. There may be good reasons for failing to comply in certain circumstances, however, and the advantage of having a discretion is to allow all the circumstances to be considered without being tied into a necessary result.

177. States may wish to craft the provision so that the person must be removed by the requesting State within the time period prescribed by the requested State's laws. This would remove any ambiguity surrounding the term "reasonable period" and increase predictability by fixing the consequences of a failure to remove the person wanted at the maximum period under the requested State's laws.

Implementation

178. The implementing legislation will need to enable release from custody after a certain period. The preconditions for such release tends to vary from State to State, but they may include the issue of a surrender warrant (or temporary surrender warrant) and the person being in custody in the requested State more than 'Y' days after the day on which the warrant was issued. The legislation could stipulate that in those cases, the person must be released from custody. However, States may wish to make this subject to certain factors. For example, the legislation could stipulate that if the person has not been removed from the requested State because it would have been dangerous to the life or prejudicial to the health of the person, or for any other reasonable cause, then the court, or in some countries, the executive authority, may order that the person be kept in custody. Where it is anticipated that surrender will be postponed under article 12, the issue of the surrender warrant can be deferred, or a provision can make possible the extension of time for removal until a fixed period after the proceedings or sentence in the requested State are terminated.

Suggestions

179. The requesting State should do everything within its power both before and after the extradition decision to ensure that surrender occurs as soon as possible. Unforeseen difficulties may arise, and it is preferable to have as much time as possible to overcome these so that the person is removed from the requested State within the required time. Established, efficient procedures and good working relations are, again, of vital importance.

Paragraph 3: Renegotiation of surrender date

Purpose

180. Paragraph 3 recognizes that circumstances may prevent either surrender or removal of a person. If this occurs, the party concerned is required to notify the other party, after which they will decide upon a new date of surrender and the provisions of paragraph 2 will then apply (i.e. removal must take place within the new specified time, otherwise the person may be released).

Application

181. It would be wise to include this paragraph, to cover unforeseen circumstances.

Implementation

182. If a State's implementing legislation sets a fixed date for removal of persons wanted, a provision to deal with unforeseen delays would be appropriate. See paragraph 177 above.

Suggestions

183. It is advantageous for all parties if each party keeps the other party informed of surrender plans and notifies the other party as soon as any difficulties are foreseen in relation to the surrender or removal of a person.

Article 12: POSTPONED OR CONDITIONAL SURRENDER

1. The requested State may, after making its decision on the request for extradition, postpone the surrender of a person sought, in order to proceed against that person, or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought. In such a case the requested State shall advise the requesting State accordingly.

2. The requested State may instead of postponing surrender, temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties.

Commentary

Paragraph 1: Postponement of surrender

Purpose

184. Paragraph 1 enables the requested State, after making its decision on extradition, to postpone surrender. It is intended to cover situations where the requested State wishes to bring its own proceedings against the person or enforce its own sentence in relation to an offence other than that for which extradition is being sought. The requested State is required to advise the requesting State of this decision.

Implementation

185. Legislative power for postponement is generally not necessary, although legislative provisions on time for removal of persons wanted should provide for this eventuality.

Paragraph 2: Temporary surrender

Purpose

186. Paragraph 2 enables the requested State, instead of postponing surrender, to temporarily surrender on conditions to be agreed between the parties.

187. This is applicable when a person wanted and ordered to be extradited is serving a long prison sentence in the requested State. Without such a provision, removal would generally be postponed and he or she might not face trial in the requesting State for many years. If in the intervening period witnesses have died or become unavailable, past events may be more difficult to reconstruct causing problems in the conduct in the requesting State's trial. With this type of provision, the parties concerned can agree to temporary surrender to the requesting State either for the purposes of both trial and punishment (after which the person would be returned to the requested State to complete service of its sentence), or solely for the purpose of trial in the requesting State, with the person to be returned immediately thereafter to complete sentence in the requested State (after which the person could again be returned to the requesting State to serve any sentence imposed there).

Application

188. States may want to allow conditional surrender only when the person is already convicted and is serving a sentence in the requested State.

Implementation

189. Legislation is generally required to enable temporary surrender. For example, the legislation could provide for the issue of a temporary surrender warrant provided that certain preconditions are satisfied (e.g. the administration of justice requires the issue of a temporary surrender warrant rather than a surrender warrant; and the requesting State has given undertakings in relation to the person, such as relating to custody arrangements within that country, or that the person will be returned to the requested State). The legislation also needs to allow for surrender after a person has been returned to the requested State following temporary surrender. These are instances of conditional extradition, which the Model Treaty also recognizes elsewhere, such as an assurance that the death penalty will not be imposed or an undertaking that the rule of specialty will be observed. Such conditions require that attention be paid to how the requested State will obtain an assurance that the conditions imposed by it and accepted by the requesting State will in effect be complied with.

Article 13: SURRENDER OF PROPERTY

1. To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered if extradition is granted.

2. The said property may, if the requesting State so requests, be surrendered to the requesting State even if the extradition agreed to cannot be carried out.

3. When the said property is liable to seizure or confiscation in the requested State, it may retain it or temporarily hand it over.

4. Where the law of the requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State free of charge after the completion of the proceedings, if that State so requests.

Commentary

Paragraph 1: Surrender of property with the person

Purpose

190. This article provides for the possibility of the surrender of property as part of the extradition process, to the extent permitted by the laws of the requested State. It relates to property acquired as a result of the offence or that may be required as evidence. The article covers possible surrender where extradition is granted or where it is not. The article also addresses the temporary surrender of such property where the property must be returned ultimately to the requested State for a variety of reasons, including to protect third party rights.

Application

191. If there is a mutual assistance treaty in place between the contracting parties or mutual assistance is available under domestic law, it may be possible to limit the scope of this article or exclude it from the treaty. In the absence of mutual assistance, States may wish to include a more extensive article which could include specifying in greater detail the property that may be surrendered, for example, "all articles, documents and evidence connected with the offence", "property found in the possession of the person sought at the time of arrest, or discovered at any subsequent time, that has been acquired as a result of the offence or may be required as evidence" or "all articles, including sums of money, that may serve as proof of the offence, or may have been acquired by the person as a result of the offence and are in his possession". This paragraph is probably broad enough to cover these matters, but the exact wording will be up to individual States.

Implementation

192. If this article is included, while it is subject to the law of the requested State, there should be at least some power to search for and seize such property for the purpose of a foreign proceeding. It will be for each State to determine the nature and scope of that search power. It can range from a limited power to seize items at the time of arrest, to a detailed power for search and seizure. If a more detailed scheme will be established, it should ensure that the requested State would have the capacity under domestic law to search for and seize such property for the purposes of a foreign proceeding. The scheme in the implementing legislation should mirror the requirements for search and seizure in a domestic case. The legislative scheme commonly includes a description of the threshold information required before a search warrant may be issued, as well as a description of any restrictions or conditions for the search process. The legislation should also specify who may conduct the search and under what circumstances. In addition, the legislation should describe how property seized should be handed over to the requesting State.

193. For example, the legislation could stipulate that if a police officer arrests a person and has reasonable grounds for suspecting that the person has control of property that may be required as evidence or has been acquired as a result of the offence, the arresting officer may seize that property. There should also be provisions relating to obtaining orders for further searches and the custody of seized property. In addition, a police officer should be able to apply for a search and seizure warrant in relation to additional material that may reasonably be suspected of being acquired as a result of the alleged offence or that may provide material evidence - and that is located on property other than that apparently in control of the person arrested. The legislation could then stipulate that, if property is seized under one or more of these provisions, relevant authorities may direct by written notice, that the property be sent to the requesting State. Conditions that may be attached to this direction are that the property has been acquired as a result of the alleged offence, that it may be required as evidence and that, unless otherwise agreed, it shall be returned to the requested State after having been used in the proceedings in the requesting State. There should also be some provision for competent authorities to hold seized property until such a direction has been given.

194. There also needs to be legislation providing for the admission of evidence obtained through these methods in the ultimate criminal proceedings in the requesting State (this may not necessarily be in the legislation dealing with extradition but is more likely to be contained in general evidence law).

Suggestions

195. Although details of legislation vary, most States have to create legislation for search warrants that require the police or prosecutor who applies for judicial authorization to establish that the warrant is justified. This normally translates into a requirement for reasonable grounds or probable cause to believe that some thing that may be material as evidence in proving an alleged offence or that has been acquired by a person as a result of such an offence can be found in a specific place in the requested State. There should be standard applications in the legislation, regulations or policy that can be used to present the facts to the judicial authority that will decide whether the warrant should be issued.

196. Police officers executing searches should make careful notes of what is seized, the circumstances of the seizure and the subsequent custody of the items seized. The requesting State will need this information when introducing the evidence in trial.

197. Police and prosecutors must be careful in handling material obtained from a foreign State, particularly since that State may want the material to be returned (see article 13, paragraph 4). People handling the material in the requesting State should ensure that it is kept under safe conditions and, if possible, that there is a documented system of accountability to show responsibility for the evidence by its custodians.

Paragraph 2: Surrender of property without extradition

Purpose

198. Paragraph 2 sets out the right of the requesting State to receive property even

if the extradition cannot be carried out. It deals with cases where a decision to surrender has been taken but actual surrender is impossible, for example, because of the death or escape of the person sought. It does not deal with the surrender of property when extradition is refused.

Implementation

199. The legislation will need to provide that the direction to send the property to the requesting State may be made, regardless of whether the person is extradited after a surrender decision has been made.

Paragraph 3: Retention or temporary surrender of property by the requested State

Purpose

200. Paragraph 3 recognizes the rights of the requested party by allowing it to retain or temporarily hand over property that is liable to seizure or confiscation in the requested State.

Application

201. States may wish to limit the right of the requested State to retain or defer surrender of property to cases in which the property is needed as evidence in the requested State.

Implementation

202. The implementing legislation will need to provide for these possibilities.

Paragraph 4: Return of property to requested State

Purpose

203. Paragraph 4 protects the rights of third parties, as well as the rights of the requested State, to regain the property. It stipulates that the property may be surrendered to the requesting State but returned to the requested State if that State so requests in the interest of any third party.

Application

204. Paragraph 4 provides that the property shall be returned free of charge, but States may wish to specifically address the subject of charges. States may wish to use other formulae that provide further flexibility on the circumstances under which the property must be returned, or allow the requested State to condition surrender of property on the assurance that it will be returned in accordance with specific conditions.

Implementation

205. In most cases, implementing legislation will not be required for returning property in these circumstances.

Article 14: RULE OF SPECIALTY

1. A person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

(a) An offence for which extradition was granted;

(b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty.

2. A request for the consent of the requested State under the present article shall be accompanied by the documents mentioned in paragraph 2 of article 5 of the present Treaty and a legal record of any statement made by the extradited person with respect to the offence.

3. Paragraph 1 of the present article shall not apply if the person has had an opportunity to leave the requesting State and has not done so within [30/45] days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the requesting State after leaving it.

Footnote to subparagraph 1(a): Countries may also wish to provide that the rule of specialty is not applicable to extraditable offences provable on the same facts and carrying the same or a lesser penalty as the original offence for which extradition was requested.

Footnote to subparagraph 1(b): Some countries may not wish to assume that obligation and may wish to include other grounds in determining whether or not to grant consent.

Footnote to paragraph 2: Countries may wish to waive the requirement for the provision of some or all of these documents.

Commentary

Paragraph 1: Manner of dealing with a surrendered person

Purpose

206. Article 14 sets out the widely recognized international principle of specialty, which limits the power that the requesting State has over the person surrendered.

207. Paragraph 1 states that an extradited person can be neither proceeded against, nor sentenced, nor detained, nor re-extradited to another State, nor subjected to any other restriction of personal liberty for any offence other than the one for which extradition was requested and granted. However, the Model Treaty recognizes several important exceptions.

208. Under the footnote to subparagraph 1 (a), States may provide that the requesting State is free to proceed against the person wanted for differently denominated extraditable offences based on the same facts as the offence for which extradition was granted, carrying the same or a lesser penalty as the original offence for which extradition was granted. Since many legal systems permit consideration of revised charges prior to or at trial as long as they are based on the same facts as the original charge, this will enable the requesting State to follow its domestic procedure without being required to seek express permission from the requested State. The requested State has the assurance in such instances that the offence is one for which extradition would have been granted, and which is not based on new facts.

209. Under paragraph 1(b), by consent of the requested State, extradition may be extended to any other offence. States may provide that the requested person may waive this immunity.

210. The discretion of the requested State to consent or not consent to trial or punishment for new charges is limited by the second sentence of paragraph 1(b), which provides that if the new offence is extraditable within the meaning of the treaty, then the requested State shall consent to prosecution or enforcement in respect of that offence.

211. The rule of specialty does not apply to offences committed following surrender.

Application

212. There are variants on the model text that may be considered by States in crafting a specialty provision. Initially, States may wish to consider how to treat the issue of re-extradition to a third State. Under the model text, the requesting State may always re-extradite to a third State for the same offence for which extradition was originally granted by the requested State, and the requested State shall consent to re-extradition for any other offence for which extradition would have been granted. Some States may instead wish to retain greater discretion with respect to any potential extradition of the person wanted to a third State for offences committed before surrender.

213. Some legal systems may provide that the person surrendered may explicitly consent to proceedings, sentencing, detention or re-extradition in respect of another offence.

214. Some States may not wish to assume the obligation that consent shall automatically be given if the other offence is extraditable according to the treaty and may wish instead to include other grounds in determining whether to grant consent if

the request is for prosecution or punishment of entirely separate criminal acts that should have been included in the original request for extradition.

215. States may wish to include a provision enabling the requesting State to retain the extradited person in custody for some period of time while its request for requested State's consent is being processed (in a manner similar to provisional arrest). With such a provision, if the charge for which extradition was granted is dismissed by the courts of the requesting State, the danger of the person wanted being released and fleeing in such a scenario may be avoided during the period in which the requesting State seeks the consent of the requested State to proceed with other charges.

Implementation

216. The legislation should stipulate that one of the conditions for the granting of an extradition is that the requesting State must give a specialty undertaking or assurance. The provision could provide that the State will be taken to have given such an assurance if, by a provision of its law, or a provision of an extradition treaty, or an undertaking given by the State, the person, after being surrendered, will not be proceeded against, sentenced, detained, re-extradited or subjected to any other restriction of personal liberty for any offence committed before surrender, other than exceptions specified in article 14. It will be desirable to specify which authority of the requested State will give the consent to enable the extradited person to face other charges; in many States it is the executive authority since once the person had been surrendered the judicial branch no longer has jurisdiction over the matter. The legislation could describe the factors to be taken into account in arriving at a decision as to whether to grant the request for consent.

217. Article 14 contains an undertaking by the contracting parties to observe the rule of specialty in respect of extradition cases dealt with under the treaty. There might also be a provision under the law of the requesting State to ensure that the person sought, once returned to the requesting State, can claim the benefit of the undertaking given by the requesting State to the requested State. The provision could simply state that, once the person is surrendered, the person will not be proceeded against and that, if proceedings are nevertheless brought against him or her, they will be declared to be inadmissible. As a means for the requested State to obtain an assurance that the conditions imposed by it and agreed to by the executive authority of the requesting State will in fact be complied with by the judicial authorities of the requesting State, States may incorporate into their domestic law a provision that assigns legal authority to the conditions agreed upon by the requested State and the requesting State, which would thus become binding upon the judicial authorities.

218. If a clause of the type described in paragraph 215 is to be inserted, there may be a need for the implementing legislation to provide for this form of arrest.

Suggestions

219. Should circumstances so change that a prosecuting authority feels that the interests of justice require the laying of additional charges or the additional deprivation of liberty, it should carefully consult the provisions of the treaty concerned. If there is a clause permitting amendment of charges without consent of

the requested State as long as those charges are closely related to those for which extradition was granted, the requesting State should consider whether that clause can be invoked. In any other case, the appropriate authority should be asked to seek the consent of the requested State before any such action is taken.

220. Ideally, all appropriate charges against a person wanted should be contained in the original request for extradition so that the requested State can resolve them in its extradition proceedings. Requests for waiver of specialty should generally be reserved for unforeseen circumstances and those involving re-extradition.

221. The rule of specialty is one of the reasons why a determination should be made whether the person is wanted for any other offences in that State (this is a particular problem for federal jurisdictions). If the requesting State obtains the extradition of the person wanted on a single charge and later finds out that there are other charges pending for which extradition could have been sought, it will be in the position of having to seek consent of the requested State, a situation that might have been avoided if the extradition request had originally been prepared for all charges. In urgent cases, such States will often be able to ensure that the person wanted is held while it seeks to prepare extradition requests for all charges by seeking provisional arrest on at least one charge and presenting the formal extradition documentation on those charges within the required time. In that way, judicial proceedings can commence in the requested State, while the requesting State prepares and forwards its documents for the remaining charges as soon as possible.

Paragraph 2: Requests for consent

Purpose

222. Paragraph 2 sets out the documentary requirements for a consent request. The requesting State should produce a complementary request that meets the formal and material requirements of an ordinary request, as well as a legal record of any statement made by the extradited person in respect to the offence concerned.

Application

223. As provided in the footnote to paragraph 2, some countries may wish to waive the requirement for the provision of some or all of the documents required in article 5, paragraph 2 of the Model Treaty. In some cases, the original extradition request previously submitted will contain sufficient information to enable a determination to be made without the need for submission of additional documents. In other cases, there will be a need for some, but not all, of the information specified in article 5.

Implementation

224. Generally it is not necessary for the legislation to set out the procedure and requirements for obtaining consent from a requested State.

Suggestions

225. There should be established procedures for seeking consent from the requested State. The channels for transmitting such requests are usually the same as for the extradition request itself. Generally, the request for consent is accompanied by documentation in support of extradition for the additional offences.

