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## **Extradition To and From the United States: Overview of the Law and Recent Treaties**

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# Extradition To and From the United States: Overview of the Law and Recent Treaties

## Summary

“Extradition” is the formal surrender of a person by a State to another State for prosecution or punishment. Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred of the nations of the world. International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool. This is a brief overview of federal law in the area and of the adjustments in recent treaties to make them more responsive to American law enforcement interests.

Extradition treaties are in the nature of a contract and generate the most controversy with respect to those matters for which extradition may not be had. In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses; capital offenses; crimes that are punishable under only the laws of one of the parties to the treaty; crimes committed outside the country seeking extradition; crimes where the fugitive is a national of the country of refuge; and crimes barred by double jeopardy or a statute of limitations.

Extradition is triggered by a request submitted through diplomatic channels. In this country, it proceeds through the Departments of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty, whether it provides sufficient evidence to satisfy probable cause to believe that the fugitive committed the identified treaty offense(s), and whether other treaty requirements have been met. If so, the magistrate certifies the case for extradition at the discretion of the Secretary of State. Except as provided by treaty, the magistrate does not inquire into the nature of foreign proceedings likely to follow extradition.

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. Requests travel through diplomatic channels and the only issue likely to arise after extradition to this country is whether the extraditee has been tried for crimes other than those for which he or she was extradited. The fact that extradition was ignored and a fugitive forcibly returned to the United States for trial constitutes no jurisdictional impediment to trial or punishment. Federal and foreign immigration laws sometimes serve as a less controversial alternative to extradition to and from the United States.

Related reports include CRS Report RL32096, *Extradition Between the United States and Great Britain: The 2003 Treaty*; and CRS Report RS21633, *Extradition Between the United States and Great Britain: A Sketch of the 2003 Treaty*.

# Contents

Introduction .....	1
Contemporary U.S. Treaties .....	3
Bars to Extradition .....	3
No Treaty .....	3
No Treaty Crime .....	4
Military and Political Offenses .....	6
Capital Offenses .....	8
Want of Dual Criminality .....	9
Extraterritoriality .....	11
Nationality .....	12
Double Jeopardy .....	13
Lapse of Time .....	14
Procedure for Extradition from the United States .....	15
Arrest and Bail .....	16
Hearing .....	17
Review .....	19
Surrender .....	20
Constitutionality .....	22
Trial in the United States: Extradition Issues .....	22
Specialty .....	23
Other Features .....	24
Expenses and Representation .....	24
Transfer of Evidence .....	26
Transit .....	26
U.K. Supplementary Treaty .....	27
Alternatives to Extradition .....	28
Waiver .....	28
Immigration Procedures .....	28
Irregular Rendition/Abduction .....	29
Bibliography .....	30
Books and Articles .....	30
Notes and Comments .....	32
Appendix .....	34
Countries with Whom the United States Has an Extradition Treaty .....	34
Countries with Whom the United States Has No Extradition Treaty .....	38

# Extradition To and From the United States: Overview of the Law and Recent Treaties

## Introduction

“‘Extradition’ is the formal surrender of a person by a State to another State for prosecution or punishment.”<sup>1</sup> Extradition to or from the United States is a creature of treaty. The United States has extradition treaties with over a hundred of the nations of the world.<sup>2</sup> International terrorism and drug trafficking have made extradition an increasingly important law enforcement tool.<sup>3</sup> This is a brief overview of federal law in the area and of the adjustments made in recent treaties to accommodate American law enforcement interests.

Although extradition as we know it is of relatively recent origins,<sup>4</sup> its roots can be traced to antiquity. Scholars have identify procedures akin to extradition scattered

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<sup>1</sup> Harvard Research in International Law, *Draft Convention on Extradition*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 21 (Supp. 1935); *see also*, 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 556-57 (1986)(RESTATEMENT). In the parlance of international law nations are identified as “states.” In order to avoid confusion, the several states of the United States will be referred to as “the states of the United States.”

