

THE MODERNISATION OF EXTRADITION LAWS OF COMMONWEALTH COUNTRIES

A Paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions at their 1995 meeting asked that the Secretariat prepare materials which would assist Commonwealth countries and jurisdictions in their efforts to ensure that their extradition laws reflected the most up-to-date practice and which would facilitate the conclusion of extradition arrangements with Commonwealth and non-Commonwealth countries. The Pacific Island Law Officers Meeting (PILOM) sought similar assistance in 1994. This paper draws on work done for PILOM.

2. While this paper does not suggest a modification of the London Scheme for the Rendition of Fugitive Offenders it does, of necessity, compare that Scheme with other international instruments. This approach is necessary if the paper is to assist member countries in their efforts to extend the scope of their bilateral extradition arrangements beyond those which exist with other countries and jurisdictions which have different legal systems and traditions.

EXTRADITION ISSUES NOT DEALT WITH IN THE LONDON SCHEME

3. There are a number of subjects of a substantive nature which are covered in the United Nations Model Extradition Treaty but not in the London Scheme. Countries may wish to consider the desirability of making these issues the subject of specific provision in national laws so as to enable them to use that law as a comprehensive basis for the consideration of extradition requests. One reason for making national legislation comprehensive is to clearly define the rights of the fugitive and those of the requesting and requested states so as to minimise uncertainty which can give rise to protracted litigation of extradition requests and potential applications for judicial review and/or *habeas corpus*. These issues are:

a. Subjects totally excluded from the London Scheme

(i) The London Scheme, although it has abolished the list approach to offences and replaced it with a dual criminality test, does

not lay down *how dual criminality is to be determined* and thus legislation which follows closely the wording of the London Scheme is unlikely to have a provision paralleling Article 2(2) of the UN model which is designed to overcome decisions such as that in Gardner's Case [1968] 2 QB 399.

- (ii) Provisions which deal with refusal of extradition in cases where the fugitive has been *convicted in absentia* are important and, although not mentioned in the London Scheme might well commend themselves to countries.
- (iii) A provision permitting discretionary refusal of surrender in cases where both the requested and the requesting state have jurisdiction and the requested state has already taken a decision not to proceed with the case.
- (iv) A provision permitting discretionary refusal of surrender in a case where both the requesting and requested state have jurisdiction and the requested state has commenced proceedings against the fugitive for the offence for which surrender is requested.
- (v) A provision permitting discretionary refusal of surrender in a case where the requesting state is exercising extraterritorial jurisdiction over the offence for which surrender is sought and the requested state does not exercise extraterritorial jurisdiction in similar cases. (Such a provision may not be needed in the London Scheme because the Scheme lacks a provision which matches conduct to determine extraditability instead of matching "offences" - see the comment above on the Gardner Case provision).
- (vi) A provision permitting refusal of surrender where the requested state claims sole jurisdiction over the offence for which surrender is sought. In such a case the provision should also require that where surrender is refused on this ground the requested state has an obligation to submit the case to its prosecution authorities which must consider the question of prosecution.
- (vii) A provision permitting refusal of extradition where the fugitive has been or would be

liable to be prosecuted by an extraordinary or *ad hoc* court or tribunal.

- (viii) A provision permitting the requested state to seek the submission of additional material in support of the request by the requesting state.
- (ix) A provision limiting the time for which a person provisionally arrested may be held without the submission of the formal request and supporting documents.
- (x) Any provisions on the surrender of the fugitive after the grant of a request.
- (xi) Any provision requiring the requested state which refuses extradition on the ground of nationality/citizenship to submit the case to its own authorities for prosecution (or consideration of the question of prosecution).

b. Subjects covered only by inference

- (i) A provision which permits refusal of surrender if prosecution of the offence of which the fugitive is accused would be statute barred in the requesting state. The "lapse of time" ground in the London Scheme may be construed as covering this but the answer to the question is far from certain.
- (ii) A provision permitting refusal of surrender on humanitarian grounds. It is arguable that refusal based on Clause 10(3)(d) could cover this but the situation is not absolutely clear.