226. Strict guidelines should be laid down on making requests for waiving the rule of specialty. For example, the relevant authority could require strong justification and advice on the matters that would justify such a request.

227. There should also be guidelines on the circumstances in which the appropriate authority would agree to requests for waiving the rule of specialty. Factors for consideration may include whether extradition would have been granted in respect of the offences for which consent is sought, whether the requesting State knew (or could reasonably have been expected to have known) about those offences at the time the extradition request was made, whether the interests of justice require that consent be given. In general, States should do as much as possible to ensure that they do not get into the position of having to make requests for waiving the rule of specialty.

Paragraph 3: Cessation of the operation of the rule

Purpose

228. Paragraph 3 provides another exception to the rule of specialty: it will not apply if the extradited person, having had the opportunity to do so, did not leave the territory of the State to which he or she was surrendered within a specified number of days after being released or went back to the territory of the State after having left it.

Application

229. The period within which the person must have had an opportunity to leave may vary. The usual period is between 10 and 45 days.

Implementation

230. The legislation dealing with the rule of specialty (referred to above under the discussion of article 14, paragraph 1) would need to state (in the case of both incoming and outgoing extradited persons) that the rule does not apply if the person has left, or has had the opportunity of leaving the requesting State or if the person has voluntarily returned to the requesting State after leaving it.

Suggestions

231. The precise wording is left to the parties, and depends on their view of how long a person sought who is wanted for other charges should be allowed to remain in the territory of the country to which he or she was extradited after the resolution of the charges for which he or she was extradited. The word "opportunity" is used in the model text to suggest that the person must have the legal and material possibility of

leaving the territory of the requesting State. The requesting State cannot therefore withdraw the person's passport or otherwise prevent the person from leaving. Cases in which the person's departure is prevented by illness may also be taken into account if desired.

Article 15: TRANSIT

1. Where a person is to be extradited to a Party from a third State through the territory of the other Party, the Party to which the person is to be extradited shall request the other Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other Party is scheduled.

2. Upon receipt of such a request, which shall contain relevant information, the requested State shall deal with this request pursuant to procedures provided by its own law. The requested State shall grant the request expeditiously unless its essential interests would be prejudiced thereby.

3. The State of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit.

4. In the event of an unscheduled landing, the Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for [48] hours, pending receipt of the transit request to be made in accordance with paragraph 1 of the present article.

Footnote to paragraph 2: Some countries may wish to agree on other grounds for refusal, which may also warrant refusal for extradition, such as those related to the nature of the offence (e.g. political, fiscal, military) or to the status of the person (e.g. their own nationals). However, countries may wish to provide that transit should not be denied on the basis of nationality.

Commentary

Purpose

Paragraph I: Requests for transit permission

232. Paragraph 1 enables a party to whom a person is being extradited from a third State through the territory of another party to request permission to transport the person through that territory. Transit provisions are traditionally based on the notion of transit by surface transport through the territory of a State. The paragraph specifically stipulates that transit permission is not required if the person is transported by air and there is no scheduled landing in the territory of the other party.

Implementation

233. There is usually no need for the legislation to provide for a power to make transit requests or for the procedure in relation to the making of such requests.

However, States should provide for situations in which they are the transit State, either because they have airports in their territory with transit capability, or for cases of unscheduled landings.

Suggestions

234. If, while a person is being extradited by air from the requested State to the requesting State, the flight must stop for any time in a third State, transit permission must be obtained from that State.

235. The transit arrangements that can be made are detailed in the treaty with the transit State or in the legislation of that State (not the treaty with the requested State). Without transit permission from the third State, an escorting officer generally has no power and will not be accorded assistance by local police in respect of the person being extradited. The latter can simply leave or, at best, can bring an application for the issue of a writ of habeas corpus. Such applications have succeeded in the past. Some States would not consent to foreign police detaining in custody the person in transit. In cases involving an unscheduled landing, it is important for the transit State to have the power to detain the person referred to in paragraphs 3 and 4.

Paragraph 2: Execution of transit requests

Purpose

236. Paragraph 2 provides for a requested State to decide on the transit request in accordance with its law. It is required to grant the request expeditiously unless its essential interests would be prejudiced thereby.

Application

237. States may wish to agree on different grounds for refusal. Some might prefer broad, general discretion in the requested State, so that permission is given "unless the requested State is satisfied that there are reasonable grounds for refusing" to grant permission.

238. Other States may prefer a more limited formulation, in essence, tying permission for transit to the same conditions and grounds governing extradition, such as those related to the nature of the offence (e.g. political, fiscal, military) or to the status of the person (e.g. their own nationals). As noted in the footnote to paragraph 2, countries may, however, wish to provide that transit should not be denied on the basis of nationality (see also paragraph 241).

239. For the reasons discussed in paragraph 241, below, if possible, States should also avoid a requirement of full extradition review in transit cases, so as not to delay transit determinations significantly. Similarly, States should try to avoid requiring that the transit request be a full extradition request under article 5, as it will be impracticable, particularly in unscheduled landing scenarios, for the State seeking transit to comply with such provisions within the time limit provided for detaining the person in custody.

240. The extent to which States can afford to be flexible with respect to article 15 will vary. For example, some isolated States will rarely be used as transit points and people being extradited to such States will be transported by plane from a third State.

241. In deciding upon grounds for refusal, the purpose of the provision should be borne in mind: a person being extradited may be transported in custody through the transit State for the purpose of being surrendered to a State with which the transit State has a treaty or arrangement concerning extradition. In such cases, the transit State plays no part in the substantive extradition; it merely facilitates the transfer of the person being extradited between the requested State and the requesting State.

Implementation

242. Implementing legislation will be required to authorize a State to comply with its transit obligations, particularly the holding in custody of extradited persons in transit (see article 15, paragraph 3) and the rendering of assistance by local police officers.

243. It is not usually necessary for the legislation to specify the grounds for refusal in relation to a transit request.

Suggestions

244. There should be established guidelines, whether they be in the legislation or policy, for deciding upon transit requests.

Paragraph 3: Legal provisions for the detention of persons in custody

Purpose

245. Paragraph 3 requires each party to ensure that it has legislation enabling the detention of persons in custody in the event that transit is requested and subsequently occurs.

Application

246. To guard against the scenarios described in paragraph 235, it may be advisable to also add a requirement that where permission to transit has been granted, the transited State shall ensure that the person is kept in custody during the period of transit.

Implementation

247. Legislation will be required to enable an extradited person to be held in custody; otherwise the person may use whatever legal mechanism is available to test whether his or her detention is expressly sanctioned by the law. While the details of the legislation will vary, the provisions usually enable an extradited person to be held in custody while passing through a State for periods not exceeding a certain number of hours. For example, the provisions could allow the foreign escort officer to hold the person in custody for, say, 24 hours or less without further authority, and then permit

a judicial authority to issue (upon application) a warrant authorizing further custody for a certain period which the judicial authority considers necessary to facilitate the transporting of the person sought. If States wish, they could include a further provision enabling this period to be extended if the relevant authority, on application by the receiving State, authorizes further custody. States may wish to specify a limit on the total period for which a person may be held in custody before such an authorization is issued. It would also be prudent to empower the relevant authority to direct the release of the person from custody.

Suggestions

248. There should be established procedures for making applications for extension of the custody period and firm guidelines on making the decision on such applications.

Paragraph 4: Unscheduled landing

Purpose

249. Paragraph 4 takes account of unscheduled landings and enables the holding of a person in custody for a specified period, pending receipt of the transit request. If such a provision is not included, there is a possibility that the extradited person will apply for habeas corpus, or otherwise escape custody.

Application

250. States should draft the transit provision in a way that makes very clear that the person is to be held in custody until the transit is effected.

251. Another issue to be considered is the amount of time permitted in unscheduled landing situations for submission of the request for transit before the person is entitled to be released. Some treaties use the suggested period of 48 hours, while others use a higher amount, such as 96 hours, to provide an additional margin of safety.

Implementation

252. In addition to the matters discussed under article 15, paragraph 3, legislation should also enable local police officers to assist the foreign escort officers as is reasonable and necessary to facilitate the transporting of the person in custody.

Article 16: CONCURRENT REQUESTS

If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.

Commentary

Purpose

253. Article 16 covers situations where requests are received from two or more States for the extradition of the same person. It provides that the requested State shall, at its discretion, determine to which of those States the person is to be extradited.

Application

254. States may wish to specify the matters to which the requested State shall (or may) have regard. These may include all relevant circumstances and, in particular, if the requests are made pursuant to treaty, the possibility of subsequent extradition between the requesting States, the respective interests of the requesting States, if the requests relate to different offences, the relative seriousness of the offences; the time and place of commission of each offence; the respective dates of the requests; the nationality of the person and of the victims; and the chronological order in which the requests were received. Further discussion of these criteria can be found in paragraph 257, below.

Implementation

255. This article requires no implementing legislation.

256. Guidelines on how to deal with concurrent requests should be established.

Suggestions

257. The fixing of criteria mentioned in paragraph 254 leaves the requested State with discretion, while reference to fixed criteria may be of considerable aid in balancing the respective equities. For example, a requested State should consider which request is made pursuant to treaty, in which there is an obligation to extradite, as opposed to a competing request made pursuant to statute, in which no such obligation exists. In considering whether to prefer extradition to a person's State of nationality or another State, the requested State should determine if the State of nationality does not extradite its nationals, since in such a case a decision to extradite the person to that State may result in the other requesting State never being able to obtain extradition of the person. Other interests of a particular requesting State may militate in giving priority to its case, e.g., where it is prosecuting its public official for corruption. Each criterion serves as a reminder of interests that may be present in a particular case that are worthy of consideration by the requested State. Reliance on such specifically articulated criteria may also be useful for the purpose of explaining the reasons for the requested State's decision.

Article 17: COSTS

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory in connection with the seizure and handing over of property, or the arrest and detention of the person whose extradition is sought.

3. The requesting State shall bear the costs incurred in conveying the person from the territory of the requested State, including transit costs.

Footnote to paragraph 2: Some countries may wish to consider reimbursement of costs incurred as a result of withdrawal of a request for extradition or provisional arrest. There may also be cases for consultation between the requesting and requested States for the payment by the requesting State of extraordinary costs, particularly in complex cases where there is a significant disparity in the resources available to the two States.

Commentary

Purpose

258. Article 17 assigns responsibility for the different costs involved in the extradition process. The requested State will bear the costs incurred in its territory, while the requesting State will be responsible for the costs of transporting the extradited person from the requested State to the requesting State following surrender.

Application

259. States may wish to include a provision for reimbursement of costs incurred by the requested State as a result of withdrawal of a request for extradition or provisional arrest.

260. As referred to in the footnote to paragraph 2, there may be cases for consultation between the requesting and requested States for the possible payment by the requesting State of extraordinary costs, particularly in complex cases where there is a significant disparity in the resources available to the two States.

261. One cost issue concerns whether "cost of any proceedings" in the requested State include the resources of providing legal representation (either by the requested State's authorities or private counsel) in such proceedings. Many modern treaties expressly provide that the ministry of justice or equivalent authority of the requested State shall advise, assist and render all necessary representation for the requesting State in extradition proceedings, and States may wish to expressly include such a provision.

262. States may also wish to provide that the costs of translation of the request and supporting documentation shall always be borne by the requesting State, to make clear that while translation is generally done in the requesting State, the cost does not shift where the requesting State relies on translation services located in the requested State.

Implementation

263. Implementation of this article does not require domestic legislation. However, estimated costs of extradition proceedings should be reflected in the budget of the appropriate authority in each State.

Article 18: FINAL PROVISIONS

1. The present Treaty is subject to [ratification, acceptance or approval]. The instruments of (ratification, acceptance or approval] shall be exchanged as soon as possible.

2. The present Treaty shall enter into force on the thirtieth day after the day on which the instruments of [ratification, acceptance or approval] are exchanged.

3. The present Treaty shall apply to requests made after its entry into force, even if the relevant acts or omissions occurred prior to that date.

4. Either Contracting Party may denounce the present Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which such notice is received by the other Party.

Commentary

Purpose

264. Article 18 provides the entry into force and termination provisions.

Application and implementation

265. The parties should reflect their general treaty process in this article. The Model Treaty provides for ratification, acceptance or approval. The formulation adopted between any two States will depend upon the requirements of each of the States with respect to bringing such a treaty into force.

266. For example, one formulation could be that the treaty enters into force "thirty days after the date on which the contracting States have notified each other in writing that their respective requirements for the entry into force of the treaty have been complied with". This method of providing for the treaty to enter into force upon an exchange of notes may be appropriate if one or both parties have domestic procedures requiring submission of the treaty to its Parliament. An alternative approach could be for the treaty to enter into force immediately upon exchange of instruments of ratification, so that the treaty may be brought into immediate use.

267. For States that have a relatively simple process for bringing treaties into effect, it may be appropriate for the treaty to enter into force, either immediately upon, or e.g., 30 days after ‘the exchange of notification of the completion of their domestic legal requirements for entry into force”.

268. Given the nature of the obligations contained in an extradition or mutual legal assistance treaty, the parties, as a general rule, agree to subject its entry into force to its ratification. This normally entails its internal approval by a competent organ – usually Parliament or Congress – as a prerequisite to its ratification by the executive authority.

269. This mechanism, though necessary, involves, more often than not, lengthy and cumbersome procedures. As an alternative to it, the parties may consider stipulating the provisional application of the treaty, provided that such alternative is not prohibited by a party's Constitution. This option is ruled by article 25 of the 1969 Vienna Convention on the Law of Treaties, which sets forth that a treaty or a part of a treaty may be applied provisionally, pending its entry into force, if (a) the treaty itself so provides; of (b) the negotiating States have in some other manner so agreed (article 25, paragraph 1). In addition, article 25, paragraph 2 provides that "unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".

PART TWO

Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters

Introduction

1. The importance of effective mutual (legal) assistance as a tool to combat transnational crime cannot be overstated. Whatever the applicable legal system or tradition, criminal investigations and proceedings are based on evidence and increasingly that evidence in the criminal context is located outside of national borders. As a result, there is now an increased emphasis on a global level on the need to develop effective instruments that will allow for seeking and rendering assistance with cross border evidence gathering. While law enforcement co-operation by way of informal agreement and otherwise remains an important component of international cooperation, there are inherent limits to it in that it will not generally extend to the use of compulsory measures. Similarly, court to court requests, particularly as between states of different legal traditions may be of limited application and can prove slow and time consuming. For this reason, many states are striving to adopt instruments and measures to allow for the rendering of formal mutual (legal) assistance in a direct and effective manner.

2. In addition to relying on the various multilateral and regional instruments that have been concluded in recent years, there is also a need for bilateral instruments for mutual assistance particularly as between neighbouring jurisdictions or jurisdictions with close ties and relations. The conclusion of these binding international treaties may be considered to be desirable in the long term, first, in order to place international cooperation on a firm footing by providing predictable rules for cooperation and secondly, to increase the overall network through which assistance may be provided. Bilateral instruments also provide an opportunity for the states involved to craft an instrument most suited to the legal systems and relations of the two states and to overcome particular problems that may exist. The Model Treaty on Mutual Assistance in Criminal Matters is intended as a tool that can be used by States in the negotiation of bilateral instruments of this nature.

3. The Model Treaty on Mutual Assistance in Criminal Matters was adopted by General Assembly resolution 45/117 of 14 December 1990 on the recommendation of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders. In its resolution 52/88 of 12 December 1997, the General Assembly requested the Secretary General to convene a meeting of an intergovernmental expert group in order to examine practical recommendations for the further development and promotion of mutual assistance in criminal matters, as well as to explore ways and means of increasing the efficiency of this type of international cooperation, including by drafting alternative or complementary articles for the Model Treaty on Mutual Assistance in Criminal Matters. This meeting was held at Arlington, Virginia, United States of America, from 23 to 26 February 1998 and hosted by the Department of Justice and the Department of State of the United States Government. In its report, the expert group proposed specific revisions to the Model Treaty, which were subsequently approved by the General Assembly in its resolution 53/112 of 9 December 1998. Following the General Assembly's approval of these 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. Before considering the substantive articles of the Model Treaty on Mutual Assistance in Criminal Matters, some introductory comments are necessary. The

Model Treaty was designed as a vehicle for international cooperation between all countries regardless of legal system or legal background. This means that some words are used that are either alien to some legal systems or convey different meanings in different legal systems. Wherever possible, an explanation will be given for those words in the present Manual under the article in which they first appear.

5. The terms "mutual assistance" and "mutual legal assistance" are often used interchangeably though they can have very different meanings in different legal systems.[8] The term used in the model treaty is "mutual assistance" and for consistency that term is also used throughout this manual.[9] In negotiating mutual assistance treaties and adopting domestic legislation, States should use the term that is most consistent and appropriate to their legal system and practice.[10]

6. It is important to note that the Model Treaty refers only to Mutual Assistance and not, as is some times the case, Judicial Assistance. The term "judicial assistance" creates problems because of differences in legal systems. In civil law countries, and under some other legal systems, investigations are conducted under judicial supervision and are therefore regarded as proceedings even though at the time of those judicially supervised investigations a suspect who has not been arrested may not be aware of the charge against him or her, or even be known. Under the common law heritage, however, the investigation stage is generally conducted by police independent of the judiciary. With rare exception, it is only when the investigation is complete and the person is charged before a judicial officer that proceedings commence.

