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INTERNATIONAL COOPERATION IN CRIMINAL MATTERS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN MALAYSIA

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I. INTRODUCTION

The world today has indisputedly opened up with an intensification of international relations in all areas. Crime previously confined to the territorial limits of states has now shed a harsh light on a new scene with accruing international fluxes which is becoming increasingly intense and complex.

With regard to the meaning of international crime, it is generally defined, as a crime which requires the cooperation of a foreign country in the process of enforcing criminal justice and the crime contains an international factor in terms of the perpetrator, victim, occurrence, whereabouts of the perpetrator or location of evidence.

The occurrence of international crime has brought great problems to investigators in their efforts to obtain evidence and to locate their witnesses, especially in foreign countries or to apprehend a fugitive abroad. In order to obtain evidence from a foreign country, mutual legal assistance is employed and the process in which a fugitive is surrendered from one country to another country is referred to as extradition. The objective of this paper is to focus on mutual legal assistance and extradition in Malaysia.

II. BASIS FOR EXTRADITION AND MUTUAL LEGAL ASSISTANCE

There are two bases for extradition: -

Firstly, International deterrence and goodwill. An extradition request from one country to another country between which there is no extradition treaty is based upon international comity. In Malaysia, if there is no such treaty with the requesting country, the law provides a discretion to the Minister of Home Affairs to allow the extradition, if he deems it fit to do so.

Secondly, An extradition made based on bilateral treaty or multilateral convention which obligates the member countries to abide by the terms. If the requesting country meets the requirements for extradition, the request must be honoured otherwise there could be a violation of its international obligations. Such a treaty is known as "Treaty Prerequisite Countries". Malaysia, Thailand, Indonesia and the United States have adopted this policy. Please refer to the relevant treaties at appendix "A, B and C".

As regard to mutual legal assistance, there are three bases for it, namely, an international treaty and international administrative agreements. The first two bases are the same as for those in extradition. The third basis is found in an international agreement with Interpol which is taken by police agencies of participating countries. In Malaysia, the role of the police in matters of mutual legal assistance is shouldered by the National Central Bureau/Interpol of Criminal Investigation Department. This division

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will act as a coordinator in providing appropriate assistance to requesting countries.

III. REQUIREMENTS OF EXTRADITION

A. The Law

The extradition process in Malaysia is governed by the Extradition Act 1992. The Act applies to countries having treaties with Malaysia and in a case where there are no treaties between the parties, the law provides a discretion to the Minister of Home Affairs to allow the extradition if he deems it fit to do so. Apart from that, in order for the existing law to be enforced, two inherent conditions are required to satisfy the elements of extradition namely, (a) there must be a fugitive criminal and (b) the offence committed must be an extradition offence.

As regards fugitive criminals, this means a person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country. The offender must be a citizen of the country to which he is seeking a transfer and the conviction must be final. The case cannot be pending, in the sentencing stage or directly under appeal. This also includes appeals filed by an Attorney-General in a country which permits such appeals as well as appeals filed by the prisoners themselves or their lawyers.

B. Categories of Offences Which Entitle Extradition

Under Malaysian Law, there are two categories of offences which entitle the respective authorities to request the return of fugitive criminals. The offences are as follows: -

1. Extradition Offence.

An extradition offence refers to any offence however described including a fiscal offence:-

- a. which is punishable with imprisonment for not less than one year or with death under the laws of a country having extradition treaties with Malaysia or countries where the Minister had granted an extradition order; and
- b. which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death.

Provided that, in the case of an extra-territorial offence, it is so punishable under the laws of Malaysia, if it took place in corresponding circumstances outside Malaysia.

2. Extra-Territorial Offences.

The offences given the status of extra-territorial offences are: -

- a. Offences against the State (Chapter VI Penal Code);
- b. Offences under the Official Secrets Act 1972 and the Sedition Act 1948;
- c. Offences under the Prevention of Corruption Act 1961;
- d. Offences which consist of attempts or conspiracies to commit, or abetting in the commission of, any offence described as above: Extradition Act 1992.