Other Features of the London Scheme

4. National legislation based on the London Scheme legislation may not adequately cover two particular areas. The first is the issue of the inability (or refusal) of certain countries to surrender their nationals. The second is issues which might arise if the requested country considers that the punishment which can be imposed by the requesting country does not meet appropriate standards such as those laid down in the International Covenant on Civil and Political Rights (ICCPR).

Nationality

5. The constitutions of some countries prohibit the extradition of nationals. Other countries prefer to reserve to themselves the right to refuse to surrender a national. Either approach characterises the extradition law and/or practice of a very

significant number of countries in the world and hence account must be taken of it by countries which do, or usually do, surrender their nationals.

6. Although the London Scheme does contain an optional annex dealing with the right to refuse the surrender of nationals it offers no alternative and therefore has the potential to create safe havens. By contrast, the civil law practice of refusing to surrender nationals derives from the application of the personal theory of jurisdiction rather than the territorial theory of jurisdiction. Hence a country (such as most European countries) which refuses to surrender a national does so on the basis that it has the right to deal with the person regardless of where the alleged offence was committed. In refusing surrender *on the basis of nationality or citizenship* such a country is not providing a safe haven for the fugitive - it is merely asserting its own jurisdictional claim.

7. Multilateral conventions dealing with criminal conduct are basing the obligation to deal with offenders on what is often described as "the nationals jurisdiction". Briefly described, the "nationals jurisdiction" in multilateral conventions requires states parties to extradite or to establish such jurisdiction over alleged offenders as would allow them to prosecute if they refuse to extradite. It is therefore necessary that all countries (whatever their historical approach to jurisdictional claims may be) which refuse to extradite nationals (or retain the right to refuse under bilateral treaties or otherwise) find a means of dealing with any national whose surrender is refused.

8. The usual way in which common law countries cater for jurisdictional claims based on nationality is to agree with the country/ies concerned that where extradition is refused on this basis the accused will be dealt with in the country which claims jurisdiction. Accordingly the laws of any country which provide for refusal on the grounds of nationality must contain provisions which permit it to exercise the jurisdiction over its nationals.

9. A necessary corollary of such a provision is that the law of the requesting country must enable it to provide the requested country (which refuses extradition) with such evidence as that country requires to enable it to bring the prosecution properly and with acceptable chances of success. If one or more countries wishes to reserve to itself the right to refuse to surrender nationals the others must all be prepared, if an effective regime is to be put in place, to enact laws which enable them to provide that country (or those countries) with the evidence they need to prosecute.

10. Another way of dealing with this issue is being adopted by various European countries. It involves surrender for trial only and return to the country of nationality to serve any sentence imposed. In Europe this can be achieved where both the requesting and the requested country are states parties to a treaty on the transfer of convicted offenders.

Human Rights Issues

11. If there is concern in any country over the potential treatment of surrendered persons in the requesting country these need to be addressed legislatively. The issues which arise in this context are generally set out in the ICCPR, in the Second Optional Protocol to the ICCPR (dealing with the death penalty) and in instruments such as the Convention Against Torture and Other Cruel and Inhuman Punishment.

12. It is consistent with the spirit (and, indeed, in some cases the requirements) of these instruments that countries refuse extradition where they are not satisfied that the treatment of the surrendered person in the requesting country will comply with the standards set out in these instruments. It is not, however, conducive to good international relations that surrender be refused lightly on human rights grounds. One way of overcoming potentially divisive issues in this area is for countries to agree bilaterally or on a wider basis that extradition will not be refused on "human rights" grounds where the requesting country is a state party to the ICCPR. In death penalty cases it is common practice for a requested country to refuse to extradite for an offence carrying the death penalty unless the requesting country guarantees that the death penalty will not be imposed or, if imposed, will not be carried out.

