

## UNDCP MODEL FOREIGN EVIDENCE BILL,2000

1. Article 7(1) of the 1988 Convention states: *“the Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1”*, and Article 7(2) provides that *“mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: (a) taking evidence or statements from persons ... (e) providing information and evidentiary items”*. The UNDCP model Foreign Evidence Bill deals with the admissibility before court of evidence obtained from foreign states.
2. The conditions of admissibility before a court for evidence obtained from other states will differ from state to state. Restrictive rules on admissibility will lead to such evidence being excluded in many cases. The interests of justice are such that before evidence obtained from foreign states can be admissible, it must satisfy certain conditions, but it would seem contrary to those interests if it has to satisfy the rules of admissibility applicable to evidence obtained in the state itself; given the differences in requirements in different legal systems, this would unduly complicate and lengthen the judicial process.
3. A balance needs to be struck, and the object of the Model Foreign Evidence Bill in providing for the admissibility in a state of evidence obtained from foreign states in respect of criminal offences where certain conditions are satisfied, is to provide a way of doing so, in order to facilitate and simplify the process whereby foreign evidence comes before courts.

### Clause 3 - Application of this Act

4. Clause 3 sets out the scope of application of the Act, by providing that it applies to certain types of proceedings, and certain types of evidence. “*Criminal proceeding*” is given a non-exhaustive definition in clause 2, being defined as “*including (i) a prosecution for an offence and (ii) a proceeding for the sentencing of a person convicted of an offence*”. “*Criminal proceeding*” would therefore cover all the formal steps to be taken in an action or other judicial proceeding in criminal law, including any appeal. “*Related civil proceedings*” in relation to a criminal proceeding, is defined in clause 2 as meaning “*any civil proceedings arising from the same subject matter from which the criminal proceeding arose.*” Military proceedings are excluded by the term “*civil*”.
5. The Bill only applies to testimony and attached exhibits obtained as a result of a request made on behalf of the Attorney-General (or other appropriate officer) to a foreign State for the testimony of a person pursuant to the Mutual Assistance in Criminal Matters Act. The object of the UNDCP Model Mutual Assistance in Criminal Matters Bill is to facilitate the cooperation between states in criminal investigations and proceedings, in accordance with the objectives of Article 7 of the 1988 Convention.
6. The Mutual Assistance in Criminal Matters Bill only applies to requests made in investigations, prosecutions and related proceedings concerning “*any serious offence*”. For the purposes of the Bill, a serious offence is one which is defined as an offence punishable in the law of the state enacting the bill where the maximum penalty is imprisonment (for not less than a time to be specified), or more severe penalty. Thus testimony for the purposes of the Foreign Evidence Bill is testimony concerned with investigations or proceedings relating to serious offences, as defined in the Mutual Assistance in Criminal Matters Bill.
7. An exhibit can be a document or a thing produced for the inspection of the court, or shown to a

witness when giving evidence. It can also be a document referred to in, but not annexed to, an affidavit.

8. Clause 2(j) provides for a definition of “*name of State court*”. The model refers to the Court of Appeal, the High Court, a magistrates court or person or body authorised by the state’s law, or by consent of parties, to hear, receive and examine evidence; depending on the court structure of each state, the names of the applicable courts are to be inserted here. Clause 2(k) sets out the definition of “[*name of State*] law”.
9. The Bill also applies to testimony obtained as a result of a request made by or on behalf of the Attorney-General to a international criminal tribunal pursuant to the Mutual Assistance in Criminal Matters Act 2000, the Schedule of which lists the tribunals to be covered.

#### **Clause 4 - Requirements for testimony**

10. “*Testimony*” is the evidence of a witness which is given *viva voce* in court. Clause 4 applies to both statements given before a court in a foreign state, and statements given by witnesses of a foreign state before the court of the state concerned. Clause 4 prescribes that testimony must either be taken before a court on oath (a religious asservation by which the party calls God to witness that what he says is the truth) or affirmation (a person affirms that what he says is the truth without reference to any religious belief), or under the procedure which would be accepted by courts in the foreign state concerned for the purposes of giving testimony in proceedings before those courts.
11. Thus if foreign courts would not require that testimony in proceedings comprise sworn evidence, but would accept a less rigorous standard, a statement made before those courts which complies

with that standard will amount to testimony in the court of the state concerned, even if it does not meet that same state's requirements for testimony. Similarly, if a witness from a foreign state comes to give evidence in the court of the state concerned, the procedure for giving testimony which would be accepted by the courts in the foreign state would apply in the court also for the purpose of taking that evidence.

12. “*In camera*” means that the hearing of a case, or part of it, takes place in private, the public being excluded.

### **Clause 5 - Form of Testimony**

13. “*Foreign State*” is defined in clause 2 as “(i) any country other than [name of State]; and (ii) every constituent part of such country, including a territory, dependency or protectorate, which administers its own laws relating to evidence.” Protectorate means territory which is subject to the control of another state.
14. Clause 5 defines the ways in which testimony may be recorded or taken; it can be recorded in writing, on tape (both audio and video), or by any other electronic or mechanical means, or taken in a way which permits the virtual presence of the person in the enacting state.
15. Looking at clause 5(2), the writing need not be in the form of a written statement by a deponent, and nor would it have to be an official copy of proceedings in the foreign court concerned. However, it would have to be either endorsed with, or accompanied by, a certificate which states that it is an accurate record of the evidence given, and it was taken before court either on oath or affirmation, or under the conditions accepted by the foreign state for testimony.
16. Clause 5(3) provides that where the testimony has been recorded by means of video or other means by which the person is virtually present in the enacting State, and so for example can be

asked questions by the authorities of the enacting State and be required to answer them then and there, that testimony is to be deemed as having been given in that State.

### **Clause 6 - foreign material may be adduced as evidence**

17. “*Foreign material*” is defined in clause 2(e), which refers in square brackets to section 4 of the Mutual Legal Assistance Act. Section 4 of the Mutual Legal Assistance Bill makes provision for the Attorney General or other authorised officer to make and act on requests for mutual legal assistance.
18. Clause 6(2) refers to “*the interests of justice*”. Clause 6(3) lays down factors which a court must take into account when reaching a decision pursuant to Clause 6(2). It does not prescribe what weight these factors are to have; this is a decision for the court concerned. However, if for example the foreign material provides evidence that would not otherwise be available, or the exclusion of the foreign evidence would prejudice the defence in criminal proceeding, it would be expected that the court would not exclude it on the grounds of the interests of justice without very strong justification. On the other hand if for example the statements contained in the material could not, at the time they were made, be challenged by questioning the persons who made them, and the evidence does not have a high probative value, and nor does it prejudice the defence in criminal proceedings, the court might decide to exclude it.

### **Clause 7 - Proof of service of documents abroad**

19. The affidavit referred to here will be a written statement in the name of the person who served the documents (the deponent), by whom it is voluntary signed and sworn to or affirmed.

### **Clause 8 -Certificates relating to foreign material**

20. “*An authorised officer*” is defined in clause 2(a), as meaning (i) the Attorney General (or other

appropriate officer to be name), or a person appointed by the Attorney General (or other officer) by notice published in the Gazette (or other specified publication), as an authorized officer for the purposes of the Act. The certification of foreign material to the effect that it was obtained as a result of a request made to a foreign State by or on behalf of the Minister (of Justice) is not mandatory. It will be appropriate for example where the origin of the evidence has been called into question in proceedings.

### **Clause 9 - Operation of other laws**

21. This provision ensures that nothing in the Bill will limit the effect of other state laws on how a matter may be proved or evidence adduced before a court in that state.

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