Interstate rendition, the formal surrender of a person by one of the states of the United States to another, is also sometimes referred to as extradition, but is beyond the scope of this report.

<sup>2</sup> The list of countries along with the citations to our treaties follow 18 U.S.C. 3181. A similar list is appended to this report, as is a list of the countries with whom we have no extradition treaty in force at the present time.

<sup>3</sup> Until the early 1970's, the United States received and submitted fewer than 50 extradition requests a year; by the mid 1980's the number had grown to over 500 requests a year, IV ABBELL & RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL ♦ EXTRADITION (ABBELL & RISTAU) 11-18 (1990).

<sup>4</sup> Even the term “extradition” did not appear until the late eighteenth century, BLAKESLY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY: A COMPARATIVE STUDY OF INTERNATIONAL LAW, ITS NATURE, ROLE, AND IMPACT IN MATTERS OF TERRORISM, DRUG TRAFFICKING, WAR, AND EXTRADITION 171 (1992). For a more extensive examination of the history of extradition, *see*, Blakesly, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 39 (1981); Harvard Research in International Law, *Draft Convention on Extradition*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 41-6 (Supp. 1935); BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (BASSIOUNI) 31-5 (4<sup>th</sup> ed. 2002); ABBELL & RISTAU at 3-11.

throughout history dating as far back as the time of Moses.<sup>5</sup> By 1776, a notion had evolved to the effect that “every state was obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself” and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law.<sup>6</sup>

Whether by practice’s failure to follow principle or by the natural evolution of the principle, modern extradition treaties and practices began to emerge in this country and elsewhere by the middle eighteenth and early nineteenth centuries.<sup>7</sup>

Our first extradition treaty consisted of a single terse article in Jay’s Treaty of 1794 with Great Britain, but it contained several of the basic features of contemporary extradition pacts. Article XXVII of the Treaty provided in its entirety,

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<sup>5</sup> Ramses II of Egypt and the Hittite king, Hattusili III, entered into a pact under which they promised to extradite fugitives of both noble and humble birth, *Treaty Between Hattusili and Ramesses II*, §§ 11-14, transliteration and translation in, Langdon & Gardiner, *The Treaty of Alliance Between Hattusili, King of the Hittites, and the Pharaoh Ramesses II of Egypt*, 6 JOURNAL OF EGYPTIAN ARCHAEOLOGY 179, 192-94 (1920). Until fairly recently, nations seem have been happily rid of those who fled rather than face punishment. The Egyptian-Hittite treaty reflects the fact that extradition existed primarily as an exception to the more favored doctrines of asylum and banishment. Fugitives returned pursuant to the treaty received the benefits of asylum in the form of amnesty, “If one man flee from the land of Egypt, or two, or three, and they come to the great chief of Hatti, the great chief of Hatti shall seize them and shall cause them to be brought to Ramesse-mi-Amun, the great ruler of Egypt. But as for the man who shall be brought to Ramesse-mi-Amun, the great ruler of Egypt, let not his crime be charged against him, let not his house, his wives or his children be destroyed, let him not be killed, let no injury be done to his eyes, to his ears, to his mouth or to his legs . . .” § 17, *id.* at 197.

<sup>6</sup> 1 RESTATEMENT, *Introductory Note to Subchapter 7B*, 557, citing, GROTIUS, DE JURE BELLI AC PACIS, Vol.II, ch.21, §§3-4 (J.Scott ed. 1925).

<sup>7</sup> “By the latter part of the nineteenth century that [principle] had yielded to the view that delivery of persons charged with, or convicted of, crimes in another state was at most a moral duty, not required by customary international law, but generally governed by treaty and subject to various limitations. A network of bilateral treaties, differing in detail but having considerable similarity in principle and scope, has spelled out these limitations, and in conjunction with state legislation, practice, and judicial decisions has created a body of law with substantial uniformity in major respects. But the network of treaties has not created a principle of customary law requiring extradition, and it is accepted that states are not required to extradite except as obligated to do so by treaty,” *Id.*

From the perspective of one commentator, “The history of extradition can be divided into four periods: (1) ancient times to the seventeenth century — a period revealing an almost exclusive concern for political and religious offenders; (2) the eighteenth century and half of the nineteenth century — a period of treaty-making chiefly concerning military offenders characterizing the condition of Europe during that period; (3) 1833 to 1948 — a period of collective concern for suppressing common criminality; and (4) post 1948 developments which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations,” BASSIOUNI at 33.