13. Where a requesting country cannot give a required "death penalty undertaking" it appears that developing international practice is for extradition to be refused. Such refusal could be accompanied by an assertion of jurisdiction by the requested country (if so desired) or could mean that the fugitive evades justice. There is no common international practice.

14. It has been suggested to us that where the requesting country is a state party to the ICCPR no question as to the adequacy of its treatment of offenders should be raised. A state party to the ICCPR is already required, at international law, to comply with globally accepted standards. To support this concept the national laws would need to provide that extradition shall not be refused on

"ICCPR" grounds where the requesting country is a state party to that Covenant.

15. The London Scheme does not deal thoroughly with this issue - the only relevant ground of refusal being contained in the death penalty annex and in Clause 10(3)(c) which is non-specific and therefore uncertain.

16. Where a requesting country is not a state party to the ICCPR and the requested country is concerned that the standard of treatment likely to be accorded a surrendered person would not meet ICCPR standards there are various alternatives which might commend themselves:

(a) extradition can be refused and the fugitive can evade justice. Clearly this option is not conducive to good relations between member countries whose views on the adequacy of their regimes for treating (or housing) prisoners may differ and whose abilities to provide "state of the art" prison facilities may differ;

(b) extradition can be granted for the purpose of the trial only and the person, if convicted, could be returned to the requested country to serve sentence in that country. The laws of both the requesting and the requested country must permit such an arrangement. Specifically, the laws of the requesting country must permit a person convicted in that country to be transferred to another country to serve his/her sentence. The laws of the requested country must allow it to receive a prisoner convicted in another country into custody and ensure that the foreign sentence forms a lawful basis for custody in its penal institutions. The necessary basis for transferring a convicted person can be founded on a comprehensive transfer of prisoner arrangement or in specialist provisions which confine the facility to cases where extradition was granted for the purpose of trial only;

(c) provision could be made to transfer the proceedings to the requested country. Transfer of proceedings is not a concept well known to common law countries and the means whereby it can be effectively achieved are somewhat complicated. Although the practice has not generally found favour in international fora which include common law countries, such a mechanism has been adopted by member countries of the Economic Community of West African States

(ECOWAS) which includes both common and civil law countries. It is, however, fair to say that the ECOWAS arrangement is very new and there is no working experience upon which members can draw for analysis.

BROAD OVERVIEW OF NATIONAL LAWS IN FORCE IN COMMONWEALTH COUNTRIES

17. A significant number of Commonwealth countries have extradition legislation which reflects the pre-1983 London Scheme. Those countries which have not amended their laws to reflect the changes since 1983 to the Scheme can only extradite for the offences listed in the old Schedule of offences. Even where countries have agreed in principle that evidentiary provisions should be modified existing laws embody the traditional evidentiary standard in that they require the submission of evidence which is admissible in the requested country and which would provide sufficient basis to put the person on trial had the offence been committed in the requested country. Provisions permitting simplified extradition where the fugitive consents to surrender are relatively rare.

One of the most significant omissions from national legislation is provision which facilitates transit through the country where a fugitive has been surrendered by one country to another and needs to be transported through a country which is not otherwise involved in the case.

18. Very few Commonwealth countries would find their extradition legislation conducive to the conclusion of modern bilateral treaties with non-Commonwealth countries. The reasons for this vary but it is fair to say that the maintenance of the list of offences for which extradition can be granted together with the evidentiary requirements, the lack of transit provisions and the maintenance of very general provisions such as those which allow the requested country to refuse to extradite on grounds that to return the fugitive would be "too severe a punishment" are inconsistent with modern extradition practice.

19. A comparison between the extradition laws of most Commonwealth countries and jurisdictions and the provisions of the United Nations Model Treaty show even greater divergence than does a comparison of laws with the provisions of the London Scheme. The following areas are those where the most significant divergence occurs and hence the areas which would provide Commonwealth countries and jurisdictions with the greatest difficulty in negotiating bilateral extradition relations with the significant number of countries in

the world which have accepted the provisions of the UN model as a guide to modern global practice.