7. For countries in which civil law operates and where investigations are judicially supervised, requests for assistance can be made, under this interpretation, even at the investigation stage, by way of letter rogatory from the supervising judicial officer to his or her judicial colleagues in other jurisdictions and can therefore be properly termed "judicial assistance". For most common law countries, however, requests cannot be made by a judicial authority during the investigation stage as there is no judicial officer involved until formal proceedings are commenced and even post charge the request may still emanate from a police or prosecution authority. Even if under the domestic law of a common law country a judicial officer is authorized to make the request, frequently this proves ineffective because that person is not recognized as a judicial officer in the requested State. In such cases, the request may be accepted by the requested State provided it has been certified by a judicial authority appointed by the requesting State on the basis of an agreement between the States. Central authorities specializing in facilitating international cooperation in criminal matters can provide a bridge between different legal systems, as can the process of both negotiating and utilizing a treaty, by enabling both parties to clarify

[8] For example, the term "mutual assistance" is used in some systems to describe international cooperation generally covering police to police cooperation, extradition, and transfer of prisoners as well as assistance with evidence gathering by way of compulsory measures. Those states employ the term "mutual legal assistance" when referring to evidence gathering by compulsory measures only. In other states it is considered that the term "mutual legal assistance" is too limited equating to "judicial" assistance between judicial authorities only. For those states the broader term mutual assistance is used.

[9] Although it should be noted that the preambular paragraphs of the General Assembly Resolution 45/117 makes reference to "mutual legal assistance".

[10] In the negotiation of a treaty between States of different legal tradition it may be useful to employ the term "mutual legal assistance" to try and bridge the differences between systems.

and understand each other's requirements. This is one significant difference that the Model Treaty seeks to overcome by using the term "mutual assistance" and avoiding any reference to “judicial assistance”. The use of the different expressions referred to earlier in this introduction is also due to this difference in legal systems.

8. In reviewing the Manual, reference will be made to various international conventions and other arrangements that contain provisions on mutual assistance in order to highlight optional approaches or identify similarities to the model treaty approach. Some of the instruments that will be referred to are as follows:

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Drug Convention).
- United Nations Convention against Transnational Organized Crime (2000) (hereinafter referred to as “the Palermo Convention”).
- United Nations Convention against Corruption (2003) (hereinafter referred to as “the Merida 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).
- Commonwealth Scheme for Mutual Assistance in Criminal Matters (Commonwealth Scheme)[11].
- European Convention on Mutual Assistance in Criminal Matters (1959) (Council of Europe 1959 Convention).
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Council Act of 29 May 2000) (EU 2000 Convention).
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) (Council of Europe 1990 Convention).

9. The Model Treaty was formulated to help Member States, enabling them to cope more effectively with criminal cases having transnational implications[12]. As far as possible, it avoids mandatory rules since the penal philosophies and systems of States can differ widely. Most issues are regulated by optional rules and it is left to specific bilateral arrangements or multilateral conventions to transform them into mandatory ones, according to the needs and circumstances of inter-State relations. Special consideration was given to the following issues: scope of application; central authorities; refusal of assistance; content and execution of a request; protection of

[11] The Commonwealth Scheme for mutual assistance in criminal matters is applicable to member countries of the Commonwealth. Copies of the text of the Scheme are available from the Commonwealth Secretariat.

[12] See the *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, United Nations Publication Sales No. E.92.1V. 1, for an overview of measures to foster international cooperation and further information on the Model Treaty on Mutual Assistance in Criminal Matters, as well as the Model Treaty on Extradition, the Model Treaty on the Transfer of Proceedings in Criminal Matters, the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released and the Model Agreement on the Transfer of Foreign Prisoners.

confidentiality; obtaining evidence; availability of persons in custody and other persons to give evidence or assist in investigation; safe conduct; provision of documents; and search and seizure. The intent of the Model Treaty was that States, when executing requests for assistance, should provide the widest possible measure of assistance compatible with domestic law or practice. In case of doubt, a requested State should be encouraged to comply with a request. The Model Treaty now also includes provisions for the tracing, freezing and confiscation of proceeds of crime that has become a critically important component of co-operation to combat crime.

Article 1: SCOPE OF APPLICATION

1. The Parties shall, in accordance with the present Treaty, afford to each other the widest possible measure of mutual assistance in investigations or court proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State.

2. Mutual assistance to be afforded in accordance with the present Treaty may include:

(a) Taking evidence or statements from persons;

(b) Assisting in the availability of detained persons or others to give evidence or assist in investigations;

(c) Effecting service of judicial documents;

(d) Executing searches and seizures;

(e) Examining objects and sites;

(f) Providing information and evidentiary items;

(g) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

3. The present Treaty does not apply to:

(a) The arrest or detention of any person with a view to the extradition of that person;

(b) The enforcement in the requested State of criminal judgements imposed in the requesting State except to the extent permitted by the law of the requested State and article 18 of the present Treaty.

(c) The transfer of persons in custody to serve sentences;

(d) The transfer of proceedings in criminal matters.

Footnote to title: Additions to the scope of assistance to be provided, such as provisions covering information on sentences passed on nationals of the Parties, can be considered bilaterally. Obviously, such assistance must be compatible with the law of the requested State.

Commentary

10. Article 1 is designed to set out the general scope of the Model Treaty and to identify areas to which it does not apply.

11. It identifies the types of assistance that can be granted in an inclusive, not exclusive, manner. Later articles in the Model Treaty amplify the general types of assistance identified in article 1, paragraph 2, particularly where these types of assistance involve compulsory measures.

12. Several words or terms used in article 1, paragraphs 1 and 2, require explanations:

(a) The expression “investigations or court proceedings” is designed to reflect that under some systems the investigation stage is not a proceeding. It is used to ensure a parity of obligations and benefits regardless of the legal system;

(b) The term “evidence or statements” results from the above-mentioned difference. In a jurisdiction where the investigation is judicially supervised any statement of a witness, or of an accused, becomes part of the judicial file and is therefore evidence. Much of the evidence is collected during investigative pre-trial procedures and may be used as such in court. In the common law system, however, a statement only becomes evidence once the maker of the statement gives the contents of that statement as testimony before a court. This could happen months, if not years, after the original statement was made;

(c) The term “give evidence or assist in investigations” is used for the same reason. In a judicially supervised inquiry the person would give evidence, in a judicially unsupervised inquiry he or she would assist investigations. The same is true of the expression “providing information and evidentiary items”, as used in paragraph 2 (f).

(d) The term "executing searches and seizures" is used in the sense of searching places, premises, vehicles etc. and compulsorily acquiring evidential material or information found there. It also must be interpreted now to cover search and seizure in a technological context e.g the search of computers and computer systems. The expression, while used in the Model Treaty, should not be used in requests for assistance, particularly in cases where the requesting and requested States have different legal systems. The expression "search and seizure", can have different meanings in different jurisdictions. It is better in a request for assistance to describe the result sought to be achieved rather than a legal methodology, such as "search and seizure", by which the result is to be achieved.

Paragraph 1: Obligations of the parties

Purpose

13. Paragraph 1 defines the scope of the Model Treaty.

Application

14. The essential principle of the Model Treaty is that it is intended for criminal matters and the parties can define those as appropriate. However, in this context, the parties, may, if it is advisable, discuss the application of the treaty to the "civil forfeiture" process that some countries are adopting with respect to proceeds of crime. Those countries which have civil forfeiture regime in place or are considering its introduction will need to clearly specify this in any treaty that is adopted.

15. In applying the model, the parties to a treaty may adopt an appropriate definition of criminal matters for the legal systems of the States. The "Jurisdiction of a judicial authority parameter" used in the model can be modified depending on the legal structure in each country. For example, the word "offences" may be sufficient if all offences fall within the jurisdiction of a judge or court, but again, for countries which have civil forfeiture regime in place or are considering its introduction, a special consideration would have to be given to whether this is sufficient to cover such a civil forfeiture regime. The definition adopted however should reflect the intention of the Model to provide the widest possible measure of assistance in criminal matters. To this end the wider the range of offences and matters covered by the treaty, the more effective a tool it will be in combating crime. It is also important to note that significant problems can arise when the application of mutual assistance is restricted to only certain types of crimes such as drug trafficking. Given that organized groups often engage in a range of criminal activity, it can complicate the assistance process considerably if distinctions are drawn as between types of crime. States should bear this in mind when arriving at the definition of criminal matters for this provision.

Implementation

16. In most States legislation will be required to implement mutual (legal) assistance treaties. However, as stated in the introduction, some cooperation may be possible without resort to specific compulsory powers based on discretionary powers of law enforcement. For example, the police in some jurisdictions may be able to obtain a statement from a witness who is prepared to provide it on a voluntary basis. However the principal aim of these treaties is to permit the receiving and rendering of assistance by way of compulsory orders. Generally these compulsory orders are only available for foreign investigations through specific powers created by legislation. The optimum legislation is a general instrument that can be used to implement all bilateral mutual assistance treaties and multilateral conventions relating to mutual assistance or which contain obligations with respect to mutual assistance. The legislation should mirror the scope of the treaties as defined in article 1 by establishing a scheme applicable to all offences or matters covered by the relevant bilateral treaty or included in the multilateral instrument. As indicated, if general legislation is adopted, it should be broadly framed to ensure that bilateral and multilateral instruments could

be implemented under the legislation without the need for legislative amendment. The legislation should allow for applications for different types of compulsory orders that are consistent with the types of assistance listed in the treaty. It should permit those applications to be made in relation to foreign matters that are at the investigation or proceeding stage. Countries should also include powers for requests to be made by or through domestic authorities to a foreign State for assistance, if that power does not already exist. It is important to note that the type of legislation required will vary depending on the relevant legal system. In some countries, where treaties are self-executing, it may be that only a very general power or some procedural provisions will be required. In other countries more extensive legislative provisions may be necessary.

Paragraph 2: Types of mutual assistance covered by the Model Treaty

Purpose

17. Paragraph 2 lists the types of assistance that may be sought and provided between parties to a mutual assistance treaty in criminal matters. The types of assistance in the illustrative list in the Model Treaty are similar to those found in most bilateral and regional instruments as well as in multilateral conventions, such as the 1988 Drug Convention (article 7), the Palermo Convention (article 18) and the Merida Convention (article 46). The provisions of the Commonwealth Scheme, while worded slightly differently, are the same in substance.

18. Each type of assistance listed is the subject of a specific article that expands on the details surrounding the particular type of assistance. These appear later in the treaty. A reference to the specific articles is included in the description below.

Application

19. The types of assistance available under a treaty should reflect the needs of the parties. It should also, for consistency, mirror the types of assistance listed in other bilateral or multilateral instruments to which either of the states are parties. They should also mirror the measures available under or to be included in any domestic legislation. Policy makers and legislators may also wish to consider the likely future needs of the parties, for example, if proceeds of crime or terrorism financing legislation is yet to be enacted. From the list provided in the Model Treaty, the parties should select the types of assistance needed and should add any other measures needed by the contracting parties. To provide flexibility to capture future types of assistance, the Contracting Parties may wish to include a "catch all" provision allowing for any other type of assistance not contrary to or prohibited by the law of the requested state[13].

[13] A sample of this provision can be found in article 18, sub paragraph 3 (i) of the Palermo Convention, as well as in article 46, sub paragraph 3 (i) of the Merida Convention. It should be mentioned that the Merida Convention contains a specific chapter (Chapter V) on asset recovery and, for this reason, article 46 provides for two additional purposes for which mutual assistance may be requested: "Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention" (paragraph 3(j)), and "the recovery of assets, in accordance with the provisions of chapter V of this Convention" (paragraph 3(k)).

Implementation

20. The legislation should provide for the implementation of the different types of assistance included in the treaty, considering the needs and obligations of the parties, when not otherwise provided by law or practice. For each type of assistance included in a treaty, the domestic law of the country should include the measures necessary to meet requests for that type of assistance. Types of assistance can be added or deleted depending on the requirements of the criminal process in each State and the domestic ability of each State.

Subparagraph (a): Taking evidence or statements from persons (see article 11)

Purpose

21. The requesting State may ask that a person be interviewed to provide a statement concerning a criminal matter or that evidence be taken from the person for use at trial, depending on the stage of the proceedings and/or whether the proceedings are carried out in a civil or common law system. The requested State should be able to obtain the statement or evidence, voluntarily or by compulsion, in the form sought by the requesting State. If the requesting State requires that the statement of a witness be taken under oath or affirmation, it should specify this in its request and the requested State should have the capacity to meet this requirement.

Implementation

22. It is desirable that the implementing legislation empowers the competent judicial authority of the requested State to issue an order to compel the taking of a statement or testimony where a witness will not provide such evidence on a voluntary basis, in response to a request from a foreign authority, and to take such statements or evidence under oath or affirmation if requested (see article 12 and its commentary on the right or obligation to decline to give evidence.) In the absence of such legislation, a State may be unable to fulfil its obligations under the treaty. In most States such a power would be limited to witnesses other than the suspect or accused person in the foreign investigations or proceedings. If it subsequently appears that the witness has committed perjury, he or she should be liable to prosecution and punishment in the requested State. The provision should be flexible enough to permit the evidence to be gathered, if possible with the participation of foreign interested parties and domestic officials. The statute should allow for different processes, such as questioning by judges, prosecutors or police and cross-examination. Such flexibility is necessary to meet the varying requirements of disparate legal systems.

23. At the same time, States may wish to consider safeguards in the legislation to protect the rights of a person compelled to provide the statement or evidence. There are various safeguards that can be included in the legislation, such as:

(a) Orders compelling attendance and response to questions only to be issued by the competent domestic judicial officials;

(b) Orders will only be issued if the appropriate authority is satisfied of certain threshold criteria, i.e. there are grounds to believe there is an offence in the

foreign State and the person to be compelled has relevant information to provide;

(c) Mechanisms to allow the subject of the examination to raise objections to the general process or specific questions on the basis of the law in either State;

(d) Guarantees (mechanisms to assist in securing) for securing the physical safety of persons whose statements or evidence are sought.

24. The law should also provide for requests to be made to foreign States for statements or evidence to be taken from witnesses. In this context, it should also be remembered that admissibility of evidence would vary according to the evidence involved. In many countries, this may be governed by court rules of evidence rather than legislation. Any such provision should take into account the judicial laws and practices in the country concerned. In addition, there should be provision for the introduction of evidence gathered abroad pursuant to a request. Any such evidentiary provisions should recognize the sovereignty of States and make evidence taken by or before foreign officials admissible. Legislation requiring the evidence to be gathered by officials of the requesting State should be avoided.

Suggestions

25. If appropriate, law enforcement or other competent authorities should approach the witness to see if the statement or evidence can be taken without a compulsory order. In executing requests of this nature, if an initial approach is made, only voluntary compliance should be sought. It should be made clear that the witness is under no legal obligation to cooperate. At no time should force or threat of sanction be used. Statements or evidence should be recorded as fully as possible by the appropriate authority. Training for officials who help with these requests is desirable. It should be noted that many jurisdictions would require evidence to be formally sworn. If this is the case, then the necessary procedures will have to be observed to ensure that the evidence is admissible.

26. If compulsory orders are required there should be uniformity in procedure and even standardized forms for applications and orders compelling testimony to be given before a judicial officer or court of the requested State. These may be provided for by legislation, policy guidelines or court rules or practice, depending on the country concerned.

27. Compulsory orders may be required for evidentiary reasons. Considerations of international or domestic policy, a possibility of misunderstanding or simple cost effectiveness may dictate that a formal compulsory approach is preferable in certain circumstances.

Subparagraph (b): *Assisting in the availability of detained persons or others to give evidence or assist in investigations (see articles 13, 14, and 15)*

Purpose

28. The requesting State may seek to have a person voluntarily appear in the requesting State to provide assistance or testify at a proceeding. This would include persons in custody, in which case they would be temporarily transferred to the requesting State for this purpose. While the provisions of the Model Treaty on this issue are quite general, other instruments such as the Palermo Convention, the Merida Convention and the Terrorist Bombing Convention contain more detailed articles (see article 18, paragraphs 10-12 of the Palermo Convention, article 46, paragraphs 10-12 of the Merida Convention and article 13 of the Terrorist Bombing Convention). These detailed provisions should be kept in mind when negotiating a treaty as they illustrate the kinds of powers that the states need to have in place particularly with regard to custodial transfers. For example, the requesting State must have the legal authority to hold such a person in custody and the requested State must have the legal ability to transfer persons in custody. Most instruments provide that custodial transfers and non-custodial appearances may only be effected with the consent of the person whose attendance is sought[14]. States may also wish to consider, in the case of persons serving long periods of imprisonment, the use of video link evidence instead of physical transfer. This is because some States have the concern of security and the fear of flight in the case of dangerous criminals. In such cases, the consent of the person in custody provides no comfort or safeguard, as such prisoners will readily consent in the hope of trying to escape during the transfer arrangements.

Implementation

29. The legislation must include provisions that meet the obligations imposed on requesting and requested States. Generally no legislative amendment will be necessary for a non-custodial appearance unless legislation is needed to make the request. The requested State must be able to comply with the request by having an appropriate authority within the country approach and invite the individual to the requesting State. In custodial cases, for the requesting State, in addition to the power to make a request there must be an ability to receive and hold a person in custody and return the person to the requested State once the assistance has been provided or within a set time period whichever is sooner.

30. Normally a State would have the power to hold someone in custody only on the basis of a domestic court order. Treaty provisions or legislation, if consistent with domestic constitutions, may provide for the validity of a foreign order of detention or empower a judicial authority in the requesting state to issue a detention order for a temporary transfer.

31. The legislation might also have to provide a mechanism to overcome any barriers that may exist because of immigration restrictions. In most countries, persons in custody would be prohibited from entry in the normal course of events because of a criminal record. There should be power in the legislation or court rules to override

[14] For example, see OAS 1992 Nassau Convention on Mutual Legal Assistance.

this prohibition and allow the witness to enter the country on a temporary basis. This may be required as well for persons not in custody if they are otherwise inadmissible to the country, for example because of a criminal record.