3. Offences Committed At Sea Or Air.

Where an offence in respect of which the return of a fugitive criminal is sought was committed on board any vessel on the high seas or any aircraft while in the air outside Malaysia which comes into any port or aerodrome in Malaysia, the Minister and any magistrate having jurisdiction in such

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port or aerodrome may exercise the powers conferred by the Extradition Act 1992.

C. Procedure of Extradition

The procedure of extradition must be strictly followed. The failure of the requesting countries to comply with it will result in their application being dishonoured. The law in Malaysia requires the following steps to be adopted: -

- (i) The requesting country issues a warrant of arrest for the fugitive. The warrant shall be submitted through diplomatic channels to the Minister (Minister of Home Affairs). If the Minister is satisfied that the warrant was issued by a person with lawful authority, he then authorises a magistrate to issue a warrant for the apprehension of the fugitive criminal. The Minister may refuse to authorise the magistrate to issue a warrant, if he thinks that the offence is political in character or which is not an extradition offence.
- (ii) A magistrate may issue a provisional warrant based on information (for instance, from INTERPOL) where the Minister must then be notified. The Minister, if he thinks fit, may cancel such a provisional warrant.
- (iii) The "fugitive criminal" shall be remanded before he is brought to the court for an inquiry into the case. The Session Court has jurisdiction to hear extradition cases. The court, after receiving enough evidence, shall decide whether a *prima facie* case has been established against the fugitive, and thus commit him and report to the Minister. If a

prima facie case has not been established, the court will then discharge him.

- (iv) Fifteen days after his committal to prison or if the fugitive challenges his detention by filing a writ of habeas corpus in the High Court, after the conclusion of the case, the Minister may order the fugitive to be handed over to the requesting country.
- (v) The fugitive criminal may also waive the committal proceedings and hence be subjected to any orders.
- (vi) Fugitive criminals who are serving sentences in Malaysia may also be returned to the requesting country for the purpose of trial against him. He will then be returned to Malaysia to complete his sentence and subsequently be returned to the requesting country.
- (vii) With regard to Brunei Darussalam and the Republic of Singapore, special provisions are provided for in the Act, where a warrant issued by both countries can be executed in any part of Malaysia after it has been endorsed by a magistrate in Malaysia. This also known as Simplified Extradition.

IV. RESTRICTIONS ON RETURN OF FUGITIVE CRIMINALS

A. Mandatory Ground for Refusal

Section 8 of the Extradition Act 1992 provides that a fugitive criminal shall not be surrendered to a country seeking his return in a situation where:

- the offence in respect of which his return is sought is of a political character. However, the following offences shall not be held to be offences of a political character in relation to a country which has made corresponding provisions in its laws:

- a. murder or other wilful crime against the person of a Head of State or a member of the Head of State's immediate family;
- b. an act which under a multilateral treaty to which Malaysia and the country seeking the return of the fugitive criminal are parties, constitutes an offence for which a person will be extradited or prosecuted notwithstanding the political character or motivation of such act;
- c. any attempt, abetment or conspiracy to commit any of the foregoing offences;

- the request for his surrender although purporting to be made for an extradition offence, was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions;
- he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions;
- prosecution for 'the offence in respect of which his return is sought is, according to the law of that country, barred by time;
- the facts on which his surrender or return is based or any lesser offence proved by the facts on which that return was grounded unless the consent of the appropriate authority

in the requested country has been obtained.

- a fugitive shall not be extradited to another country for trial or punishment for any offence that is alleged to have been committed unless the consent of the appropriate authority in the requested country has been obtained.

B. Discretionary Ground for Refusal

In addition to the mandatory grounds for refusal, most treaties also contain a number of discretionary or optional grounds. In Malaysia, the Act gives wide discretion to the Minister, who may refuse to allow an extradition if he thinks it would be unjust or inexpedient to do so for reasons such as the trivial nature of the offence or the application for extradition was not made in good faith or in the interest of justice or it was made for political reasons or for any other reason.