(i) *Extraditable Offences:* The majority of Commonwealth countries only grant extradition for offences listed in the Schedule rather than adopting the no-list dual criminality approach. This means that extradition laws require continual updating as forms of criminality develop - a cumbersome task the need for which usually only becomes apparent when a country finds it is unable to respond to a specific request for surrender.

All other things being equal, there is little, if any, justification for not surrendering a person to face trial or serve a sentence for conduct which would constitute an offence against the laws of both the requesting and requested countries.

(ii) *Determination of Dual Criminality:* The 1968 decision in *R. v. Governor of Brixton Prison, ex parte Gardner* probably would apply, at least persuasively, in many Commonwealth countries. This decision has the effect that dual criminality is not established unless the elements of the offences as created under the laws of both the requesting and requested countries match exactly. It may be desirable that legislative action be taken to ensure that courts cannot reach the same conclusion.

(iii) *Fiscal Offences:* Once the list approach to determining extraditable offences is adopted it becomes necessary to deal expressly with the question of fiscal offences. Traditionally one state was under no obligation to assist another in the enforcement of its fiscal laws.

As fraud on the revenue and other economic crimes become more widespread, countries have a real interest in ensuring that they can bring to justice these criminals. Hence there has been a global trend to modify the traditional rule by providing specifically that fiscal offences are extraditable. The deficiencies here are the same as those arising from the non-implementation of paragraph 2(3) of the London Scheme.

(iv) *Accessory Extradition:* Because extradition can only be granted for serious offences (generally those carrying a maximum penalty of not less than one or two years imprisonment) fugitives who are charged in the requesting country with both offences which carry the required penalty to be extraditable and with lesser offences will find

- on their return that they cannot be dealt with for the lesser offences and therefore cannot get the possible benefit of having concurrent sentences imposed. To overcome this problem it is desirable to include provision in domestic laws which allows, with the consent of the fugitive, other offences to be taken into account or dealt with during (or concurrently with) the proceedings for the offence/s for which extradition was granted.
- (v) **Grounds of Refusal:** A number of grounds for refusing extradition are not included in the laws of Commonwealth countries because extradition can only be granted for "list offences". When the list is abolished it is highly desirable that the grounds of refusal be reviewed.
- (a) **Limitation of the Political Offence Exception** - This issue is the same as arises under the London Scheme (paragraph 10(1)(b) and Annex 1). Many laws have not been revised to reflect the international practice of refusing to treat certain serious "international" crimes as never being offences of a political nature. It is clear fugitives accused of genocide, offences against internationally protected persons, and other crimes described in the major multilateral conventions which deal with serious offences should not be able to escape extradition by relying on the political offence exception. This is an area in which revision of laws could be contemplated.
- (b) **Military Offences** - Where no list of offences is contained in the extradition law it becomes necessary to specifically exclude offences created solely under military law from the definition of extraditable offences.
- (c) **Double Jeopardy** - It is becoming increasingly the practice that countries extend the double jeopardy provision to provide that a person who has been granted a pardon in the requesting country should not be surrendered. Although Commonwealth country laws do not do this some countries may wish to consider whether such a provision should be included in revised laws. In some cases full faith and credit is also given to pardons issued in third countries but this is less usual in light of isolated cases where it has been found that countries sometimes sell pardons, particularly to their citizens, with the express purpose of providing them with a means of defeating extradition procedures.
- (d) **Lapse of Time** - There are cases where prosecutions might be statute barred - either in the requesting or requested country - and in such cases the Commonwealth country laws generally do not expressly permit refusal of extradition.
- (e) **ICCPR and Torture Convention Exceptions** - As more countries become parties to the International Covenant on Civil and Political Rights (and the protocols to that Covenant) there is an increasing tendency to accept that it is acceptable to refuse surrender to a country which does not prohibit cruel, inhuman or degrading treatment or punishment or which does not provide the minimum guarantees set out in the ICCPR. Commonwealth country laws generally reflect only the old grounds relating to refusal in cases where it would be unjust, oppressive or too severe a punishment to surrender the person. The modern reliance on internationally acceptable norms is far more certain and less likely to cause difficulty in bilateral relations because the requesting country can clearly identify the grounds on which extradition is being refused.
- (f) **Conviction in Absentia** - Because common law countries do not provide for conviction *in absentia* the London Scheme, and hence the laws based on it, does not deal with refusal on this ground. Laws capable of supporting extradition arrangements with a wider range of countries should, however, permit refusal in cases where the person has been convicted *in absentia* unless the fugitive has a legal right to have the case re-opened upon surrender and a new trial conducted.
- (g) **Nationality** - Although Annex 2(2) to the London Scheme contemplates refusal to surrender based on the ground that the fugitive is a national or resident of the requested country, most Commonwealth country laws do not mirror this provision. If it is thought that such a provision is desirable in updated laws then there also needs to be provision which obliges the country refusing on this ground to take action to prosecute the person itself or at least to refer the case to the competent authority and require that authority to determine whether or not to prosecute.