32. Relevant authorities in the requested State must have the ability to transfer prisoners to a foreign State on a temporary basis, pursuant to a request for assistance. Any enactment should provide a process for the release of the prisoner from the institution into the custody of law enforcement officers. This may require a court order. If policy or administrative directives will not suffice, the legislation should address conveyance to the foreign State, re-admittance into the requested State and return to the institution. As well, the relevant prison legislation should be amended to ensure that the prisoner receives credit for the time spent in custody in the foreign State.

Suggestions

33.With respect to persons who are not in custody, there should be a designated authority responsible for approaching and inviting these individuals to travel to the requesting State. There should be a policy in place that outlines the appropriate way to approach the person. Since the persons must choose to appear voluntarily, this should be made clear to them when they are approached. The requested State may be prepared to pay an advance for travel costs, to be reimbursed by the requesting State (see commentary to article 14). To avoid friction, pay in advance.

34. In custodial cases, the competent authorities that will effect the physical transfer of the individual in both States should be able to communicate directly, once the official request has been made and accepted. It is important that the requested country have procedures in place to coordinate the transfer. The request requires the involvement of officials at the prison and the border and for the court process. There should be a contact person in each responsible authority who will receive such requests and liaise with other officials. There should also be a procedure in place that ensures that all of the necessary officials are apprised of the details of the transfer, in particular that officials at the border are aware of the matter in advance.

35. As noted, under existing treaties and conventions, these requests may be executed only with the consent of the person to be transferred. Most requested States will require the written consent of the person to be provided before obtaining the appropriate orders. However, States may wish to bear in mind that increasing consideration is being given internationally to the concept of a cross border witness "subpoena" process that would allow for a witness to be compelled to attend a proceeding in another State. There may be some States where, because of their close ties, such a concept could be considered for inclusion in a bilateral treaty.

36. Police officers, prison officials or judicial authorities in the requested State may be called upon to assist with or obtain the written consent of a person to be transferred. As such transfers are voluntary, these officials must ensure that the person sought is aware of his or her right of refusal and that no pressure, threats or force are used to compel that person to travel to the requesting State.

37. In addition, if a detained person is to be transferred, the relevant authorities will have to carefully consider the best route for the transfer. If there are no direct connections between the countries, the question of transit through a third State will arise. Arrangements will have to be made for permission from the third State for transit.

Subparagraph (c): *Effecting service of judicial documents (see article 10)*

Purpose

38. The requesting State would seek service of judicial documents such as a summons, notice or judgment. The requested State would be required to serve the documents.

Implementation

39. In many jurisdictions, documents can be served without legislation providing for such service. In others, existing legislation on the service of documents may be applied also in cases of requests for foreign authorities. If legislation is required, it should establish a mechanism to serve documents and to provide proof of service to the requesting State. Any such legislation should be flexible enough to allow for service and proof of service to be carried out in a manner that meets the requirements of the requesting state.

Suggestions

40. Documents served on behalf of a requesting State have no binding effect in the requested State. At the same time, there may be legal ramifications in the requesting state resulting from the service. Each State should develop an appropriate process to ensure that this message is communicated to the recipient of the document in the requested State. Some States may rely on police officers or other officials serving the documents to advise the recipients verbally. If so, the State should develop a standard form wording that can be sent to the serving authority. Alternatively the State may wish to develop some form of a standard document to be served along with the judicial materials.

41. There should be a procedure to obtain proof of service. Normally, this would involve the person signing a receipt for the document, which receipt could be forwarded to the requesting State. If the recipient refuses to sign, there should be a mechanism by which this information could be conveyed to the foreign State, through an affidavit, certificate or other document.

Subparagraph (d): Executing searches and seizures (see article 17)

Purpose

42. The requesting State would ask for a location in the foreign State to be searched and any relevant evidence seized and transferred to the requesting State. In general, there should be no question that the provision applies to searches of computers and computer systems as well. In the unlikely circumstance that parties

could interpret the provision as not applying to such searches, the parties may wish to consider more specific language relating to such searches and the seizure of evidence from them. In order for a request for search and seizure to be carried-out, the requested State would need the capacity to execute search and seizure for a foreign investigation. Interestingly, the Palermo Convention (article 13, paragraph 2) and the Merida Convention (article 55, paragraph 2) also make reference here to requests for freezing which is a search type power that exists for some legal systems. If that is relevant and meaningful to the contracting parties in question, it could also be included in this subparagraph. However, States may wish to pay special attention to how such freezing is to be carried out within the domestic legal system of the requested State.

Implementation

43. A State should create a scheme for search and seizure for foreign investigations that mirrors the requirements for search and seizure in domestic investigations. This should include any special provisions applicable to search of computers or computer systems in domestic law. The legislative scheme should include a description of the threshold information required before a search warrant may be issued, as well as a description of any restrictions or conditions for the search process. The legislation should also specify who may conduct the search and under what circumstances. The legislation should further describe how evidence seized should be transferred to the requesting State.

44. When necessary, the legislation should empower the appropriate authorities to request a search in a foreign State. It should also provide for the admission of evidence obtained through the execution of a search in a foreign State. The evidentiary provisions should be designed to simplify the process for the reception of the evidence. In particular, there should, if necessary, be a presumption of continuity of custody and the power to introduce the evidence of the foreign officials involved in the search by way of statement, certificate, affidavit or other document. Where appropriate and not otherwise covered under domestic law, countries may wish to include in the statute a codification of the "plain view" doctrine[15], whereby officers lawfully executing a search for evidence of a particular crime may seize and use any evidence of other crimes that is in plain view during the course of the search.

Suggestions

45. Although standards will vary, in most States the power for a judicial authority to authorize a search will normally be exercised on the basis of underlying facts having been established or a standard having been met. So for example, in the common law systems the law enforcement officer or prosecutor who applies for

[15] The plain view doctrine provides that if authorities are lawfully present on premises conducting a search for the evidence of a crime they may, without additional authorization, seize any evidence they may discover in the course of the search even though it pertains to a different crime; for example, if when searching for weapons in a murder case the officers discover a package of narcotics, the drugs may be seized. In the context of mutual assistance, if a search is being conducted with respect to a foreign investigation and evidence of a domestic crime is located the police should be empowered to seize it.

judicial authorization must establish that the warrant is justified, in that there are reasonable grounds to believe or suspect that relevant evidence will be found through the search. In some systems, such reasonable grounds or probable cause may be presumed to exist if the request for search emanates from a judge or a court in the requesting State. In other systems, those grounds must be restated in the request.

46. In most States it is unlikely that foreign police or judicial officers will be allowed to participate in the search, other than as observers. The practice in this respect should be clearly communicated to domestic police forces and explained in each instance to the foreign authorities.

47. An issue that the Contracting States may wish to discuss and consider, in view of developments in technology and investigative techniques, either in the context of search and seizure or the gathering of evidence, is the possible inclusion in the treaty of assistance by way of electronic surveillance and interception. Whether this would be useful or even practicable for discussion or inclusion will depend on the circumstances of the contracting States, as the laws, practices, experiences and resources of States in this field will vary considerably.[16]

48. The authorities executing the search should make careful notes describing what is seized, including any relevant identification numbers and the circumstance of seizure, such as time and place and subsequent custody of the items seized. This information can then be communicated to the foreign State in the response to the request, in a form that will allow for the introduction of this surrounding evidence and the items seized at the trial in the requesting State.

Subparagraph (e): *Examining objects and sites*

Purpose

49. The requesting State would ask that a particular object or site be examined. The requested State needs ability at law to conduct this examination.

Implementation

50. In civil law States, such action is usually carried out by or under the supervision of an examining magistrate. In common law States, an inspection or examination can be carried out by the police without any compulsory order. If the inspection or examination requires entry into premises or production of objects, the general evidence-gathering order or search power should be sufficiently flexible for these situations.[17]

[16] The concept of the use of electronic surveillance and specific agreements on that issue is recognized in article 20 of the Palermo Convention, as well as in article 50 of the Merida Convention. An example of a treaty provision on interception of telecommunications can be found in the EU 2000 Convention, Title III.

[17] In this context, States that are party to the Rome Statute for the International Criminal Court, which intend to use general mutual assistance legislation to implement the "other forms of cooperation" obligations under that Statute should pay careful attention to the requirement for assistance by way of exhumation of gravesites. It may be that general powers will not be sufficient and specific provisions may be required to incorporate that power.

Subparagraph f: *Providing information and evidentiary items (see articles 11 and 16)*

Purpose

51. The requesting State would ask for information or things to be obtained and transferred to the requesting State. The requested State would require the ability to obtain information and items, voluntarily or by compulsion, for transfer to a foreign State. In the Palermo convention, specific reference is made here to assistance by way of expert evaluations (article 18, sub paragraph 3(e)). A similar provision is also included in the Merida Convention (article 46, sub paragraph 3(e)). Again, if the contracting parties consider it relevant and necessary, such a reference can be incorporated in this sub-paragraph.

Implementation

52. The legislation should provide for the compulsory production of documents or things that might afford evidence about the offence in the requesting State. Besides the search warrant power, this obligation may be met by having the legislative ability to require a person to produce documents or objects to a competent authority. This production order power can be particularly useful for gathering computer data from businesses or in obtaining documentation from financial institutions. It is generally only applied where there is no threat that evidence sought will be destroyed or the order will not be complied with as would be the case with businesses not otherwise involved in the matter under investigation or subject to the proceedings. This power can be framed similar to the search warrant sections, though the standard to be met may be less stringent for some states, given that this is a less invasive process than search and seizure. The provision should be flexible enough, however, to permit the production of different types of items to different persons, i.e. to a judge, police or prosecutor, so that the provision can be used for the different cases that may arise (see also commentary on subparagraph (a), above.)

53. The legislation should allow for the information or objects so produced to be turned over to authorities in the foreign State, with or without conditions.

54. The requesting State should have the power to make such requests. There should also be evidentiary sections, as with search warrants, that provide for the introduction of the evidence obtained from the foreign
State and simplify the process for admissibility (see commentary on subparagraph (d).)

Suggestions

55. There should be standard applications that can be used to provide the judicial authority with the necessary information to decide whether to grant an application for an order for the production of the document or thing. Normally the salient facts would be those showing a belief that there is a criminal matter under investigation or subject to prosecution and that the documents or objects sought are relevant. However, the required facts will vary according to the standards included in the legislation.

56. As with search warrants, the authorities that take custody of items produced should make careful records of how the items are handled to ensure that the materials

are transferred to the foreign State, along with enough information to permit the foreign State to use the evidence. The requesting State should include sufficient information in the request for the requested State to determine the form and amount of information required for the introduction of the evidence.

57. In some countries, there may be legal impediments that prevent or make difficult the transmission of information to another State spontaneously without a request. If that is the case for either of the contracting parties, it may be useful to include a clause providing for the transmission of information related to criminal matters to a competent authority in another State without prior request where they believe that such information could assist the authority. Such a clause would facilitate the spontaneous provision of information where a legal basis for transmission is required under domestic law.[18]

Subparagraph (g): Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records (see articles 11 and 16)

Purpose

58. The requesting State would seek the production of records from businesses or financial institutions. Originals or certified copies may be required. The requested State would need an ability to require production from the relevant business, financial institution or government department or agency, along with accompanying certification.

Implementation

59. This obligation could be met with the two legislative provisions described above, i.e. an ability to compel production and an ability to conduct a search. The power to make such a request and introduce the evidence obtained would be the same as outlined under subparagraphs (d) and (f). For government departments and agencies it may be possible in some circumstances to obtain the relevant information without use of compulsory measures provided that there are proper protections in place with respect to privacy considerations. See also the commentary under article 16 concerning publicly available documents.

60. It is acknowledged that gathering records may take time. Once the formal order is served, it is normally helpful to allow the business, financial institution or government department or agency a reasonable time to comply with the formal order, if feasible, or to find some equivalent way of accommodating the record custodians' legitimate concerns.

[18] See article 18, paragraphs 4 and 5 of the Palermo Convention and article 46, paragraphs 4 and 5 of the Merida Convention.

Paragraph 3: Inapplicability to other treaties

Purpose

61. Paragraph 3 distinguishes the mutual assistance treaty from treaties relating to extradition, enforcement of judgments, transfer of offenders, or transfer of proceedings. As the treaty includes no obligations with respect to these other matters, this paragraph or parts thereof need only be included if the parties decide that clarification of the purpose of the treaty is required.

Implementation

62. Paragraph 3 creates no obligations and therefore there is no necessity for legislation.

Article 2: OTHER ARRANGEMENTS

Unless the Parties decide otherwise, the present Treaty shall not affect obligations subsisting between them whether pursuant to other treaties or arrangements or otherwise.

Footnote to title: Article 2 recognizes the continuing role of informal assistance between law enforcement agencies and associated agencies in different countries.

Purpose

63. Article 2 delineates that the treaty does not affect other treaties, agreements or arrangements that may exist between the parties. Many countries negotiating a mutual assistance treaty will have existing treaties on extradition or transfer of offenders, memoranda of understanding or arrangements between police or other investigative forces or other types of cooperation agreements. The mutual assistance treaty will not influence the operation of these other treaties or arrangements, unless specifically so agreed.[19]

Implementation

64. Article 2 creates no obligations. No implementing legislation is required.

Suggestions

65. As noted above, given the option for agreement to use the Palermo Convention, if the request relates to organized crime, or the Merida Convention (when it enters into force), if the request relates to corruption, consideration should be given to the most effective instrument for the rendering of assistance in the particular circumstances.

[19] On a similar point, the Palermo Convention provides in article 18, paragraph 7 that bilateral binding agreements on mutual legal assistance will take precedence unless otherwise agreed by the Parties (see also article 46, paragraph 7 of the Merida Convention).

66. Each country should have a policy outlining when requests should be submitted or executed pursuant to the mutual assistance treaty and when other arrangements or police to police channels should be used. In particular, there is often confusion between the use of the mutual assistance treaty and the use of channels of the International Criminal Police Organization (ICPO/Interpol). A distinction should be drawn between requests for information and voluntary assistance that can be provided by police authorities through ICPO/Interpol and requests that require compulsory measures or the production of evidence, which are best executed under the treaty.

Article 3: DESIGNATION OF CENTRAL AUTHORITIES

Each Party shall designate and indicate to the other Party a central authority or authorities by or through which requests for the purpose of the present Treaty should be made or received.

Footnote: Countries may wish to consider providing for direct communications between central authorities and for the central authorities to play an active role in ensuring the speedy execution of requests, controlling quality and setting priorities. Countries may also wish to agree that the central authorities are not the exclusive channel for assistance between the Parties and that the direct exchange of information should be encouraged to the extent permitted by domestic law or arrangements.

Purpose

67. The purpose of this article is to require the parties to designate a central authority or authorities and to communicate the particulars of this designation to the other party. The parties can either specify immediately the channels of communication for treaty requests or agree to do so later. The implementation of the obligation to designate a central authority, which will be responsible for receiving and transmitting requests is central to the effective operation of the treaty. Each country should decide the appropriate ministry or agency for this function. The authority chosen need not be responsible for the execution or creation of the requests.

68. This authority is responsible for receiving the requests from foreign States and for executing or forwarding them to an executing authority, as well as for following up on execution, where necessary, and transmitting the results to the requesting State. In the reverse case, this authority is responsible for transmitting requests to the foreign State and for pursuing execution of the request with the requesting State.

69. By designating an authority or authorities the parties will have an identified channel through which to pursue requests. The establishments of those direct channels will enhance the effectiveness of the treaty. Because of the nature of mutual (legal) assistance it is important that the authority chosen is capable of the speedy and efficient execution of its responsibilities. In many countries the designated channel is the Ministry of Justice or the office of the Attorney-General or equivalent, but this is to be decided by each State.

Application

70. The importance of a central authority for effective mutual assistance has been repeatedly emphasized in various fora.[20] As noted in the footnote to this article, the designation of a central authority does not preclude direct transmission of requests, where appropriate and authorized under domestic law.[21] However, working through the central authority may be the best method to ensure that the request reaches the appropriate executing authority.

Implementation

71. It will be a matter of domestic law whether implementing legislation must designate the responsible authority for mutual legal assistance treaties. In many States the authority could be designated as a matter of policy without the necessity to legislate. For example, the Minister who is responsible for mutual legal assistance could establish such an authority, or the authority could operate based only on practice. In other states, it may be appropriate to establish the central authority by legislation and specifically empower that authority to transmit and receive requests.

72. Consideration should be given also to the role and functions of the central authority to ensure that it is an effective body. This role can vary from a body that is responsible only for the receipt and transmission of requests to a body that also has an execution capacity. Whichever model is chosen, to be effective the central authority needs to have capacity to receive and transmit and to either execute or distribute the request for execution. The central authority also needs to act as a centre for advice and information to be provided to both domestic and foreign authorities. There needs to be a determination within each state as to whether any particular powers need to be included in the legislation to ensure it can carry out these various functions.

Suggestions

73. A first step in establishing an effective mutual assistance programme is the creation of a central authority with an appropriate infrastructure[22]. The first goal of the officials within the central authority should be to establish lines of communication through which requests will be received and executed or sent to the foreign State. A central authority should be equipped with telephones, fax machines, and e-mail capacity to the greatest extent possible as speed of communication is important.

---

[20] See the Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation, 15-19 February 1993, Vienna, sponsored by UNDCP; Report of the Oxford Conference on Mutual Assistance in Criminal Matters, 1994; Report of UNDCP's Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, 3-7 December 2001, Vienna; Report of the Oxford Conference on the Changing Face of International Cooperation in Criminal Matters in the 21st Century, 27-30 August 2002; Recommendations of the OAS-REMJA IV on Central Authorities, Trinidad and Tobago, 2002; Report of the OAS meeting to improve mutual legal assistance in the hemisphere, Ottawa, 30 April – 2 May 2003.