The Minister may, having regard to the circumstances of the case for which simultaneous countries made the requisition, return the fugitive criminal to such country as he thinks fit. The Minister may also refuse the surrender if the fugitive criminal is a citizen of Malaysia or for which the extradition offence is one over which the courts in Malaysia have jurisdiction. Where a country having no extradition treaty with Malaysia makes a request for the extradition of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give special direction in writing allowing such fugitive criminal to be extradited to the requested country after the provisions of the Act have been complied with.

**V. ESSENTIAL PRINCIPLES
ADOPTED BY MALAYSIA
REGARDING EXTRADITION**

A. Principle of Double Criminality.

For the rule to apply it must be an event that is defined as a crime in the territory of the requested country and also in the requesting one. The right to claim an individual from a state may not be acceptable if its legislation does not consider the event as punishable according to its own domestic law. This requirement must exist at the time the punishable act takes place and must continue until the handing over occurs. In Malaysia, the principle was established in the case of PP v Lin Chien Pang (1993) 2 MLJ34.

B. Principle of Speciality

The rule of speciality means the requesting country is under a duty not to try or punish the offender other than that for which he has been extradited. The rule guarantees that all the requirements of the extradition process (such as double criminality, extraditable offences, reciprocity and, etc) are observed by the requesting state. The purpose of this rule is to prevent the requesting state from abusing the extradition process by way of using legal subterfuges to obtain extradition for an unavowed goal. In other words it will protect the right of an extraditee against any violation.

C. Rule on Prime Facie Cases

In order to enable a fugitive criminal to be extradited to a requesting country, the court of the requested country shall decide whether a prima facie case has been proved against the fugitive. If a prima facie case has not been established, the court shall discharge the fugitive. However the statutory law in Malaysia does not define what is prima facie case in the extradition process. Article No. 5 of the Model Treaty regards a prima facie case

as “sufficient proof in a form acceptable under the law of the requested state, established according to the evidentiary standards of the state that a person is a party to that offence”.

From the definition, it is clear that the prima facie case embodies a dual concept namely, sufficiency and admissibility of evidence under the law of the requested state. This requirement must be fulfilled by both requested and requesting country. The majority of common law jurisdictions including Malaysia still require and recognise this standard.

D. Political Offences

The Malaysia Extradition Act 1992 states that a fugitive criminal shall not be surrendered to a country seeking his return on the basis of political character / offences. However, no clarification has been made by local courts pertaining to the definition on the offence of a political character. However in the United Kingdom, the political offence has been defined by the judiciary. In the case of “Regina v. Governor of Brixton Prison, Ex - parte Schtraks (1964) AC 566 at pg. 591 - 592 the court defined that, “offence of a political character” is that the fugitive is at odds with the state where he applies for his extradition on some issue connected with the political control or government of the country. The analogy of political in such phrases as “political refugee”, “political asylum” or “political prisoner”. In this regard, since Malaysia’s courts practice the common law system, the definition in the abovementioned case is acceptable in deciding the nature of offences classified as political offences. Perhaps the scope of the definition may be wider depending on the situation which suits local conditions.

VI. EXTRADITION AGREEMENTS

Presently, Malaysia has treaties with the Republic of Indonesia, the Kingdom of Thailand and the United States of America for the mutual surrender of fugitive criminals. As for the Republic of Singapore and Brunei Darussalam, special provisions are made in the Extradition Act 1992, for the similar purpose by way of warrants. The treaties made are as follows:

A. Extradition (Republic of Indonesia) Order 1975

This treaty was signed between Malaysia and Indonesia at Jakarta on 7 June 1974 and came into force on 11 August 1975. On signing this treaty, the Government of Malaysia and the Government of Indonesia undertakes to surrender fugitives to each other, subject to the provisions and conditions as laid down in the treaty.