Without the second requirement, countries which refuse to surrender nationals simply provide a safe haven for their own criminals.

- (h) **Requested State Competence over the Offence** - The UN Model permits discretionary refusal of surrender when the requested state also has jurisdiction over the offence which is the subject of the request. Refusal is permitted where the requested state has (before the request is received) decided not to prosecute. In cases where this decision was reached because of a lack of evidence there is clearly no real ground for refusal but where the decision was reached, say because of the mental state of the accused, this is a ground of refusal which may commend itself to Commonwealth countries.

Refusal is also permitted where the requested state is proceeding against the fugitive for the offence for which extradition is requested. At the end of such proceedings the fugitive will have available the "prior conviction or acquittal" objection to extradition.

- (i) **Death Penalty** - Many Commonwealth countries already have provision in their laws which permit refusal of surrender in cases where the offence is punishable by death provided that the offence is not punishable by death in the requested country. As there is a divergence of practice relating to the death penalty amongst Commonwealth countries there is no absolute certainty as to how this provision will operate on a case by case basis.
- (j) **Extraterritoriality** - Common law countries did not traditionally exercise extraterritorial criminal jurisdiction. As these countries deal increasingly with countries which have traditionally exercised extraterritorial jurisdiction over their nationals and as the multilateral conventions impose increasingly obligations to exert jurisdiction over extraterritorial offences there is a need for the subject to be addressed. Countries may wish to consider whether they should provide for refusal in cases where the jurisdiction claimed by the requesting country differs from the jurisdiction they would exercise in a similar case. Similar considerations apply in cases where the requested state has a concurrent jurisdiction over the offence but refusal on this ground should only be permitted where the requested country

submits the case to its competent authority for consideration of prosecution.

- (k) **Ad Hoc Tribunals** - Countries may wish to include in their laws provision permitting them to refuse extradition in cases where the person surrendered would not be dealt with by the ordinary courts of the requesting country.

- (vi) **Required Documents**: The UN Model treaty proposes two options. The first requires the submission of documentary proof of identity, the text of, or a statement of, the law creating the offence, a warrant for the arrest of the person sought and a statement of acts and/or omissions alleged to constitute the offence.

The second option proposed in the UN model is suggested for countries which require a judicial assessment of the sufficiency of the evidence. For those countries it is recognised that bilateral relations may require the submission, in addition to the documents listed in the preceding paragraph, of "sufficient proof in a form acceptable under the law of the requested state, establishing, according to the evidentiary standards of that state, that the person is a party to the offence." This option leaves it open to countries which require something more than a statement of acts and/or omissions to determine what that additional something may be. It could, for example, be submission of evidence (admissible in the requested country) sufficient to warrant trial of the accused or to establish a *prima facie* case against the accused. It could well be something less - such as the United States requirement of "reasonable suspicion" which can be established by hearsay evidence but requires more than a mere statement of acts and/or omissions. It could, alternatively, be something like the modified evidentiary requirement reflected in Annex 3 to the London Scheme.