“It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive,” 8 Stat. 116, 129 (1794).

## Contemporary U.S. Treaties

### Bars to Extradition

Extradition treaties are in the nature of a contract and by operation of international law, “[a] state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state (a) for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state, or (b) for punishment after conviction of such a crime and flight from that state, provided that none of the grounds for refusal to extradite set forth in [the treaty] is applicable.”<sup>8</sup>

Subject to a contrary treaty provision, federal law defines the mechanism by which we honor our extradition treaty obligations, 18 U.S.C. 3181 to 3196. Although some countries will extradite in the absence of an applicable treaty as a matter of comity, it was long believed that the United States could only grant an extradition request if it could claim coverage under an existing extradition treaty, 18 U.S.C. 3181, 3184 (1994).<sup>9</sup> Dicta in several court cases indicated that this requirement, however, was one of congressional choice rather than constitutional requirement.<sup>10</sup>

### No Treaty.

Congress appears to have acted upon that assumption when in 1996 it first authorized the extradition of fugitive aliens even at the behest of a nation with whom

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<sup>8</sup> 1 RESTATEMENT §475 at 559.

<sup>9</sup> 18 U.S.C. 3181 (“The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government”); 18 U.S.C. 3184 (“Whenever there is a treaty or convention for extradition between the United States and any foreign government . . .”).

<sup>10</sup> E.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992) (“*Valentine v. United States ex rel. Neidecker*, *supra*, 299 U.S., at 8-9. . . (United States may not extradite a citizen in the absence of a statute or treaty obligation)” (emphasis added)).

we have no extradition treaty,<sup>11</sup> and then by statute making the extradition procedures applicable to requests from international tribunals for Yugoslavia and Rwanda.<sup>12</sup>

The initial judicial response has left the vitality of those efforts somewhat in doubt. A district court in Texas initially ruled that constitutional separation of powers requirements precluded extradition in the absence of a treaty, but Fifth Circuit Court of Appeals upheld the constitutional validity of extradition by statute rather than treaty when it overturned the district court finding on appeal.<sup>13</sup>

A question has occasionally arisen over whether an extradition treaty with a colonial power continues to apply a former colony becomes independent. Although the United States periodically renegotiates replacements or supplements for existing treaties to make contemporary adjustments, we have a number of treaties that pre-date the dissolution of a colonial bond or some other adjustment in governmental status. Fugitives in these situations have sometimes contested extradition on the grounds that we have no valid extradition treaty with the successor government that asks that they be handed over for prosecution. These efforts are generally unsuccessful since successor governments will ordinarily have assumed the extradition treaty obligations negotiated by their predecessors.<sup>14</sup>

### **No Treaty Crime.**

Extradition is generally limited to crimes identified in the treaty. Early treaties often recite a list of the specific extraditable crimes. Jay's Treaty mentions only murder and forgery; the inventory in our 1852 treaty with Prussia included eight

<sup>11</sup> 18 U.S.C. 3181(b) ("The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that — (1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and (2) the offenses charged are not of a political nature").

<sup>12</sup> 18 U.S.C. 3181 note, Pub.L. 104-132, §443, 110 Stat. 1280 (1996).