[21] For example, there is an arrangement for the direct transmission of requests among the Member States of the European Union.

[22] See the Report of the Oxford Conference on Mutual Legal Assistance, 5-9 September 1994, Christ Church, Oxford (London, Commonwealth Secretariat, 1994) for a discussion on establishing a central authority.

Where resources are limited, or it is otherwise appropriate, countries could consider using the established facilities located in ICPO/Interpol national central bureaux to transmit and receive requests. Besides establishing lines of communication, the designated authority should ensure that pertinent information on the responsible authority, such as address, telephone and fax numbers, is communicated to its treaty partner as soon as possible. That information also needs to be provided to appropriate depositories in relation to UN multilateral instruments, regional conventions or other instruments, such as the Commonwealth Scheme, where those agreements or schemes require the designation of such an authority. States parties should also provide each other with practical information to facilitate contact between central authorities, such as addresses, including e-mail as well as telephone and fax numbers. Failure to address communications to the proper channels may result in delays.

74. It is advantageous for a central authority to have established lines of communication domestically. To accomplish this, it is useful to have designated contact persons in relevant sectors of the government and, where there are State or provincial governments, within these governments as well. For example, in a federal State, assuming a federal government department acts as the central authority, there should be contact persons in each State who can help with or execute requests. Similarly, if there is one government involved in execution, it would be helpful to have contact persons in each department that may be called upon to execute requests.

75. On a similar point, within a State a request for assistance can originate with various domestic authorities, e.g. police, prosecutors or judicial officials. For that reason, the network for domestic coordination should include a similar system of contact persons, for example in each police or prosecuting organization, that may generate a request. In this way, information on the preparation of requests, channels of communication and other essential advice can easily be distributed through these contact persons to those who need to prepare a request for assistance to a foreign State.

76. Many small and developing countries are confronted by major resource constraints in the administration of international cooperation in criminal matters. Regional and sub-regional cooperation can be very valuable; for example, some regional groups have shared courts, and the possibility of regional central authorities should be considered. It is also important to note that the size, resources and structure of central authorities will vary from state to state depending on national circumstances, volume of work and existing structures. Some states require an elaborate structure and large staff because of the volume of incoming and outgoing requests and the availability of resources to do so. For a small jurisdiction with very limited resources it can be equally effective to have a person within an existing office or Ministry designated to deal with requests in addition to his or her other functions.

77. The designated competent authority is fundamental to achieving effective mutual assistance[23]. The designated authority should serve as the national central coordinating office for mutual assistance requests. In addition to receiving, reviewing

[23] See the Report of the expert working group on mutual legal assistance and related international confiscation, held at Vienna from 15 to 19 February 1993. See also the Report of UNDCP's Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, 3-7 December 2001, Vienna.

and transmitting requests, this authority should provide advice to its counterparts on its requirements relating to the execution of requests. The authority can also carry out a leading domestic role on quality control. To that end, it is important that the central authority is composed of trained and knowledgeable personnel who will be in a position to fulfil these roles.

78. The personal contacts between these designated authorities can also be very valuable. Much can be accomplished through a good working relationship between the relevant authorities in each State. Thus, visiting opportunities, correspondence exchanges and telephone contacts between the authorities of each State should be encouraged. They serve to open communication channels and to develop mutual understanding.

79. Some Member States that do not have the appropriate central authorities in place may consider the possibility of allowing transmission of requests directly between the judicial authorities of the requesting State and the requested State or by means of ICPO/Interpol for urgent requests. However ICPO/Interpol national central bureaux generally deal with local police agencies and may have difficulties gaining access to prosecutors and judges or other authorities should they be responsible for the request.

Article 4: REFUSAL OF ASSISTANCE

1. Assistance may be refused if:

(a) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order *(ordre public)* or other essential public interest;

(b) The offence is regarded by the requested State as being of a political nature;

(c) There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons;

(d) The request relates to an offence the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (ne bis in idem);

(e) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction;

(f) The act is an offence under military law, which is not also an offence under ordinary criminal law.

2. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions.

3. The requested State may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested State.

4. Before refusing a request or postponing its execution, the requested State shall consider whether assistance may he granted subject to certain conditions. If the requesting State accepts assistance subject to these conditions, it shall comply with them.

5. Reasons shall be given for any refusal or postponement of mutual assistance.

Footnote to title: Article 4 provides an illustrative list of the grounds for refusal.

Footnote to paragraph 1: Some countries may wish to delete or modify some of the provisions or include other grounds for refusal, such as those related to the nature of the offence (e.g. fiscal), the nature of the applicable penalty (e.g. capital punishment), requirements of shared concepts (e.g. double jurisdiction, no lapse of time) or specific kinds of assistance (e.g. interception of telecommunications, performing deoxyribonucleic – acid (DNA) tests). Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.

Footnote to paragraph 4: States should consult, in accordance with article 21, before assistance is refused or postponed.

Commentary

Paragraph 1: Refusal of assistance

Purpose

80. Article 4 sets out the grounds for refusing assistance under the Treaty. As indicated in the footnote to the title of article 4 above, the list of grounds provided in the Model is illustrative. It is for the parties to the Treaty to agree on the limitations that will apply under any given Treaty. In deciding on a policy towards grounds for refusal, the parties may want to keep in mind developments reflected in other international instruments. Where the Palermo Convention is used as a basis for mutual assistance, the grounds for refusal set out in article 18 of that Convention would be applicable as follows: Legal assistance can be refused if the request does not contain the information required by the Palermo Convention (paragraphs 14, 15 and 21 of article 18); if the request is for an offence or form of assistance not covered by the Convention; if the offence alleged is not an offence under the laws of both parties

(paragraph 9)[24]; if providing assistance would be prejudicial to essential interests of the requested State, such as public order, sovereignty or security requirements; or if it is inconsistent with constitutional or other fundamental legal requirements (paragraph 21(d)). Assistance may also be postponed to protect an ongoing domestic investigation (paragraph 25) and there are provisions for the giving of reasons and consultations between governments when assistance is postponed or refused (paragraphs 23 and 26).

81. The Palermo Convention also specified in article 18 two circumstances where assistance shall not be refused: Legal assistance cannot be refused on the grounds of bank secrecy (paragraph 8) or the grounds that the alleged offence also involves "fiscal matters" (paragraph 22). Although bank secrecy may not be used as a ground for refusal of a mutual assistance request, there must still be compliance with other domestic requirements even if bank secrecy is lifted in appropriate cases, e.g. satisfying the requirements of a production order.

82. The 1988 Drug Convention and the Merida Convention contain similar grounds for refusal to the Palermo Convention and also include a specific exclusion of bank secrecy (see article 7, paragraph 5 of the 1988 Drug Convention and article 46, paragraph 8 of the Merida Convention).

83. The Treaty provides a list of the most common grounds and refers to other possibilities in the footnote. In agreeing on grounds for refusal for a Treaty the parties will need to achieve a balance between protection of national interests and fundamental principles and ensuring that the widest measure of assistance possible can be rendered. In some treaties, the issue is addressed by including only subparagraph (a) of the model as this is considered a sufficient and flexible protection for essential and fundamental interests which may include some of the specific grounds outlined below it. The parties could consider adopting that approach as opposed to reflecting a series of specific grounds. An important issue that needs to be addressed in light of recent developments is whether the political offence exception will be included. If it is, then the parties may want to limit its application to ensure that assistance will not denied on this basis in the case of alleged terrorist activity, as the recent anti-terrorism instruments (Terrorist Bombing and Terrorist Financing Conventions) preclude application of the political offence exception in such cases. Also because the state of the law may vary particularly in areas such as proceeds of crime and computer crime, the parties may wish to consider if it is necessary to have a ground for refusal relating to dual criminality at all or if it should be limited in application to more intrusive forms of obtaining evidence, such as search and seizure (see also footnote 24).

[24] However, according to the same provision of the Palermo Convention, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under its domestic law. In addition, according to article 46, paragraph 9(b) of the Merida Convention, a requested State Party **shall**, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action without applying the dual criminality requirement. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of the Convention. Generally, a requested State Party, in responding to a request for assistance in the absence of dual criminality, shall take into account the purposes of the Convention (paragraph 9(a)) and may consider adopting such measures as may be necessary for providing a wider scope of assistance (paragraph 9(c)).

84. Subparagraph (a) gives a party discretion to refuse requests that might prejudice its essential public interests. It is a well established ground for refusal that provides substantial protection for the parties (see also article 2(b) of the Council of Europe 1959 Convention).

85. Subparagraph (b) reflects grounds for refusal common to extradition treaties, namely, that the offence for which evidence is sought is considered a political offence. Parties can refuse to assist with prosecutions for traditional political offences, such as treason, or for prosecutions for criminal matters that are of a political nature. However, as noted above, the inclusion of this ground for refusal may cause difficulty if no exception is provided with respect to terrorist offences given the provisions of the recent counter terrorism conventions.

86. Subparagraph (c) gives the parties the right to refuse to assist where it is decided that the prosecution is discriminatory in its purpose or the subject of the prosecution may be prejudiced because of one of the enumerated discriminatory grounds, such as the violation of human rights as contained in existing international instruments.

87. Subparagraph (d) recognizes that a State may choose to apply its law concerning *ne bis in idem* in the context of a mutual assistance request, although not all States will choose do so. As laws relating to ne bis in idem vary considerably, the States may wish to discuss this to determine the precise parameters of their laws. Where the request in a mutual assistance context relates to evidence as opposed to the individual, States may also decide not to apply this ground for refusal at all.

88. Subparagraph (e) permits refusal in circumstances where the compulsory measure sought by the requesting State is inconsistent with the law and practice of the requested State in similar investigations. This safeguard is designed to ensure that only those powers that can be exercised in relation to domestic offences can be exercised in relation to foreign offences i.e. parity of powers.

89. Subparagraph (f) provides for discretion to refuse in the case of purely military offences. As mutual assistance is intended for criminal matters, many countries will not provide assistance for military crimes that are not otherwise subject to criminal sanction.

Application

90. In choosing the grounds for refusal to be included in a treaty, the parties must decide what is essential to protect their interests. The scope of assistance desired, the relations between the countries and domestic legal requirements are all factors that should be considered in structuring this article. Unlike extradition, the grounds for refusal in the Model Treaty on Mutual Assistance in Criminal Matters are all discretionary. As mutual assistance does not directly affect a person's liberty, it may be felt unnecessary to insist on the inclusion of mandatory grounds for refusal, unless there are domestic legislation provisions to the contrary, given that in some countries there is a two-tier regime of grounds for refusal, e.g. mandatory and discretionary ones. Instead there are discretionary grounds in the Model Treaty that a country may rely on to refuse a request when appropriate. If including specific grounds for refusal,

countries may wish to consider modified versions of the grounds for refusal listed in the Model Treaty. For example, one might agree to exclude the application of the political offence grounds for refusal to certain types of offence, e.g. violent crimes. A more limited version of certain grounds for refusal may be preferable for some countries.

Implementation

91. Domestic legislation should reflect any grounds for refusal that are fundamental within that State and which would therefore be applicable to all requests. If a State is using one flexible piece of legislation to implement mutual assistance treaties generally, then a mechanism needs to be found to ensure that only the grounds for refusal set out in a treaty will be applicable to requests made under that instrument. This can be accomplished in a variety of ways including providing in the legislation that the grounds for refusal in the treaty will be applicable or by providing only for a discretion in an executive authority to refuse requests and leaving the legislation silent as to the basis for refusal.

92. In those systems where the decision on acceptance or refusal is made by the executive or by a governmental authority as opposed to the judiciary, it may be helpful to specifically designate the official or officials who are responsible for this. In addition, if appropriate in the relevant system, it may be useful to have a policy that outlines the criteria to be considered in reviewing a request.

Paragraph 2: Banking secrecy

Purpose

93. As many criminal investigations require the production of financial records, paragraph 2 is designed to override domestic bank secrecy laws. In some jurisdictions, bank secrecy has in the past been a major impediment to assistance. For that reason, this paragraph is very useful. As noted in paragraphs 81 and 82, this provision is reflective of an international trend that is now captured in several international instruments.[25]

Implementation

94. If necessary the legislation should override specifically any bank secrecy laws. As noted in paragraph 6 of article 12 of the Palermo Convention, the competent judicial authorities within the State need to have a power to order the production or seizure of such documents (see also the corresponding article 31, paragraph 7 of the Merida Convention). This power needs to be clearly established so as to override any legislative protections for the confidentiality of such material. As is always the case, while the power must be established it can be premised on the production of information sufficient to meet a defined standard, such as “reasonable grounds to believe” or “probable cause” that an offence has been committed and the documents

[25] In addition to the provisions of international instruments already mentioned, see also article 12, paragraph 2 of the Terrorist Financing Convention.

will provide information or evidence relevant to that offence. Alternatively the powers for compulsory orders discussed above, if sufficiently general and comprehensive, may be used to compel banks and financial institutions to produce documents.

95. The appropriate method will depend on the legal system within the country.

Paragraph 3: Postponement in the light of ongoing investigation or prosecution

Purpose

96. Paragraph 3 empowers parties to postpone assistance in circumstances where the subject matter is under investigation or prosecution domestically.

Implementation

97. Legislative power for postponement is generally not necessary.

Application

98. The contracting parties may want to consider including a requirement for consultations before a request is refused as often such discussions may resolve issues of concern such that the request can be executed. An example of such a provision can be found in paragraph 26 of article 18 of the Palermo Convention, as well as in paragraph 26 of article 46 of the Merida Convention.

Suggestions

99. Often the subject matter of a request may be under investigation in both jurisdictions. In such a case it is important that the investigating and prosecuting authorities discuss the procedures in each State and try to arrive at a satisfactory division of jurisdiction. This may result in one party waiving its claims in favour of the other. If disputes arise, each party can protect its jurisdiction and interests by postponing assistance in favour of domestic proceedings under this article.

Paragraph 4: Postponement subject to conditions

Purpose

100. Paragraph 4 obligates the parties to try to execute a request if possible by considering execution with conditions as an alternative to refusal. The paragraph reflects the general philosophy that the parties will provide assistance if possible. If conditions are imposed, the requesting State must comply with them.

Implementation

101. If necessary, the legislation may refer to the means by which the requested State can ensure that the conditions imposed will be respected.

Paragraph 5: Reasons for refusal

Purpose

102. Paragraph 5 obligates the parties to provide reasons for refusal or postponement of a request. In this context, reasons for refusal have to be understood as the usual grounds for refusal provided for in article 4.

Implementation

103. No legislation is required.

Suggestions

104. A letter of refusal should clearly show the basis of the refusal and identify all of the facts upon which the decision is based. This will provide the requesting State with a clear understanding and an opportunity to correct or clarify any facts as required.

Article 5: CONTENT OF REQUESTS

1. Requests for assistance shall include:

(a) The name of the requesting office and the competent authority conducting the investigation or court proceeding to which the request relates;

(b) The purpose of the request and a brief description of the assistance sought;

(c) A description of the facts alleged to constitute the offence and a statement or text of the relevant laws, except in cases of a request for service of documents;

(d) The name and address of the person to be served, where necessary;

(e) The reasons for and details of any particular procedure or requirement that the requesting State wishes to be followed, including a statement as to whether sworn or affirmed evidence or statements are required;

(f) Specification of any time-limit within which compliance with the request is desired;

(g) Such other information as is necessary for the proper execution of the request.

2. Requests, supporting documents and other communications made pursuant to the present Treaty shall be accompanied by a translation into the language of the requested State or another language acceptable to that State.

3. If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

Footnote to paragraph 1: This list can be reduced or expanded in bilateral negotiations.

Footnote to paragraph 2: Countries may wish to provide that the request may be made by modern means of communication, including, in particularly urgent cases, verbal requests that are confirmed in writing forthwith.

Commentary

Paragraph 1: Information required

Purpose

105. Article 5 outlines the information that should be incorporated in the request for assistance. The list reflects the essential information that most States require executing requests for assistance. These are as follows:

(a) The name of the relevant authorities in the requesting State;

(b) The reason for the request and a description of the assistance required;

(c) A summary of the facts and the law (except in cases of simple requests such as those for service of documents).

(d) In the case of service of documents the relevant information needed to effect service;

(e) A clear description of any particular procedure or requirement of the requesting State for how the evidence should be obtained or presented and the reasons for these requirements, including a statement on the form a statement should take, i.e. sworn or unsworn;

(f) Any time limits for the assistance;

(g) Other information as required.

106. This article provides the parties with an opportunity to outline in detail the required information for the execution of requests. The list can be expanded or reduced as necessary to meet the needs of the parties. Most instruments and schemes including the 1988 Drug Convention, the Palermo Convention, the Merida Convention and the Commonwealth Scheme contain a list of contents of requests. While there are some differences in terms of detail and language, in general terms the lists in all of these instruments are very similar. The list incorporated in any particular treaty will be dependent on the legal requirements in both States. To obtain speedy and efficient execution of requests, this article should provide a precise description of

the information to be included in a request. In this way, the treaty acts as a guide for those who are called upon to draft the materials. The parties may want to include, in addition to the general information required for all types of assistance, the information needed to obtain specific types of assistance, e.g. to obtain an order for a search what type of information needs to be provided.

Implementation

107. The content of requests is generally not a matter specifically included in legislation. In fact inclusion of such detail can reduce the effectiveness and flexibility of the legislation. However, the implementing legislation will influence this article to the extent that it establishes what information must be presented to the court for compulsory orders to issue. These essential ingredients of a request should be reflected in this article.