Extraditable crimes are as listed in the treaty and they include abetments and attempts to commit such crimes. Restrictions on extradition are for the following reasons:

- a. Crime regarded as political crime.
- b. The right to refuse extradition of its nationals.
- c. May refuse to extradite the offender if the offence is extra-territorial.
- d. May refuse to extradite if the requested party is proceeding against the fugitive criminal in respect of crimes for which the extradition is requested.
- e. Causes double jeopardy to the fugitive criminal (*Non is in idem*).
- f. Rule of speciality to be adhered.

In cases of emergency, the competent authorities of the requesting party may request provisional arrest. Decisions in this matter will be made by the competent

authorities of the requested party according to its laws. It can be made through the inspector General of Police in Malaysia or the National Central Bureau in Indonesia or through diplomatic channels or the INTERPOL.

So far as the law permits, the requested party shall seize and hand over property to the requesting party if such property, (a) is required as evidence, and (b) was acquired as a result of a crime and at the time of arrest he was found in possession or subsequently discovered. The property shall be handed over even if the extradition could not be carried out owing to the death or escape of the fugitive criminal. Any right in which the requested party or any other State may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested party as soon as possible after the trial. Expenses incurred in the territory of the requested party by reason of extradition shall be borne by that party.

B. Anglo - Siamese Extradition Treaty 1911

This treaty which was enforceable was made between His Majesty the King of the United Kingdom of Great Britain and His Majesty the King of Siam in 1911. The provisions and procedures of the treaty are quite similar to the Extradition Act 1992.

In 1992 the Government of Thailand came up with a new draft treaty to update and repeal the 1911 treaty which had not yet been finalised. The new draft treaty is modified with the inclusion of the following provisions:

- a. The obligation to extradite includes persons who have been proceeded against, have been charged with, have been found guilty or are wanted for the

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enforcement of a judicially pronounced penalty for committing an extraditable offence by the judicial authority of the requested State;

- b. Extraditable offence includes the principle of the double criminality rule where the offence is punishable under the laws of both contracting parties;
- c. Restrictions to extradite with the following reasons.
 - i. Offence is political or military in nature;
 - ii. Dual jurisdictions;
 - iii. Double jeopardy;
 - iv. Capital punishment;
 - v. Lapse of time;
 - vi. Own nationals.

C. Extradition (United States of America) Order 1985

By an exchange of notes on 17 November 1958 an arrangement was made between the Federation of Malaya and the United States of America for the mutual surrender of criminals in accordance with the treaty dated 22 December 1931 concluded between His Majesty the King of the United Kingdom and the President of the United States of America. With the powers conferred on the Yang Di Pertuan Agong, this Order was made in 1985.

This treaty allows the High Contracting Parties to deliver up to each other, under circumstances and conditions stated, those persons being accused or convicted of any crimes or offences which are extraditable and are committed within the jurisdiction and found within the territory of each other. Restrictions on extradition's are for the following reasons:

- a. Double jeopardy;
- b. Lapse of time;
- c. Crime of political character;
- d. A lesser crime other than the crime extradited.

Sufficient evidence to be given before the extradition should be produced within two months. If the fugitive criminal is claimed by other States extradition shall be granted to the State whose claim is the earliest in date unless the claim is waived. All articles seized in possession of the criminal fugitive at the time of his apprehension may be served as proof and shall be handed over when extradition takes place. Expenses connected with the extradition shall be borne by the party making the request.

VII. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Assistance in the investigation and prosecution of criminal activities in an international binding sense, is a far more recent development. Given the difference in legal systems both procedural and substantive, including rules as to the admissibility of evidence, it should come as no surprise that the difficulties in this area of international co-operation are even greater.

Considering the international features of many organized crime groups and criminals, it must be acknowledged that no country by itself can be effective in neutralising them. It is important for nations having problems with the same crime groups to share their information and experiences to curtail transborder criminal activities.

In the absence of formal legal treaties, experience has shown that regional meetings between law enforcement agencies play a big role in promoting cooperation and mutual understanding between states.