<sup>13</sup> "The Constitution calls for the Executive to make treaties with the advice and consent of the Senate. Throughout the history of this Republic, every extradition from the United States has been accomplished under the terms of a valid treaty of extradition. In the instant case, it is undisputed that no treaty exists between the United States and the Tribunal. This is so even when, the Government insists, and the Court agrees, the Executive has the full ability and right to negotiate such a treaty. The absence of a treaty is a fatal defect in the Government's request that the Extraditee be surrendered. Without a treaty, this Court has no jurisdiction to act, and Congress' attempt to effectuate the Agreement in the absence of a treaty is an unconstitutional exercise of power," *In re Surrender of Ntakirutimana*, 988 F.Supp. 1038, 1042 (S.D.Tex. 1997), *rev'd*, *Ntakirutimana v. Reno*, 184 F.3d 419, 424-27 (5<sup>th</sup> Cir. 1999).

<sup>14</sup> *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168-72 (3d Cir. 1997); *Then v. Melendez*, 92 F.3d 851, 853-55 (9th Cir. 1996), *see generally*, ABBELL & RISTAU, at 52-3, 180-81.

others;<sup>15</sup> and our 1974 treaty with Denmark identifies several dozen extradition offenses:

1. murder; voluntary manslaughter; assault with intent to commit murder. 2. Aggravated injury or assault; injuring with intent to cause grievous bodily harm. 3. Unlawful throwing or application of any corrosive or injurious substances upon the person of another. with schemes intended to deceive or defraud, or by any other fraudulent means. 4. Rape; indecent assault; sodomy accompanied by use of force or threat; sexual intercourse and other unlawful sexual relations with or upon children under the age specified by the laws of both the requesting and the requested States. 5. Unlawful abortion. 6. Procuration; inciting or assisting a person under 21 years of age or at the time ignorant of the purpose in order that such person shall carry on sexual immorality as a profession abroad or shall be used for such immoral purpose; promoting of sexual immorality by acting as an intermediary repeatedly or for the purpose of gain; profiting from the activities of any person carrying on sexual immorality as a profession. 7. Kidnaping; child stealing; abduction; false imprisonment. 8. Robbery; assault with intent to rob. 9. Burglary. 10. Larceny. 11. Embezzlement. 12. Obtaining property, money or valuable securities: by false pretenses or by threat or force, by defrauding any governmental body, the public or any person by deceit, falsehood, use of the mails or other means of communication in connection. 13. Bribery, including soliciting, offering and accepting. 14. Extortion. 15. Receiving or transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained. 16. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or officer of any company. 17. An offense against the laws relating to counterfeiting or forgery. 18. False statements made before a court or to a government agency or official, including under United States law perjury and subornation of perjury. 19. Arson. 20. An offense against any law relating to the protection of the life or health of persons from: a shortage of drinking water; poisoned, contaminated, unsafe or unwholesome drinking water, substance or products. 21. Any act done with intent to endanger the safety of any person traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation, or any act which impairs the safe operation of such means of transportation. 22. Piracy; mutiny or revolt on board an aircraft against the authority of the commander of such aircraft; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft. 23. An offense against the laws relating to damage to property. 24. a. Offenses against the laws relating to importation, exportation or transit of goods, articles, or merchandise. b. Offenses relating to willful evasion of taxes and duties. c. Offenses against the laws relating to international transfers of funds. 25. An offense relating to the: a. spreading of false intelligence likely to affect the price of commodities, valuable securities or any other similar interests; or b. making of incorrect or misleading statements concerning the economic conditions of such commercial undertakings as joint-stock companies, corporations, co-operative societies or similar undertakings through channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to, or registration with, any commission, agency or officer having supervisory or regulatory authority over corporations, joint-stock companies, other forms of commercial undertakings or in any invitation to the establishment of those commercial undertakings or to the subscription of shares. 28. Unlawful abuse of official authority which results in grievous bodily injury or deprivation of the life, liberty or property of any person, [or] attempts to commit, conspiracy to commit, or participation in, any of the offenses mentioned in this Article, Art. 3, 25 U.S.T. 1293 (1974).<sup>16</sup>

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<sup>15</sup> 10 Stat. 964, 966 (1852)(“murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys”).