Suggestions

108. A well drafted and complete request for assistance is the key to effective mutual assistance. Authorities preparing requests must include the information outlined in this section of the Model Treaty and must do so in a clear and concise fashion that makes the request understandable. The following general points should be kept in mind when preparing the request:

(a) The request will be read and executed by officials in a foreign State that may have an entirely different legal system. Therefore the document should avoid overly specialized or emotional language that may not be understood in other countries. For example terms such as “affidavit”, “business record”, “testimony” “process verbal”, which are terms of art, should not be used. Any particular legal process that is referred to should be given a simple explanation;

(b) The request portion should be very specific as to the assistance required and the form of the assistance. For example, if a statement is requested, it should be clear whether the statement should be taken by officials in the requested State or if the requesting authority needs to be present or to participate. If the requesting authority is not going to be present, then the questions to be posed should be provided. If a sworn statement is needed, this should be stated. Precision in the request portion is essential;

(c) With respect to the assistance required, as noted in the introductory remarks, the request should identify by a detailed description the object it seeks to achieve, but not the methodology for achieving it, unless crucial to admissibility. The means by which a particular request will be fulfilled will vary with the legal system of the country involved. A request for a production order or monitoring order may be refused as those methodologies may be unknown to the requested State. However, if the aim of the request is described as obtaining copies of records of transactions on a bank account, the request might be approved as it permits the requested State the flexibility of determining how best to respond to such a request under its domestic law;

(d) In preparing a summary of the facts, the writer should focus on providing those facts that will be relevant to the requested State for the particular type of assistance sought and not necessarily all of the facts known about the case. There should be emphasis on those facts that explain the alleged offence, the evidence sought in the requested State and the relevance of the evidence to the investigation or prosecution;

(e) The time limits imposed should be realistic. Requesting authorities should respect the fact that the requested State must have sufficient time to properly execute the request. Although urgent situations cannot be avoided, where the authorities in the requesting State are aware of the need for a request they should prepare the materials as soon as possible;

(f) The authorities requesting assistance must focus on the form that the evidence must take and the manner in which it must be gathered for it to be admitted in any proceedings in the requesting state. Those requirements as to form and procedure should be set out in the request in detail and should be included at the earliest opportunity. For example, if a country requests copies of the records of a bank account, an accompanying certificate referring to the documents may be required for the documents to be admitted in evidence. The accompanying certificate should be requested with the documents. In addition, as the requested State may not be familiar with the form of the certificate sought, it is very important to include a sample of the certificate with the request.

Paragraph 2: Language and translation

Purpose

109. Paragraph 2 reflects a normal practice within the field of mutual assistance that the country seeking the assistance should translate the documents into a language acceptable to the requested State. It is drafted in flexible terms to allow for requests in the language of the requested State or another language that may be acceptable generally or in a particular case. If either of the States Parties has more than one official language, the wording of the article should reflect that by referring to "a" language of the requested State.

110. As noted in the footnote to paragraph 2, States Parties may expand on the content of this article to provide for use of modern means of communication, such as fax or e-mail. In addition, the Parties may want to allow verbal requests in cases of real urgency and if so language to that effect should be added.

Implementation

111. This requirements in this paragraph respecting translation and languages generally will not require implementation by legislation.

112. However, if the treaty refers to modern means of communication or verbal requests then consideration should be given to whether the legislation needs to include specific reference to those means of communication for requests.

Suggestions

113. A country will require translation facilities for mutual assistance. Arrangements for access to translation should be made when the programme is first established. A competent authority preparing a request should always keep in mind the time required for translation. It is the translation that will be the working document for the requested State and therefore it is essential that the translation is accurate. In addition, it is the requesting State that will be required to translate the documents it receives in response to a request into an appropriate language for use in the investigation or trial. Translation facilities will have to be organized for this either at the central or competent authority level. It is also important that the requesting state transmits both the original language version and the translation. This gives the requested state an opportunity to clarify any points and avoid any problems arising from translation errors or misunderstandings should such circumstances arise. The presence of a bilingual practitioner somewhere in the process can reduce them.

114. The use of verbal requests may be necessary in extremely urgent cases, particularly where the request involves a life threatening situation (see also article 18, paragraph 14 of the Palermo Convention and article 46, paragraph 14 of the Merida Convention). However the contracting parties will need to carefully consider whether it is possible to include such a provision given legal restrictions and if it is included how it will be best implemented in practice.

Paragraph 3: Requesting additional information

115. Paragraph 3 is self-explanatory.

Article 6: EXECUTION OF REQUESTS

Subject to article 19 of the present Treaty, requests for assistance shall be carried out promptly, in the manner provided for by the law and practice of the requested State. To the extent consistent with its law and practice, the requested State shall carry out the request in the manner specified by the requesting State.

Footnote to title: More detailed provisions may be included concerning the provision of information on the time and place of execution of the request and requiring the requested State to inform promptly the requesting State in cases where significant delay is likely to occur or where a decision is made not to comply with the request and the reasons for refusal.

Footnote: The requested State should secure such orders, including judicial orders, as may be necessary for the execution of the request. Countries may also wish to agree, in accordance with national legislation, to represent or act on behalf or for the benefit of the requesting State in legal proceedings necessary to secure such orders.

Commentary

Purpose

116. Article 6 is an important article as it sets out the two principles that govern the execution of requests. Requests will be executed in accordance with the domestic law and practice of the requested State. The requests should, to the extent possible, be executed in the manner and form sought by the requesting State.

117. This article addresses one of the major difficulties in mutual assistance. Clearly each country must render assistance in accordance with its domestic law and practice in order for the assistance to be lawful. However, the goal of mutual assistance is for country A to assist country B in gathering evidence that can be used in a criminal process in country B. The purpose of assistance is frustrated if the evidence is provided in a form where it is not admissible in a proceeding in country B. For that reason, the second principle, that the evidence will be gathered in the form sought by the requesting State, is essential for effective assistance.

Application

118. In incorporating this article in a treaty, the parties should discuss the requirements and restrictions of their domestic law that may prevent the provision of evidence in a particular form or manner.

119. The parties should then draft a provision that reflects the two governing principles outlined in the Model Treaty in language that will allow for the most effective assistance under the treaty. For example, in article 18, paragraph 17 of the Palermo Convention provides that "a request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request". A similar provision is also included in the Merida Convention (article 46, paragraph 17).

120. Another important concept in this article is the need for prompt execution of requests. Delay is the single most significant problem in mutual assistance practice. For that reason, the parties may wish to discuss the execution process within each state and consider adding language on this point. An example on this point can be found in article 18, paragraph 24 of the Palermo Convention, which places considerable emphasis on the need for speedy execution of requests and on providing updates as to progress with the request (see also the similar article 46, paragraph 24 of the Merida Convention).

Implementation

121. If assistance is to be effective, countries must be able to gather evidence in an admissible form. There are many different legal systems in the world and many different requirements respecting the form of evidence. If the domestic law and practice require evidence to be gathered only in accordance with the procedures of the requested State, then effective assistance will be frustrated. The requesting State will be unable to gather evidence in a form admissible in its system.

122. Therefore, the implementing legislation should be flexible enough to allow States with different legal systems and requirements to obtain evidence in an admissible form. An example of the problem arises in the context of taking evidence from persons. There are very different ways to present the statement of a witness before a court. In the common law tradition a person must appear physically before the court and relate only matters of personal knowledge. To draw out that information, questions are posed by the party presenting the witness through his or her counsel. The opposing party then tests the evidence by questioning the witness i.e. cross-examination. All of this takes place in the presence of the accused person. Except in very limited circumstances, the judge does not question the witness. When evidence is taken in a foreign State for use in a proceeding in a common law State, this is the general process that is required to make the evidence admissible.

123. In a civil law State, an investigating judge, or police officer duly authorized by such a judge, will want to interview the witness, record the statement himself or herself, or a summary of it, and provide it to the court that will make a decision in the case. When the evidence is taken by the investigating judge, the prosecutor and the accused, or his or her counsel, are, as a rule, entitled to be present and to ask questions or have questions asked. The statement of the witness need not be limited to matters of personal knowledge, but can include statements made to or in the presence of the witness by other people. When a civil law country wishes to gather evidence in a foreign State, they will require this process. Nevertheless, in some civil law jurisdictions, the judge may accede to a request to the effect that the evidence may bear only on the facts directly and be personally attested to by the witness.

124. That portion of the legislation that allows for compelling statements from witnesses must be flexible enough to allow the gathering of evidence for both systems. One approach is to have witnesses to appear before a designated official to be questioned. A court order can designate the appropriate official in the particular circumstances including the right of foreign and domestic officials, judges, prosecutors, police etc. to be present. In addition, the legislation should be flexible enough to permit different forms of questioning (direct examination, cross-examination) with protection for the witness. It is essential that the legislation should be adaptable, so that it may be used to assist a variety of countries and several different legal systems.

125. It is also important that the laws and practices of requesting States governing the admissibility of evidence are flexible enough to permit evidence-gathering in foreign States in accordance with procedures different from their own.

Article 7: RETURN OF MATERIAL TO THE REQUESTED STATE

Any property, as well as original records or documents, handed over to the requesting State under the present Treaty shall be returned to the requested State as soon as possible unless the latter waives its right of return thereof.

Commentary

Purpose

126. Article 7 outlines the procedures for returning property or original documents provided in response to a request. Property and original documents should be returned to the requested State unless there is a waiver.

Implementation

127. The legislation should include a power to control the ultimate disposition of evidence provided pursuant to a request. It is necessary that the requesting State maintain control over the evidence to ensure that it can meet this treaty obligation. It may be that policy as opposed to legislative powers will suffice, but this must be decided by each State.

Suggestions

128. Police, prosecutors and investigating magistrates must be careful in handling materials obtained from a foreign State. They should ensure that the materials are kept under safe conditions and a documented system of accountability should exist to establish responsibility for the evidence by its custodians. If there is a central authority in a requesting State, that authority would be well advised to include a reminder of this obligation when it transmits foreign documents or evidence to national authorities suggesting that the foreign evidence be segregated or inventoried so that it can readily be reassembled for return to the requested State.

Article 8: LIMITATION ON USE

Unless otherwise agreed, the requesting State shall not, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations or proceedings other than those stated in the request. However, in cases where the charge is altered, the material provided may be used in so far as the offence, as charged, is an offence in respect of which mutual assistance could be provided under the present Treaty.

Footnote to title: Some countries may wish to omit article 8 or modify it, e.g. restrict it to fiscal offences, or restrict use of evidence only where the requested State makes an express request to that effect.

Purpose

129. Article 8 ensures that information and evidence provided is used solely for the purpose specified in the request, unless the parties agree otherwise. As the treaty is designed to allow for assistance between parties in criminal matters, this article prevents a State from obtaining the evidence in a criminal context but ultimately using it for other purposes such as civil or administrative proceedings. This rule is analogous to the concept of specialty in extradition law.

130. The second part of the article recognizes that the intent of the treaty is to provide assistance in defined criminal matters and therefore a change in the charge will not constitute another use that would offend this article. The limitation is that the newly charged offence must fall within the treaty, and it must not breach other rules in the treaty that would have allowed the requested State to refuse a direct request for assistance in respect of the new offence.

Application

131. The parties should draft this article to meet the requirements of their respective systems. For some, this restriction poses difficulties because of the public nature of the information filed before a court. For some states the problem may be even more complex in that the information obtained may in some cases be exculpatory evidence which by law must be disclosed. Thus the parties will need to discuss these issues and the language of the article crafted to meet the needs of both parties. In some cases the qualification "unless otherwise agreed" may provide sufficient flexibility leaving the issue to be addressed on a case by case basis. In other instances a more detailed exception may be necessary. Article 18, paragraph 19 of the Palermo Convention is an example of a more detailed exception that can be included to address the issue of exculpatory evidence (see also article 46, paragraph 19 of the Merida Convention).

Implementation

132. The provision contained in article 8 should not require implementation by legislation, unless the structure of the administration of justice is such that it is necessary to legislate to prevent the distribution of the evidence obtained or to ensure that evidence obtained in violation of the terms of the article shall be inadmissible.

Suggestions

133. It is essential that investigators, prosecutors or judicial authorities using the treaty be familiar with this restriction and respect it. This central authority may wish to implement a policy where a reminder of this restriction is included in the covering note when information obtained in response to a request is sent to a competent authority. It will be the responsibility of the central authority to control information received pursuant to treaty, so that it is not used other than for the purposes of the investigation or prosecution outlined in tile request or for another criminal matter covered by the treaty.

Article 9: PROTECTION OF CONFIDENTIALITY

Upon request:

(a) The requested State shall use its best endeavours to keep confidential the request for assistance, its contents and its supporting documents as well as the fact of granting of such assistance. If the request cannot be executed without breaching confidentiality, the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed;

(b) The requesting State shall keep confidential evidence and information provided by the requested State, except to the extent that the evidence and information is needed for the investigation and proceedings described in the request.

Footnote to title: Provisions relating to confidentiality will be important for many countries but may present problems to others. The nature of the provisions in individual treaties can be determined in bilateral negotiations.

Commentary

Purpose

134. Article 9 applies only if confidentiality is requested. The article is divided into parts, imposing obligations on both the requested State and the requesting State. Under this article the requested State is obliged to use its best efforts to keep the request and all surrounding documents confidential. If this cannot be done, then the requesting State must be informed in order that officials can decide whether to proceed or not.

135. Similarly, the requesting State should not release any of the information or evidence obtained under the request, except in relation to the matter for which assistance was sought. This obligation is analogous to the previous article 8 on limitation of use.

Application

136. Like the article on limitation of use, the article on confidentiality should be drafted in accordance with the principles outlined in the Model Treaty but reflecting the specific requirements of the parties. The issue is an important one as premature disclosure of information, particularly at the investigative stage, can be damaging to the case and in some instances may endanger lives. For this reason, the parties need to fully discuss the question of confidentially and ensure that the language of the article will provide sufficient protections. For a requesting State it may be necessary to release the request itself prior to or during a trial (for example as part of disclosure to the defence). It should be clear between the parties that such release is considered to be part of proceedings and, if not, additional clarifying language should be included as necessary. In general, the degree of secrecy accorded to information obtained and used pursuant to a treaty should coincide with the degree of secrecy that is accorded to comparable information under national law. This may vary from country to country. For example, in some countries, lawyers are not bound by strict secrecy concerning criminal proceedings.

137. Domestic laws on privacy and data protection are also relevant to the drafting of this article as well as the previous article on limitation of use. In some contexts special language may have to be included to meet a State's requirements that personal data transmitted or received be protected. This issue should be canvassed by the parties during the negotiation of these articles.

138. It may also not be necessary to include a confidentiality provision in respect of the requesting State if the parties consider the protection under article 8 to be sufficient.

Implementation

139. The requirements for confidentiality should be reflected in the legislation as necessary. Each party should consider whether legislative powers are needed to protect the confidentiality of materials received in support of a request from a foreign State and for materials obtained pursuant to a request to a foreign State. It may be that policy will suffice. However, there may be particular concerns that should be reflected in the legislation. For example, in some States it may be difficult to obtain a compulsory order protecting information filed with a court. If necessary, the legislation should empower the court to seal the documents where there is a demonstrated need to do so.

Suggestions

140. As with limitation of use, the central authority should ensure that prosecutors, police and judicial officials requesting and providing assistance under the treaty are familiar with the confidentiality requirements. Again, when confidentiality is requested, the central authority may wish to include a general statement about confidentiality in the cover note that accompanies the materials sent to the competent authority. In the reverse, authorities presenting a request to a foreign State must include a specific request for confidentiality if it is necessary.

Article 10: SERVICE OF DOCUMENTS

1. The requested State shall effect service of documents that are transmitted to it for this purpose by the requesting State.

2. A request to effect service of summonses shall be made to a requested State not less than […] days before the date on which the appearance of a person is required. In urgent cases, the requested State may waive the time requirement.

Footnote to title: More detailed provisions relating to the service of documents, such as writs and judicial verdicts, can be determined bilaterally. Provisions may be desired for the service of documents by mail or other manner and for the forwarding of proof of service of the documents. For example, proof of service could be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested State that service has been effected, with an indication of the form and date of such service. One or other of these documents could be sent promptly to the requesting State. The requested State could, if the requesting State so requests, state whether service has been effected in accordance with the law of the requested State. If service could not be effected, the reasons could be communicated promptly by the requested State to the requesting State.

Footnote to paragraph 2: Number of days provided for in paragraph 2 depending on travel distance and related arrangements.

Purpose

141. Article 10 relates to the service of documents. The article along with the footnote to the title of this article describe the procedure for service in some detail.

142. In incorporating an article on service, the parties should include as much procedural detail as required to facilitate execution. Each party should identify the types of document, if any, which may be served abroad. As well, each country should identify the proof of service required. The article can then be drafted to meet the specific requirements of the parties in these matters.

Implementation

143. It would be rare that service of documents would require any additional legislative authority. Parties may wish to consider whether evidentiary provisions should be included to allow for the admission of the proof of service documents.

Suggestions

144. As noted above (see commentary on article 1, paragraph 2 (c)), persons served with documents from a foreign State should not face any consequences in the requested State for failing to respond to those documents. Police or other authorities who serve these documents should advise the recipient accordingly, preferably with a written notice to this effect. In addition, if the documents are served by mail, the accompanying letter should refer to this principle.

145. Experience has shown that the volume and scope of requests for service of documents under this provision may be problematic. As set out in the footnote to the title of this article, the parties should consider all alternative methods of service available.

Article 11: OBTAINING OF EVIDENCE

1. The requested State shall, in conformity with its law and upon request, take the sworn or affirmed testimony, or otherwise obtain statements of persons or require them to produce items of evidence for transmission to the requesting State.

2. Upon the request of the requesting State, the parties to the relevant proceedings in the requesting State, their legal representatives and representatives of the requesting State may, subject to the laws and procedures of the requested State, be present at the proceedings.