In other words, the UN model recognises that it is for each country to determine what its documentary requirements are and to reflect them in its extradition arrangements. While impliedly advocating a lowering of the standard of evidence required and hence a strengthening of the rule of non-inquiry the UN model acknowledges that some countries may be either unwilling or unable to follow

this trend and will need to require "sufficient proof "in a form acceptable under (their) law/s"".

This issue has been the subject of extensive consideration by Law Ministers and the views of member countries vary. Subject to the specific national position on the questions national laws could be amended with a view to countries ultimately entering into extradition relations with other countries based on the UN model while at the same time embodying the evidentiary standard thought most appropriate by each sovereign government. That might be the lower standard reflected in Article 5.2 or it might be some standard which is contemplated within the wide ranging words of footnote 14 to that article.

- (vii) *Simplified Extradition Procedure*: With few exceptions extradition laws do not facilitate what is generally described as "consent surrender" or "simplified extradition".
- (viii) *Certification and Authentication*: Few, if any, Commonwealth country laws permit countries to enter into extradition relations which abolish any need for certification or authentication of documents. This said, there is merit in giving consideration to simplifying the certification and authentication procedures and in ensuring that documents which comply with an appropriate standard are admissible once they meet that standard of certification or authentication.
- (ix) *Additional Information*: The laws of most countries do not specifically provide for the "suspension" of extradition proceedings to permit the requested country to seek additional material from the requesting country.
- (x) *Provisional Arrest*: The laws of all Commonwealth countries provide for provisional arrest. It is a question for individual judgment whether those laws are as clear as they could be and whether they sufficiently set out objective grounds for both arrest and release of the detained person.
- (xi) *Postponed or Conditional Surrender*: Most countries with laws enacted since the 1960s are capable of including in bilateral relationships provisions relating to postponed

or conditional surrender. Those still relying on Imperial statutes cannot.

- (xii) *Surrender of Property*: The UN model contemplates that property which will be handed over to the requesting state with the fugitive includes all "property found in the requested state that has been acquired as a result of the offence or that may be required as evidence". The laws of most Commonwealth countries do not go this far - they permit the handing over of property "found in the possession of an offender at the time of his arrest". The latter is capable of narrow construction and could well exclude, for example, property (including negotiable instruments) stored in a bank or, in fact, anywhere other than on the person of the offender.
- (xiii) *Transit*: This issue arises in relation to the UN model as it does under the London Scheme. The laws of many countries are generally totally deficient in this regard - they do not provide adequate (and usually do not provide at all) for the proper custody of a person surrendered by one country to another who must transit a Commonwealth country en route to the country of destination. It is an area where urgent action needs to be taken, particularly in light of some regional air schedules and routes where transit assistance could be required for days at a time while waiting for an ongoing flight.

20. A copy of the United Nations Model Treaty on Extradition is attached to this paper.

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RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Third Committee (A/45/756)]

45/116. Model Treaty on Extradition

The General Assembly,

Bearing in mind the Milan Plan of Action, 1/ adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the General Assembly in its resolution 40/32 of 29 November 1985,

Bearing in mind also the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, 2/ principle 37 of which stipulates that the United Nations should prepare model instruments suitable for use as international and regional conventions and as guides for national implementing legislation,

Recalling resolution 1 of the Seventh Congress, 3/ on organized crime, in which Member States were urged, inter alia, to increase their activity at the international level in order to combat organized crime, including, as appropriate, entering into bilateral treaties on extradition and mutual legal assistance,

1/ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. A.