<sup>16</sup> Section 203 of Public Law 105-323 purports to require construction of an extradition treaty that permits extradition for kidnapping to authorize extradition for parental kidnapping as well; the impact of section 203 remains to be seen.



While many of our extradition treaties continue to list specific extraditable offenses, several of the more recent treaties simply make all felonies extraditable (subject to other limitations found elsewhere in their various provisions).<sup>17</sup>

### **Military and Political Offenses.**

In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses. The military crimes exception usually refers to those offenses like desertion which have no equivalents in civilian criminal law.<sup>18</sup> With the possible exception of selective service cases arising during the Vietnam War period,<sup>19</sup> application of the military offense exception appears to have been infrequent and untroubled.

The political offense exception, however, has proven more troublesome.<sup>20</sup> The exception is and has been a common feature of extradition treaties for almost a century and a half. In its traditional form, the exception is expressed in deceptively simple terms.<sup>21</sup> Yet it has been construed in a variety of ways, more easily described in

<sup>17</sup> *E.g.*, *Argentine Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-18 (eff. June 6, 2000) (“An offense shall be an extraditable offense if it is punishable under the laws in both Parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty”); *see also*, *Bolivian Extradition Treaty*, Art. II, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *French Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 104-5 (eff. Mar. 18, 1997); *Jordanian Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); and *Italian Extradition Treaty*, Art., ¶1, 35 U.S.T. 3027 (1984).

Where an official citation is unavailable for particular treaty, we have used the Senate Treaty Document citation along with the date upon which the treaty entered into force according to the State Department’s *Treaties In Force* (Aug. 2002). Beginning with the 104<sup>th</sup> Congress, Senate Treaty Documents are available on the Government Printing Office’s website, [<http://www.access.gpo.gov/congress>].

<sup>18</sup> *E.g.*, *Italian Extradition Treaty*, Art. V, §3 35 U.S.T. 3029 (1984) (“Extradition shall not be granted for offenses under military law which are not offenses under ordinary criminal law”). *See generally*, *In re Extradition of Suarez-Mason*, 694 F.Supp. 676, 702-3 (N.D.Cal. 1988)(the military offense exception covers crimes like “mutiny and desertion which are outside the realm of ordinary criminal law”); BASSIOUNI at 676-78; ABBELL & RISTAU at 116-17, 212-13.

<sup>19</sup> Even then the political offense exception was thought more hospitable, except in the case of desertion, *see generally*, Tate, *Draft Evasion and the Problem of Extradition*, 32 ALBANY LAW REVIEW 337 (1968).

<sup>20</sup> *See generally*, BASSIOUNI, at 594-676; RESTATEMENT, §476, *Comment g. & Reporters’ Notes* 4-8; ABBELL & RISTAU at 199-212; Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, 15 DICKINSON JOURNAL OF INTERNATIONAL LAW 337 (1997); *The Political Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEORGE WASHINGTON LAW REVIEW 585 (1995).

<sup>21</sup> *Egyptian Extradition Treaty*, Art. III, 19 Stat. 574 (1874) (“The provisions of this treaty shall not apply to any crime or offence of a political character”).

hindsight than to predicate beforehand. As a general rule, American courts require that a fugitive seeking to avoid extradition “demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion.”<sup>22</sup>

Contemporary treaties often seek to avoid misunderstandings in a number of ways. They expressly exclude terrorist offenses or other violent crimes from the definition of political crimes for purposes of the treaty;<sup>23</sup> they explicitly extend the political exception to those whose prosecution is politically or discriminatorily motivated;<sup>24</sup> and/or they limit the reach of their political exception clauses to conform to their obligations under multinational agreements.<sup>25</sup>

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<sup>22</sup> *Kostotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991), citing, *Eain v. Wilkes*, 641 F.2d 504, 512 (7th Cir. 1981); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980); *Quinn v. Robinson*, 783 F.2d 776, 807-9 (9th Cir. 1986); *Ornelas v. Ruiz*, 161 U.S. 689, 692 (1896); *In re Extradition of Singh*, 170 F.Supp.2d 982, 997 (E.D.Cal. 2001); *Barapind v. Reno*, 225 F.3d 1100, 1105 (9<sup>th</sup> Cir. 2000).