Footnote to title: Article 11 is concerned with the obtaining of evidence in judicial proceedings, the taking of a person's statement by a less formal process and the production of items of evidence.

Footnote to paragraph 2: Wherever possible and consistent with the fundamental principles of domestic law, the Parties should permit testimony, statements or other forms of assistance to be given via video link or other modern means of communication and should ensure that perjury committed under such circumstances is a criminal offence.

Commentary

Purpose

146. Article 11 outlines the specific procedure applicable for the taking of statements and evidence or producing documents and things. Paragraph 1 sets out the general obligation to have the capacity to take statements and require the production of documents and things. This obligation will be met through domestic law and procedure. Paragraph 2 recognizes that for some States it is essential that officials of the requesting State, such as prosecutors and judges or others (defence counsel), be present for the taking of statements and evidence, so that the evidence will be admissible. This paragraph permits such persons to be present at the proceedings subject to the law of the requested State. Footnote to paragraph 2 highlights the important and growing role for video link evidence in the context of mutual assistance and encourages inclusion of that concept within the Treaty.

Application

147. In including an article on the taking of statements or testimony from witnesses, the parties should clearly identify their evidentiary requirements, to decide if it is possible for each State to obtain evidence from the other in an admissible form. Once limitations in this respect are identified, the parties can try to develop the necessary language and process to overcome any difficulties. An important issue to consider is the domestic laws of the contracting parties concerning the need for the presence of other parties during the making of a statement by a witness for the evidence to be admissible in proceedings, as these vary considerably. For example, some jurisdictions may require that the defence counsel be present during the taking of the evidence and that he or she be allowed to pose questions to the witness. Such requirement may be in direct conflict with the law of the other contracting party. Given the critical importance of this type of evidence, the parties need to try and find a way to bridge these differences and allow for this evidence to be gathered in a manner that will allow for its admissibility in the requesting State.

148. As indicated above, another issue the parties may wish to consider under the topic of taking evidence from witnesses is the possible use of video and other technology to gather evidence of this nature. If the parties agree that this should be available, it should be specifically referenced in the article. Even if the parties are not yet able to grant assistance in this manner, they may wish to include flexible language on the point, such as the one found in paragraph 18 of article 18 of the Palermo Convention (see also article 46, paragraph 18 of the Merida Convention).

Implementation

149. As discussed under article 6, if the domestic law of the parties is not flexible enough to permit evidence to be gathered in different forms, the purpose of the Treaty will be frustrated. For that reason, it is essential that the legislation provides for flexibility in the process by which evidence is taken and documents are produced (see discussion under articles 1 and 6).

150. If the parties agree to provide for video or satellite link evidence to be taken, the implementing legislation needs to address issues, such as the application of the laws of perjury and contempt, and whether special compulsion powers are needed to get the witness to a facility where the relevant technology will be available.

Article 12: RIGHT OR OBLIGATION TO DECLINE TO GIVE EVIDENCE

1. A person who is called upon to give evidence in the requested or requesting State may decline to give evidence where either:

(a) The law of the requested State permits or requires that person to decline to give evidence in similar circumstances in proceedings originating in the requested State; or

(b) The law of the requesting State permits or requires that person to decline to give evidence in similar circumstances in proceedings originating in the requesting State.

2. If a person claims that there is a right or obligation to decline to give evidence under the law of the other State, the State where that person is present shall, with respect thereto, rely on a certificate of the competent authority of the other State as evidence of the existence or non-existence of that right or obligation.

Footnote: Some countries may wish to provide that a witness who is testifying in the requesting State may not refuse to testify on the basis of a privilege applicable in the requested State.

Commentary

Purpose

151. Article 12 defines the circumstances in which a witness giving evidence in the requesting or requested States may decline to answer questions. There may be a variety of privileges upon which the witness can rely. For example many States recognize a spousal privilege in that a spouse while competent to testify against his or her spouse cannot be compelled to provide such evidence. Some States extend this privilege also to other members of the family of the accused. While article 12 permits the witness to invoke any such testimonial privilege recognized under the law of either the requested or the requesting state, States may also wish to consider other options that appear in modern treaties and provide a more streamlined approach.

Under a formulation permitting the invocation of privileges recognized by either state, for example, when the witness is providing testimony in the requested state, but claims a privilege under the law of the requesting state, execution of the request may be held up until the requested state can confirm whether the witness is, in fact, exempt from testifying, and/or the extent to which any such privilege under the law of the requesting state would apply. An alternative approach would be to provide that where the witness is testifying in the requested state, he or she may invoke a privilege under the laws of that state. Where, however, the witness asserts a privilege under the laws of the requesting state, the evidence should nonetheless be taken and the claim of privilege then made known to the central authority of the requesting state for resolution. This structure avoids the problems inherent in having the requesting State, in essence, analyze a complex area of another state's law to determine whether the witness's claim of privilege is valid.

Article 13: AVAILABILITY OF PERSONS IN CUSTODY TO GIVE EVIDENCE OR TO ASSIST IN INVESTIGATIONS

1. Upon the request of the requesting State, and if the requested State agrees and its law so permits, a person in custody in the latter State may, subject to his or her consent, be temporarily transferred to the requesting State to give evidence or to assist in the investigations.

2. While the person transferred is required to be held in custody under the law of the requested State, the requesting State shall hold that person in custody and shall return that person in custody to the requested State at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person's presence is no longer required.

3. Where the requested State advises the requesting State that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person referred to in article 14 of the present Treaty.

Footnote to title: In bilateral negotiations, provisions may also be introduced to deal with such matters as the modalities and time of restitution of evidence and the setting of a time-limit for the presence of the person in custody in the requesting State.

Commentary

Purpose

152. Article 13 sets out the basic principles for the temporary transfer of detained persons to provide evidence or assist in investigations in the requesting State. The basic prerequisites of existing treaties are that the person transferred must consent to the process and the requesting State is obligated to hold the person in custody during the transfer. Whether consent can be dispensed with by treaty and national legislation is an open question in many jurisdictions. However, some countries do permit the transfer of persons in custody to other countries to give evidence without their consent,

subject to some other conditions (see section 25 of the Norwegian Act of 13 June 1975, No. 39 on Extradition of Offenders). If the person's sentence expires in the requested State the person should be set free and treated as a witness in the requesting State pursuant to a request.

Application

153. The parties need to consider how the term "detained person" will be defined for the purpose of the Treaty. In some cases it may be restricted in application to those persons who are serving sentences of imprisonment, while in other instances a broader definition can be used to cover any detained person even those being held in pre-trial detention.

154. The parties may wish to expand on the content of the article and provide more detail including specific references to the obligations in the case of such a transfer as has been done in article 18, paragraph 11 of the Palermo Convention, as well as in article 46, paragraph 11 of the Merida Convention.

Implementation and suggestions

155. See discussion under article 1, subparagraph (b)[26].

Article 14: AVAILABILITY OF OTHER PERSONS TO GIVE EVIDENCE OR ASSIST IN INVESTIGATIONS

1. The requesting State may request the assistance of the requested State in inviting a person:

(a) To appear in proceedings in relation to a criminal matter in the requesting State unless that person is the person charged; or

(b) To assist in the investigations in relation to a criminal matter in the requesting State.

2. The requested State shall invite the person to appear as a witness or expert in proceedings or to assist in the investigations. Where appropriate, the requested State shall satisfy itself that satisfactory arrangements have been made for the person's safety.

3. The request or the summons shall indicate the approximate allowances and the travel and subsistence expenses payable by the requesting State.

4. Upon request, the requested State may grant t he person an advance, which shall be refunded by the requesting State.

Footnote to title: Provisions relating to the payment of the expenses of the person providing assistance are contained in paragraph 3 of article 14. Additional details,

[26] For example article 20 of the OAS 1992 Nassau Convention on Mutual Legal Assistance.

such as provision for the payment of costs in advance, can be the subject of bilateral negotiations.

Commentary

Purpose

156. Article 14, which is related to article 13, involves persons not being in custody who are requested to travel to the requesting State to provide evidence or assist in an investigation. The obligation on the parties is to facilitate the attendance of the person by advising of the request and providing information on allowances and expenses payable. The article also refers to the necessity for the requested State to verify the arrangements for the safety of the witness.

157. While in certain cases circumstances may require the requested State to grant the person an advance, to be refunded by the requesting State, in general the most practical approach may be for the requesting State, e.g. embassy, consulate, official air carrier or travel representative, to handle all travel and logistical arrangements. The requested State, when it gives notice to the witness, should then identify that contact to the witness and stress that it is the requesting State that must satisfy all questions and needs of the witness if it wants that person's voluntary presence and testimony.

Implementation

158. As with service of documents, it is unlikely that legislation is required to meet this obligation. Instead, the central authority should have policies in place through which a request of this nature can be forwarded to a competent authority for execution. The one exception is that there may need to be a specific power to override immigration or other similar laws that would preclude the admission of the person providing the assistance, for example because he or she has a criminal record.

Suggestions

159. Officials of the requested State should encourage a witness to travel to a requesting State in response to a request. However, the decision of the witness must be a voluntary one. Therefore, a competent authority should not use any force or threaten the witness in any way. The central authority of the requested State should make sure that the requesting State makes the travel arrangements of the witnesses and remits payment of the necessary fees and expenses to the witness. In addition, officials in the requested State should discuss the safety arrangements for the witness with officials in the requesting State.

Article 15: SAFE CONDUCT

1. Subject to paragraph 2 of the present article, where a person is in the requesting State pursuant to a request made under article 13 or 14 of the present Treaty:

(a) That person shall not be detained, prosecuted, punished or subjected to any other restrictions of personal liberty in the requesting State in respect of any acts or omissions or convictions that preceded the person's departure from the requested State;

(b) That person shall not, without that person's consent, be required to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation to which the request relates.

2. Paragraph 1 of the present article shall cease to apply if that person, being free to leave, has not left the requesting State within a period of [15] consecutive days, or any longer period otherwise agreed on by the Parties, after that person has been officially told or notified that his or her presence is no longer required or, having left, has voluntarily returned.

3. A person who does not consent to a request pursuant to article 13 or accept an invitation pursuant to article 14 shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure, notwithstanding any contrary statement in the request or summons.

Footnote to title: The provisions in article 15 may be required as the only was of securing important evidence in proceedings involving serious national and transnational crime. However, as they may raise difficulties for some countries, the precise content of the article, including any additions or modifications, can be determined in bilateral negotiations.

Commentary

Purpose

160. Article 15 is designed to provide protection to witnesses who agree to travel to the requesting State pursuant to a request under article 13 or 14. The principle of this article is that persons appearing in the requesting State should not be placed at risk nor be made to provide assistance other than that agreed to. The article does not provide for immunity for offences committed by the witness while present in the requesting State, including offences of perjury or contempt of court. The protection in this article will cease to apply if the person remains in the country after a specified period after completion of the request or if the person leaves and returns to the requesting State. Although the Model Treaty provides only for voluntary cooperation under article 14, other treaties provide for the application of sanctions under domestic law for failure to comply with a treaty request, although not yet for forcible removal to the requesting State.

161. This article recognizes the voluntary nature of assistance under articles 13 and 14. A person who refuses to go to the requesting State will not be subject to a penalty in the requested State.

Application

162. In some States there may be concerns about providing a blanket safe conduct protection in all cases. The parties will need to discuss the issue and adopt wording that will provide a suitable protection within the restrictions of domestic law. In addition, for the sake of clarity, it may be necessary to add language to exempt the "detention" of persons who have been temporarily transferred in custody. Obviously their detention does not violate the safe conduct provision.

Implementation

163. Each country must have the legal capacity to provide these protections. It may be appropriate to incorporate the protection into the legislation, particularly if there is more than one authority with responsibility for arrest or prosecution.

Suggestions

164. Competent authorities, police and prosecutors are responsible for the safety and security of witnesses who seek protection and who come to a requesting State to provide evidence and assistance. Police must keep the witnesses in a safe location and provide security as required.

Article 16: PROVISION OF PUBLICLY AVAILABLE DOCUMENTS AND OTHER RECORDS

1. The requested State shall provide copies of documents and records in so far as they are open to public access as part of a public register or otherwise, or in so far as they are available for purchase or inspection by the public.

2. The requested State may provide copies of any other document or record under the same conditions as such document or record may be provided to its own law enforcement and judicial authorities.

Footnote to title: The question may arise as to whether this should be discretionary. This provision can be the subject of bilateral negotiations.

Commentary

Purpose

165. Article 16 provides that public documents should be made available to the requesting State and other documents should be available under the same conditions that apply to the release of the documents domestically. This article is intended to address those cases where a mutual assistance request may be required to obtain

access to documents. In the case of publicly available documents, it may not be necessary to make a formal request for such documents as they may be available directly from the relevant public agency, via Internet or otherwise or they may be obtainable through police to police contacts.

Implementation

166. The legislation should provide for compulsory orders to produce otherwise confidential documents that would be available in a domestic criminal investigation, under the same conditions.

Suggestions

167. The production of public documents in many circumstances may not require a request under a mutual assistance treaty. In many instances that information can be made available quickly through law enforcement authorities or by accessing public data bases, such as those available through the Internet. It would be advisable to encourage competent authorities that might be seeking such information to consider the use of other informal channels first and using the mutual assistance treaty only where absolutely necessary.

Article 17: SEARCH AND SEIZURE

The requested State shall, in so far as its law permits, carry out requests for search and seizure and delivery of any material to the requesting State for evidentiary purposes, provided that the rights of *bona fide* third parties are protected.

Footnote to title: Bilateral arrangements may cover the provision of information on the results of search and seizure and the observance of conditions imposed in relation to the delivery of seized property.

Commentary

Purpose

168. This article obligates the parties to execute requests for search, seizure and delivery of evidence to the extent possible at law and subject to the rights of third parties.

Application

169. Additional detail may be added to this article in the negotiations to specify the information required to obtain search, seizure or production and also to outline the requirements for dealing with the evidence after the search to ensure its admissibility. Depending on the domestic laws of the parties, this provision can, if necessary, be expanded upon to include specialized "search" provisions relating to computers, computer systems and other technology. In particular, to the extent that there are

powers for preservation of data under domestic law, those could be included to cover requests for preservation under the Treaty and for non electronic surveillance.

Implementation

170. Any implementing legislation will need to include a power and process to carry out search and seizure in response to a request. This can be accomplished in a variety of ways - by adopting a new power and process; by applying existing domestic regimes with necessary modifications allowing for transmission of the evidence obtained; or by introducing a power but incorporating by reference the process and procedures under domestic law.

Article 18: PROCEEDS OF CRIME

1. In the present article "proceeds of crime" means any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence.

2. The requested State shall, upon request, endeavour to ascertain whether any proceeds of the alleged crime are located within its jurisdiction and shall notify the requesting State of the results of its inquiries. In making the request, the requesting State shall notify the requested State of the basis of its belief that such proceeds may be located within its jurisdiction.

3. In pursuance of a request made under paragraph 2 of the present article, the requested State shall endeavour to trace assets, investigate financial dealings, and obtain other information or evidence that may help to secure the recovery of proceeds of crime.

4. Where, pursuant to paragraph 2 of the present article, suspected proceeds of crime are found, the requested State shall upon request take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the requesting State.

5. The requested State shall, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State or take other appropriate action to secure the proceeds following a request by the requesting State.

6. The Parties shall ensure that the rights of *bona fide* third parties shall be respected in the application of the present article.

Footnote to title: Assistance in forfeiting the proceeds of crime has emerged as an important instrument in international cooperation. Provisions similar to those outlined in the present article appear in many bilateral assistance treaties. Further

details can be provided in bilateral arrangements. One matter that could be considered is the need for other provisions dealing with issues related to bank secrecy. Provision could be made for the equitable sharing of the proceeds of crime between the Contracting States or for consideration of the disposal of the proceeds on a case-by-case basis.

Footnote to paragraph 5: The Parties might consider widening the scope of the present article by the inclusion of references to victims' restitution and the recovery of fines imposed as a sentence in a criminal prosecution.

Purpose

171. Freezing, seizure and confiscation[27] of proceeds of crime has become an increasingly important component of effective international co-operation. The purpose of the article is to allow for requests to be made for freezing, seizure and confiscation of such proceeds, either through direct enforcement of the foreign orders or the application of domestic procedures on the basis of the information provided in the request. There are now multiple provisions on co-operation in freezing, seizure and confiscation flowing from various treaties including the 1988 Drug Convention, the Palermo Convention and the Merida Convention. Similarly most bilateral instruments do address this issue and thus, in the recent amendments, the article respecting proceeds has been converted from an Optional Protocol to an article within the Model Treaty.

Application

172. How this provision is incorporated in any bilateral instrument will depend very much on the domestic laws of the parties. Issues that will need to be considered include:

- the scope of the predicate offences for proceeds legislation;
- the laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts, and, therefore, would require a clause setting out the authentication required;
- whether direct enforcement is possible;
- if there is a need to include a specific exclusion of bank secrecy.

173. Depending on the laws on these and other points, the article can be framed in general and flexible terms or more specific provisions can be included where the proceeds laws of both parties will support them.

[27] As with mutual assistance and mutual legal assistance, there is different terminology used in the context of proceeds of crime when referring to measures to prevent dealing in, transfer or disposal of assets pending final determinations on the disposition of the proceeds and as to whether the final order is for confiscation or forfeiture. In the manual the terms "freezing or seizure" and "confiscation " will be used throughout paralleling the defined and translated terms in the 1988 Drug Convention, the Palermo Convention and the Merida Convention. Again, when agreeing on these provisions for a treaty or incorporating them under domestic law, States should use the terms consistent with and appropriate to their domestic law. If there are differences in the laws of the contracting parties with regard to these concepts, the definitions in the conventions mentioned above may be useful in resolving any language problems in the treaty.