2/ Ibid., sect. B.

3/ Ibid., sect. E.

Recalling also resolution 23 of the Seventh Congress, 3/ on criminal acts of a terrorist character, in which all States were called upon to take steps to strengthen co-operation, inter alia, in the area of extradition,

Calling attention to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 4/

Acknowledging the valuable contributions of Governments, non-governmental organizations and individual experts, in particular the Government of Australia and the International Association of Penal Law,

Gravely concerned by the escalation of crime, both national and transnational,

Convinced that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international co-operation for the control of crime,

Conscious of the need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights 5/ and the International Covenant on Civil and Political Rights, 6/

Conscious that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements which take into account recent developments in international criminal law,

Recognizing the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions,

1. Adopts the Model Treaty on Extradition contained in the annex to the present resolution as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice;

2. Invites Member States, if they have not yet established treaty relations with other States in the area of extradition, or if they wish to revise existing treaty relations, to take into account, whenever doing so, the Model Treaty on Extradition;

3. Urges all States to strengthen further international co-operation in criminal justice;

4/ E/CONF.82/15 and Corr.2.

5/ Resolution 217 A (III).

6/ See resolution 2200 A (XXI), annex.

4. Requests the Secretary-General to bring the present resolution, with the Model Treaty, to the attention of Member States;
5. Urges Member States to inform the Secretary-General periodically of efforts undertaken to establish extradition arrangements;
6. Requests the Committee on Crime Prevention and Control to review periodically the progress attained in this field;
7. Also requests the Committee on Crime Prevention and Control, where requested, to provide guidance and assistance to Member States in the development of legislation that would enable giving effect to the obligations in such treaties as are to be negotiated on the basis of the Model Treaty on Extradition;
8. Invites Member States, on request, to make available to the Secretary-General the provisions of their extradition legislation so that these may be made available to those Member States desiring to enact or further develop legislation in this field.

68th plenary meeting
14 December 1990

ANNEX

Model Treaty on Extradition

The _____ and the _____

Desirous of making more effective the co-operation of the two countries in the control of crime by concluding a treaty on extradition,

Have agreed as follows:

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. ^{1/}

^{1/} Reference to the imposition of a sentence may not be necessary for all countries.

/...

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.

ARTICLE 3 -

Mandatory grounds for refusal

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

§/ Some countries may wish to omit this paragraph or provide an optional ground for refusal under article 4.

/...

(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature; 9/

(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 judgement 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; 10/

(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; 6/

(g) If the judgement 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. 11/

9/ Some countries may wish to add the following text: "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."

10/ Some countries may wish to make this an optional ground for refusal under article 4.

11/ 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 14.)

/...

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; ^{12/}

(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. ^{13/} 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;

^{12/} Some countries may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence.

^{13/} 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.

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(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.

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; ^{14/}

(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;

^{14/} Countries that require a judicial assessment of the sufficiency of evidence may wish to add the following clause: "and sufficient proof in a form acceptable under the law of the requested State, establishing, according to the evidentiary standards of that State, that the person is a party to the offence". (See also footnote 11.)

(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 (g) 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.

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.

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. 15/

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.

15/ 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.

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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 rearrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

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.

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

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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.

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.

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.

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ARTICLE 14

Rule of speciality

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. ^{16/} Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty. ^{17/}

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.

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

^{16/} Some countries may wish to add, as a third case, explicit consent of the person.

^{17/} Some countries may not wish to assume that obligation and may wish to include other grounds in determining whether or not to grant consent.

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own law. The requested State shall grant the request expeditiously unless its essential interests would be prejudiced thereby. 18/

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.

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.

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. 19/

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

18/ 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).

19/ Some countries may wish to consider reimbursement of costs incurred as a result of withdrawal of a request for extradition or provisional arrest.

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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.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Treaty.

DONE at _____ on _____ in the _____
and _____ languages, [both/all] texts being equally authentic.