<sup>23</sup> *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)(“For purposes of this Treaty, the following offenses shall not be considered to be political offenses: a. a murder or other willful crime against the person of a Head of State of one of the Contracting Parties, or a member of the Head of State’s family; . . . c. murder, manslaughter, or other offense involving substantial bodily harm; d. an offense involving kidnaping or any form of unlawful detention, including the taking of a hostage; e. placing or using an explosive, incendiary or destructive device capable of endangering life, of causing substantial bodily harm, or of causing substantial property damage; and f. a conspiracy or any type of association to commit offenses as specified in Article 2, paragraph 2, or attempt to commit, or participation in the commission of, any of the foregoing offenses”); *Polish Extradition Treaty*, Art.5, ¶2, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999)(murder or other offense against heads of state or their families; murder, manslaughter, assault; kidnaping, abduction, hostage taking; bombing; or attempt or conspiracy to commit any of those offenses); *Extradition Treaty with Luxembourg*, Art.4, ¶2, S. Treaty Doc. 10-10 (eff. Feb. 1, 2002)(virtually the same); *Costa Rican Extradition Treaty*, Art.4, ¶2, S. Treaty Doc. 98-17, (eff. Oct. 11, 1991)(violent crimes against a Head of State or a member of his or her family).

<sup>24</sup> *Jamaican Extradition Treaty*, Art. III, ¶2, S. Treaty Doc. 98-18 (eff. July 7, 1991) (“Extradition shall also not be granted if . . . (b) it is established that the request for extradition, though purporting to be on account of the extraditable offence, is in fact made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, or political opinions; or (c) the person sought is by reason of his race, religion, nationality, or political opinions, likely to be denied a fair trial or punished, detained or restricted in his personal liberty for such reasons” ); *Extradition Treaty with the Bahamas*, Art. 3, ¶(1)(c), S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)(“Extradition shall not be granted when: . . . the executive authority of the Requested State determines that the request was politically or racially motivated”); *Extradition Treaty with Cyprus*, Art.4, ¶3, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999)(politically motivated); *French Extradition Treaty*, Art.4, ¶4, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002)(prosecution or punishment on account of the fugitive’s “race, religion, nationality or political opinions”).

<sup>25</sup> *Costa Rican Extradition Treaty*, Art.4, ¶2(b), S. Treaty Doc. 98-17, (eff. Oct. 11, 1991); *Korean Extradition Treaty*, Art. 4, ¶2(b), S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Indian Extradition Treaty*, Art.4, ¶2(b)-(g), S. Treaty Doc. 105-30 (eff. July 21, 1999); *Hungarian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)(“For purposes of this

## Capital Offenses.

A number of nations have abolished or abandoned capital punishment as a sentencing alternative.<sup>26</sup> Several of these have preserved the right to deny extradition in capital cases either absolutely or in absence of assurances that the fugitive will not be executed if surrendered.<sup>27</sup> More than a few countries are reluctant to extradite in a capital case even though their extradition treaty with the United State has no such provision, based on opposition to capital punishment or to the methods and procedures associated with execution bolstered by sundry multinational agreements to which the United States is either not a signatory or has signed with pertinent reservations.<sup>28</sup>

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Treaty, the following offenses shall not be considered to be political offenses . . . an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution”). The State Department has noted that the list of crimes subject to such international agreements includes air piracy, aircraft sabotage, crimes of violence committed against foreign dignitaries, hostage taking and narcotics trafficking, *Letter of Submittal*, ID. at VI. Unless restricted in the Treaty, the list apparently also includes genocide, war crimes, theft of nuclear materials, slavery, torture, violence committed against the safety of maritime navigation or maritime platforms, theft or destruction of national treasures, counterfeiting currency and bribery of foreign officials. BASSIOUNI at 665-66;

<sup>26</sup> SCHABAS, *THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT*, 239-45 (1997); HOOD, *THE DEATH PENALTY*, 240-47 (2d ed. 1996).