The Royal Malaysian Police (RMP) has always viewed regional cooperation as a practical means in pursuing a criminal matter outside its jurisdiction. The RMP has the following arrangements to foster

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cooperation amongst the Police Forces in this region:

1. The Annual Conference of the Association of National Police Forces of Asean (ASEANAPOL)

- a forum of Asean Chiefs of Police to discuss, exchange intelligence, mutual assistance, and others;
- The Aseanapol Database System which was fully implemented at the end of 1996. Through this network, the NCBs of each country will be able to exchange criminal information by computer.

2. Malaysia/Singapore Liaison Meeting

- Held every three months. The Narcotics Department of the RMP also maintains a special relationship with the Central Narcotics Bureau (CNB) of Singapore. Regular meetings and exchange of information/intelligence have in the past resulted in the successful detection and apprehension of criminals in both countries.

3. Malaysia/Indonesia RAPAT Conference

- This conference is held annually at alternative venues to discuss/exchange intelligence on crime related matters. Both countries have a bilateral treaty that allows fugitive criminals to be arrested and extradited based on the principal of reciprocity.

4. Malaysia/Thailand Joint Committee

- Police forces of both countries conduct an annual Joint Malaysia/Thai Working Committee on

Criminal Activities. It is held alternately in each country to discuss and exchange intelligence on criminal matters.

- The Malaysian CID also conducts a special bilateral forum with the Royal Thai Police of the Southern Region to discuss crime related matters occurring along the common borders of Malaysia/Thailand.
- The Narcotics Department of the RMP also maintains a special relationship with the Office of the Narcotics Control Board, Thailand to discuss drug related matters.

5. Malaysia/United States of America

- The RMP maintains good relations with the American law enforcement agencies, such as the DEA and the FBI, especially in the field of training and the exchange of information/intelligence to curb transitional crimes.

6. NCB/Interpol Networking

- The Interpol network has given much assistance to the RMP in dealing with foreign offenders and in reciprocity the Malaysian NCB/Interpol handles all requests and renders assistance to foreign countries for any enquiries or apprehension of fugitive criminals.
- For countries which do not have any bilateral/special arrangement with Malaysia, a request can be made through the diplomatic channel of NCB/Interpol Branch for extradition purposes.

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- International "Red Notice" for the purpose of provisional arrests can also be sent through NCB/Interpol office for the purpose of extradition.

7. Scope of Mutual Assistance in Criminal Matters

Malaysia has not ratified the UN Model Treaty and as such we do not have any legislation on mutual assistance to other foreign enforcement agencies. However the scope of assistance that can be given by the Royal Malaysia Police to our counter-parts are as follows:

- a. To carry out investigations by interviewing witnesses after information received from requesting countries and inform the results of investigations to the requesting countries. This is normally done though INTERPOL.
- b. Confirming the whereabouts of wanted persons of the requesting country.
- c. If statements are required by the requesting country this can only be done through an affidavit before a competent authority. This can only be made through the witnesses voluntarily.
- d. The requesting country may send their investigating officers to Malaysia for discussions regarding the case they are investigating. Interviews of witnesses or interrogation will be done by the Malaysia police and he may be in attendance.
- e. Providing information for investigative use of the requesting country.

VIII. CONCLUSION

Malaysia in its efforts to combat transnational criminal activities is ever willing to extradite a fugitive criminal as long as it satisfies all requirements as required by the law. In cases where there is no treaty, a fugitive criminal may be extradited upon the discretion of the Minister.

The extradition process is a slow process as it needs to fulfil all the necessary procedures before a fugitive criminal can be surrendered to a requesting country. This could take months as the fugitive criminal is allowed to seek redress by a writ of habeas corpus from the High Court of Malaysia. The alternative action that can be taken by the authorities is to expel the fugitive criminal from Malaysia through the process of deportation. In this instance only the immigration law of Malaysia is applied. However the Immigration Department requires reasonable justification to implement this process for a foreigner. Reasons could be given on the basis of expiration of travel documents or an invalid travel document, violations of Immigration Laws, etc.

We believe in close cooperation amongst the law enforcement officers of other States/Countries so that we can check the criminals in their endeavours to commit cross-border and global transnational crimes.