174. In addition, the parties may wish to address the issue of asset sharing in the treaty, as noted in the footnote to the title of this article. The article can be expanded as well to deal with restitution to victims and recovery of payment of fines.

175. In light of international developments, states may want to expand the application of this provision to address instrumentalities of crime as well as freezing and confiscation of terrorist funds, as outlined in the Terrorist Financing Convention.

176. As mentioned above, the contracting parties will want to consider if this article should contain a specific override of bank secrecy in addition to the general exclusion found in article 4, paragraph 2. The necessity and usefulness of such a provision will depend on the laws and practice of the contracting parties, but the aim should be to ensure that requests for freezing, seizure or confiscation will not be frustrated by the application of laws relating to bank secrecy.[28]

177. Another development that needs to be considered is the adoption in an increasing number of States of legislation allowing for forfeiture of proceeds in the absence of a criminal conviction. The proceedings under such legislation are "in rem" brought against the property and the standard of proof is lower than that required in a criminal forfeiture proceeding. As noted earlier, the parties need to consider whether this article and the Treaty itself will be applicable to investigations and proceedings for forfeiture in the absence of a criminal conviction. If it is to be included, specific language to that effect needs to be set out both in this article and in the general provisions dealing with the scope of the treaty.

Implementation

178. If the parties agree to provide for the treaty to apply to requests for evidentiary assistance in relation to civil forfeiture proceedings and to requests under this article relating to civil forfeiture orders, careful consideration will have to given to how to provide for that in domestic law. In many States, because the mutual assistance legislation was enacted at time when there were few, if any, civil forfeiture regimes, the law may not provide for assistance to be rendered when the request relates to a such a proceeding as it does not constitute assistance for a "criminal" matter. While in some countries arguments have been made for a broad interpretation of the legislation in this regard, it is preferable to specifically provide for it application in express terms.

Paragraph 1: Definition of "proceeds of crime"

Purpose

179. Paragraph 1 defines "proceeds of crime" for the purposes of article 18 of the Model Treaty. The definition is similar to that found in the 1988 Drug Convention, the Palermo Convention and the Merida Convention. It includes direct and indirect gains and both actual or derivative property.

[28] An example of a bank secrecy provision applicable to confiscation and seizure, albeit in the context of domestic proceedings, can be found in paragraph 6 of article 12 of the Palermo Convention (see also paragraph 7 of article 31 of the Merida Convention).

Application

180. This definition is very wide in scope and may need to be refined in the bilateral negotiating process depending on the definitions applied under domestic law within both States. Under the definition set out in the Model Treaty certain key points should be noted.

181. First, the property has to be derived from an offence, either a suspected offence for the purposes of preventing dealings in that property or a proven offence as determined by a court, to qualify for possible confiscation.

182. Secondly, the property may be directly or indirectly derived or realized from the commission of the offence. The actual cash proceeds of, for example, stolen goods, would be directly derived. An example of indirectly derived proceeds would be a car purchased with the proceeds of the sale of stolen goods, in that there was a further transaction involved after the initial offence. Under the laws of some countries, capital gains would equally be deemed to be indirect proceeds.[29]

183. Thirdly, the term "represent the value of property and other benefits" is designed to cover those situations where a court can assess the amount of profit made, but cannot identify property directly referable to the offence. Under the laws of some countries, the court can then order the confiscation of any property of the convicted person to the extent of the profit or “benefit”, as decided by the court. Once again, as noted above, states may wish to include other definitions in a bilateral treaty such as “instrumentalities” and “terrorist funds”.

Implementation

184. To have the capacity to fulfil the obligations set out in article 18 of the Model Treaty with respect to proceeds of crime, any domestic legislation should both identify the offences in respect of which confiscation action can be taken and mirror the definition of proceeds. If this were not so, the matter would need to be addressed during the Treaty negotiations.

Paragraph 2: Obligation to locate “proceeds of crime”

Purpose

185. Paragraph 2 imposes an obligation on the requested State to make its best efforts to locate proceeds of crime on receipt of a request from another State. The paragraph can be invoked during the investigative phase, during court proceedings or after conviction.

186. Clearly, any conditions required by the Treaty must be satisfied, such as a requirement that the offence is one that attracts proceeds of crime action under the

[29] For example under some national laws, if a person bought a house valued at US$ 500,000 using money from the sale of stolen property, and at the time that the case for confiscation came before the court the house was worth US$ 700,000, then the entire US$ 700,000 could be confiscated on the basis that the increase to the value of the house was an indirect proceed of crime.

laws of both requesting and requested States. A request should also include a description, if possible, of the property or nature of the property, where it is located and the reasons for the belief that it is so located, as well as evidence linking the property to an offence.

Application

187. Paragraph 2 is very general. Even States with a limited capacity to execute such requests may wish to include this paragraph that creates a "best efforts" obligation to identify proceeds of crime. Effective cooperation in this area is dependent upon specific, detailed information being provided by the requesting State as an overly broad request is unlikely to be successfully executed. In applying this article the contracting parties may wish to stress this point.

Implementation

188. Paragraph 2 requires States to have a domestic capacity to investigate the existence and location of suspected proceeds of crime in response to a foreign request. Most States that have legislation making it a criminal offence to engage in activities relating to proceeds of crime and establishing mechanisms for freezing, seizure and confiscation, may be able to use domestic investigative mechanisms to meet the obligations of this paragraph.

189. If there is no domestic legislation or it will not apply in such circumstances, then new legislation may be needed to empower the appropriate investigating bodies within the State to conduct any relevant investigations.

Paragraph 3: Obligation to locate "proceeds of crime"

Purpose

190. Paragraph 3 sets out the possible methods that States might employ to be better equipped to recover proceeds of crime in response to a request for assistance. The provision however is drafted to provide flexibility to the requested state as to what methods will be used.

Application

191. The contracting parties may want to include a provision of this nature as a helpful guide to the authorities who will be called upon to execute the request.

Implementation

192. If paragraph 3 is included, the contracting parties may wish to consider whether such methods are available under existing law and if not whether any amendments should be made to provide for them. However, the article does not mandate the use of any particular approach or method for the location of proceeds of crime.

Paragraph 4: Freezing or seizure of proceeds of crime

Purpose

193. Paragraph 4 obliges a party upon request to use the measures available under domestic law to restrain suspected proceeds of crime until a final determination is made by a court in the requesting State. It obliges the parties to take steps to restrain proceeds (subject to limitations under domestic law) to ensure that property cannot be dissipated or otherwise disposed of pending a final determination by a court.

Application

194. Because the parties to a treaty have different legal systems and different approaches to the freezing and seizure of proceeds of crime, this paragraph creates a general obligation only. The parties must take steps to restrain, but the procedure for doing so is not specified and there is recognition of the limitations that may exist at domestic law. Unless one party has no capacity to execute requests for freezing and seizure, most States will wish to include this general provision on freezing and seizure in the treaty.

195. There are two fundamental approaches to freezing and seizure that are found in the domestic law of most States. In most States the information and evidence provided by the requesting State will be used to obtain a domestic judicial order to freeze or seize the relevant property in response to the request. However, because this can involve a difficult and timely process, some States have enacted laws to provide for the direct enforcement of a foreign seizure or freezing order. Under this system the foreign authorities that have conducted the investigation will obtain an order from their court relating to the proceeds in the other state. This order will be transmitted to the requested State where it will be registered and then enforced as if it were a domestic order. Because of these different approaches, the contracting parties will want to discuss their procedures under domestic law and draft a treaty article that reflects the laws of the two States. Unless the system for freezing and seizure is identical in both countries and the restrictions of domestic law are limited, the States may not wish to include anything more specific than the paragraph in the Model Treaty. But if freezing and seizure is limited to certain offences or there are very specific pre-conditions, the parties may wish to refer to these matters in the Treaty as well.

Implementation

196. Either through the application of domestic proceeds law or through specific legislation for foreign requests, a State must have some power to restrain suspected proceeds of crime. Importantly it is necessary that the freezing and seizure procedures are applicable to the proceeds of both foreign and domestic offences. As already noted, there are different approaches that may be employed in implementing legislation. A State may choose legislation that permits the direct freezing and seizure of funds upon the request of a foreign State based on a foreign restraint order. Alternatively the information provided in the request can be used to trigger a domestic process leading to a restraint order.

197. Whichever approach is adopted, the legislation will generally have threshold requirements that must be met by the foreign State before assets or property can be frozen. For example, if the legislation provides for enforcement by obtaining a domestic order as opposed to registering and enforcing the foreign order, there are different models for such legislation. In some systems, it may be essential to have evidence to show the connection between the funds and either specific illegal transactions or ongoing criminal activities, to obtain the domestic order.

198. In the case of the registration and enforcement of a foreign order, there may be other technical requirements that will be included in the legislation.

Suggestions

199. Investigators and prosecutors dealing with requests for freezing and seizure will want to satisfy themselves that the legislative requirements are met by the information provided by the requesting State. In addition, if a domestic order is necessary, they must ensure that the requesting State can provide not only information but evidence in an admissible form that can be used in a freezing and seizure proceeding in the requested State.

Paragraph 5: Enforcement of final order by a court in requesting State concerning proceeds of crime

Purpose

200. Paragraph 5 relates to the final stage of legal action against the proceeds of crime, when a court has convicted a person and has decided either that the property constitutes the proceeds of crime and/or should be available to discharge an assessment of profit made.

201. While the result is the same, i.e. confiscation, two alternative mechanisms are provided for, namely, enforcing the order of the foreign court in the requested State or bringing its own confiscation proceedings within its jurisdiction, relying on evidence and other material made available by the requesting State. These options reflect differences in legal systems. A similar approach is adopted in the 1988 Convention (article 5, paragraph 4(a)), the Palermo Convention (article 13, paragraph 1), the Merida Convention (article 55, paragraph 1) and the Council of Europe 1990 Convention (article 13, paragraph 1).

Application

202. Paragraph 5 is flexible enough to be applicable in most treaties. As with paragraph 4, it recognizes that the measures to be taken are limited by domestic law and thus it allows for the obligation to be met through different means of enforcement. As is the case with freezing and seizure, countries will employ different methods for confiscation of proceeds of crime arising from a request for assistance. Some States may have powers for direct enforcement, which means that the final confiscation order issued in the requesting State can be registered in the requested State and enforced as if it were a domestic order. Other countries may need to use the order and

information provided by the requesting State to obtain a domestic confiscation order. Either method is an acceptable means to meet the treaty obligation. The contracting parties will need to carefully consider this issue and the powers under domestic law in adopting an appropriate article on this point. For example, if the laws of both parties permit direct enforcement, it may be useful to specify this in the Treaty.

Implementation

203. To meet the imposed obligations a country should have the capacity to confiscate assets or property found by a foreign court to constitute the proceeds of crime. As noted above, this can be achieved by legislation permitting the direct enforcement of a foreign order of confiscation or alternatively by a legislative power to obtain a domestic confiscation order by presenting evidence before a court in the requested State. In the latter case, there are different legislative approaches that can be employed. A State may adopt legislation designed specifically for obtaining confiscation orders based on requests from foreign States. More commonly, a State will rely on general proceeds of crime legislation that includes a power for the confiscation of proceeds of crime generated from domestic as well as foreign crime.

Suggestion

204. It is very important that a requesting State is aware of the method of confiscation that will be used in the requested State as this will determine how the request should be made. It would be pointless to forward a certified copy of a court order if what the requested country needs is evidence to initiate its own proceedings. A very useful checklist for such requirements can be found as an annex to the Report of the 2001 Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice (see footnote 20).

Paragraph 6: Rights of bona fide third parties

Purpose

205. Proceeds of crime cases involve the confiscation of property or assets. Paragraph 6 recognizes the reality of such proceedings and reflects the accepted principle that the rights of bona fide third parties must be protected.

Application

206. Because of the importance of this principle and the need for safeguards in any confiscation process, States will want to include this statement of principle in the Treaty[30].

[30] The necessity for ensuring the protection of bona fide third parties is recognized in both the Palermo and the Merida Convention. Article 13, paragraph 8 of the Palermo Convention and article 55, paragraph 9 of the Merida Convention clarify that the measures taken in the context of international cooperation for purposes of confiscation should not be construed to prejudice the rights of bona fide third parties. In addition, article 57, paragraph 2 of the Merida Convention requires a State Party to adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to return confiscated property, when acting on the request made by another State Party, taking into account the rights of bona fide third parties.

Implementation

207. Any domestic legislation for the confiscation of proceeds will be likely to contain protection for third parties. If there is specific legislation for foreign requests, it should similarly incorporate such protection. In the case of the enforcement of foreign orders, there should be an ability to notify any third parties who may have an interest in the assets or property so that their interests may be considered by the court. Similarly, if the legislation allows for an order based on evidence produced before a domestic court there should be a mechanism that respects third party interests.

Article 19: CERTIFICATION AND AUTHENTICATION

A request for assistance and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication.

Footnote to title: The laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts, and, therefore, would require a clause setting out the authentication required.

Commentary

Purpose

208. Article 19 provides that no certification or authentication of documents is required under the present Treaty. This is intended to simplify the process of providing assistance by eliminating the necessity for seals, ribbons, certificates or other formalities. Although this is the general rule, the footnote to the title of the article recognizes that some States may require particular forms of authentication or certification. In those instances, an article describing the authentication required should be included in the treaty.

Implementation

209. No domestic legislation is required to implement this article, unless certification is a requisite for admissibility, in which case legislation or court rules may need to be changed.

Suggestions

210. While as a general principle no certification is required, police, prosecutors and investigating magistrates in the requesting State must consider whether their domestic law requires certification or other supporting documentation for the evidence obtained to be admissible. For example, business records may be admissible only if accompanied by an affidavit. If this is the case, the required certification or other supporting material should be set out in the request.

Article 20: COSTS

The ordinary costs of executing a request shall be borne by the requested State, unless otherwise determined by the Parties. If expenses of a substantial or extraordinary nature are or will be required to execute the request, the Parties shall consult in advance to determine the terms and conditions under which the request shall be executed as well as the manner in which the costs shall be borne.

Footnote to title: More detailed provisions may be included. For example, the requested State would meet the ordinary cost of fulfilling the request for assistance except that the requesting State would bear (a) the exceptional or extraordinary expenses required to fulfil the request, where required by the requested State and subject to previous consultations; (b) the expenses associated with conveying any person to or from the territory of the requested State, and any fees, allowances or expenses payable to that person while in the requesting State pursuant to a request under article 11, 13 or 14; (c) the expenses associated with conveying custodial or escorting officers; and (d) the expenses involved in obtaining reports of experts.

Commentary

Purpose

211. Article 20 assigns responsibility for costs. The requested State will bear the costs of execution. The parties may alter this article by arrangement in a particular case. The article also recognizes the need for consultation in the case of extraordinary costs.

Implementation

212. Implementation of the article on costs does not require domestic legislation. However estimated costs of execution should be reflected in the budget of the appropriate authority in each State.

Suggestions

213. In some cases the requested State may seek a detailed division of responsibility for costs, if it appears that these may be extensive. Where there is a marked disparity between the financial resources of the parties, they may consider negotiating a special article under which the wealthier party would bear all the costs of the requested State executing the request.

Article 21: CONSULTATION

The Parties shall consult promptly, at the request of either, concerning the interpretation, the application or the carrying out of the present Treaty either generally or in relation to a particular case.

Commentary

Purpose, implementation and suggestions

214. Article 21 is self-explanatory and requires no implementing legislation. Clearly, the existence of central authorities within the countries concerned would greatly facilitate consultation and communication.

Article 22: FINAL PROVISIONS

1. The present Treaty is subject to [ratification, acceptance or approval]. The instruments of [ratification, acceptance or approval] shall be exchanged as soon as possible.

2. The present Treaty shall enter into force on the thirtieth day after the day on which the instruments of [ratification, acceptance or approval] are exchanged.

3. The present Treaty shall apply to requests made after its entry into force, even if the relevant acts or omissions occurred prior to that date.
4. Either Contracting Party may denounce the present Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which it is received by the other Party.

Commentary

Purpose

215. Article 22 provides the entry into force and termination provisions.

Application and implementation

216. The parties should reflect their general treaty process in this article. The Model Treaty provides for ratification, acceptance or approval. The formulation adopted between any two States will depend upon the requirements of each of the States with respect to bringing such a treaty into force.

217. For example, one formulation could be that the treaty enters into force "thirty days after the date on which the contracting States have notified each other in writing that their respective requirements for the entry into force of the treaty have been complied with". This method of providing for the treaty to enter into force upon an exchange of notes may be appropriate if one or both parties have domestic procedures requiring submission of the treaty to its Parliament. An alternative approach could be for the treaty to enter into force immediately upon exchange of instruments of ratification, so that the treaty may be brought into immediate use.

218. For States that have a relatively simple process for bringing treaties into effect, it may be appropriate for the treaty to enter into force, either immediately upon, or e.g., 30 days after ‘the exchange of notification of the completion of their domestic legal requirements for entry into force”.

219. Given the nature of the obligations contained in an Extradition or Mutual Legal Assistance Treaty, the parties, as a general rule, agree to subject its entry into force to its ratification. This normally entails its internal approval by a competent organ – usually Parliament or Congress – as a prerequisite to its ratification by the Executive.

220. This mechanism, though necessary, involves, more often than not, lengthy and cumbersome procedures. As an alternative to it, the parties may consider stipulating the provisional application of the treaty, provided that such alternative is not prohibited by a party's Constitution. This option is ruled by article 25 of the 1969 Vienna Convention on the Law of Treaties, which sets forth that a treaty or a part of a treaty may be applied provisionally, pending its entry into force, if (a) the treaty itself so provides; of (b) the negotiating States have in some other manner so agreed (article 25, paragraph 1). In addition, article 25, paragraph 2 provides that "unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".