<sup>27</sup> *E.g.*, *Jordanian Extradition Treaty*, Art. 7, S. Treaty Doc. 104-3 (eff. July 29, 1995) (“when the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides such assurances as the Requested State considers sufficient that the death penalty, if imposed, shall not be carried out”); *see also*, *Argentine Extradition Treaty*, Art.6, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Bolivian Extradition Treaty*, Art. IV, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996); *Hungarian Extradition Treaty*, Art. 7, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *South African Extradition Treaty*, Art.5, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Costa Rican Extradition Treaty*, Art.7, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991).

Some capital punishment clauses do not apply in murder cases, *see e.g.*, *Extradition Treaty with the Bahamas*, Art. 2, ¶2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994) (“When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the competent authority of the Requested State may refuse extradition unless: (a) the offense constitutes murder under the laws in the Requested State; or (b) the competent authority of the Requesting State provides such assurances as the competent authority of the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out”); *Extradition Treaty with Thailand*, Art. 6, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Extradition Treaty with Sri Lanka*, Art.7, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *see also*, *Extradition Treaty with the United Kingdom*, Art. IV, 28 U.S.T. 230 (eff. May 17, 1977).

<sup>28</sup> BASSIOUNI at 735-44; ABBELL & RISTAU at 117-19, 295-6; *International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the Soering and Kindler Decisions*, 34 *AMERICAN CRIMINAL LAW REVIEW* 225 (1996); *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged*

### Want of Dual Criminality.

“Under most international agreements . . . [a] person sought for prosecution or for enforcement of a sentence will not be extradited . . . (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and requested state. . . .”<sup>29</sup>

Although there is a split of authority over whether dual criminality resides in all extradition treaties that do not deny its application,<sup>30</sup> the point is largely academic since it is a common feature of all American extradition treaties.<sup>31</sup> Subject to varying interpretations, the United States favors the view that treaties should be construed to honor an extradition request if possible. Thus, dual criminality does not “require that the name by which the crime is described in the two countries shall be same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.”<sup>32</sup> When a foreign country seeks to extradite a fugitive from the United States dual criminality may be satisfied by reference to either federal or state law.<sup>33</sup>

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*with a Capital Crime*, 25 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 189 (1994).

<sup>29</sup> 1 RESTATEMENT, §476; *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995). Examples include the *Italian Extradition Treaty*, Art II, 35 U.S.T. 3027 (1984) (“An offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty. . . .”); *see also*, *Extradition Treaty with Belize*, Art.2, ¶1, S. Treaty Doc. 106-38 (eff. Mar. 21, 2001); *Argentine Extradition Treaty*, Art.2, ¶1, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Extradition Treaty with Uruguay*, Art. 2, 35 U.S.T. 3201 (1973); *Hungarian Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Jordanian Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty*, Art. II, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with the Bahamas*, Art. 2, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Extradition Treaty with Thailand*, Art. 2, ¶1, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 2, ¶1, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991).

<sup>30</sup> *In re Extradition of Loharoi*, 932 F.Supp. 802, 810 (N.D.Tex. 1996) (“The principle is a general policy of extradition, and arguably applies even absent explicit inclusion in the treaty in question. *See*, *Wright v. Henkel*, 190 U.S. 40, 58 (1903); *Bauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980). On the other hand, there is authority suggesting that the principle does not apply unless it is expressly stated in the treaty. *See*, *Factor [v. Laubenheimer]*, 290 U.S. [276], at 287-90 [(1933)]”).

<sup>31</sup> Soma, Muther, & Brissette, *Transnational Extradition for Computer Crimes; Are New Treaties and Laws Needed?* 34 HARVARD JOURNAL OF LEGISLATION 317, 324 (1997).

<sup>32</sup> *Collins v. Loisel*, 259 U.S. 309, 312 (1922); *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1307 (11<sup>th</sup> Cir. 2000); *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998); *DeSilva v. DiLeonardi*, 125 F.3d at 1113; *LoDuca v. United States*, 93 F.3d 1100, 1112 (2d Cir. 1996); *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995); *In re Extradition of Platko*, 213 F.Supp.2d 1229, 1236 (S.D.Cal. 2002); *see generally*, *Test of “Dual Criminality” Where Extradition to or From Foreign Nation Is Sought*, 132 ALR FED 525 (1996 & Oct. 2002 Supp.).

<sup>33</sup> *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 191, 207 (“The current state of the law appears

Our treaty partners do not always construe dual criminality requirements as broadly. In the past, some have been unable to find equivalents for attempt, conspiracy, RICO, CCE, and crimes with prominent federal jurisdictional elements.<sup>34</sup> Many modern extradition treaties contain provisions addressing the problem of jurisdictional elements<sup>35</sup> and/or making extraditable attempt or conspiracy to commit an extraditable offense.<sup>36</sup> Some include special provisions for tax and customs offenses as well.<sup>37</sup>

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to be that if the offense is considered criminal under federal law, the law of the asylum State, or under the law of the preponderance of States, the dual criminal requirement is satisfied”); *Test of Dual Criminality Where Extradition From Foreign Nations Is Sought*, 132 ALR FED. at 539-40.

<sup>34</sup> The Racketeer Influenced and Corrupt Organization (RICO) provisions prohibit acquisition or operation of an interstate commercial enterprise through the patterned commission of various other “predicate” offenses, 18 U.S.C. 1961 to 1966. The Continuing Criminal Enterprise (CCE) or drug kingpin provisions, 21 U.S.C. 848, outlaw management of a large drug trafficking operation. Along with attempt, conspiracy and federal crimes with distinctive jurisdictional elements, they pose difficulties when they approximate but do not exactly matching the elements for extraditable offenses. They present a distinct problem, however, when they are based entirely on predicate offenses that are not themselves extraditable offenses. BASSIOUNI at 504-11; *RICO, CCE, and International Extradition*, 62 TEMPLE LAW REVIEW 1281 (1989).

<sup>35</sup> *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶3.b., S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“For the purpose of this Article, an offense shall be an extraditable offense . . . whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court”); *see also*, *Austrian Extradition Treaty*, Art.2, ¶4(c), S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Extradition Treaty with Belize*, Art.2, ¶3(b), S. Treaty Doc. 106-38 (eff. Mar. 21, 2001); *Korean Extradition Treaty*, Art.2, ¶3(c), S. Treaty Doc. 106-2 (eff. Dec. 20, 1999).

<sup>36</sup> *E.g.*, *Extradition Treaty with the Bahamas*, Art. 2, ¶2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994) (“An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling, causing or procuring the commission of, or being an accessory before or after the fact to, an [extraditable] offense. . .”); *Extradition Treaty with Trinidad and Tobago*, Art. 2, ¶2, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Jordanian Extradition Treaty*, Art. 2, ¶2, S. Treaty Doc. 104-3 (eff. July 29, 1995) (“An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, or participation in the commission of, an [extraditable] offense. . .”); *Extradition Treaty with Luxembourg*, Art.2, ¶1(a), (b), S. Treaty Doc. 105-10 (eff. Feb. 1, 2002); *Extradition Treaty with the United Kingdom*, Art. III, ¶2, 28 U.S.T. 230 (1977) (“Extradition shall also be granted for any attempt or conspiracy to commit an [extraditable] offense . . .”).

<sup>37</sup> *E.g.*, *South African Extradition Treaty*, Art. 2 ¶6, S. Treaty Doc. 106-24 (eff. June 25, 2001) (“Where extradition of a person is sought for an offense 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 kinds as the law of the Requesting State”); *Austrian Extradition Treaty*, Art. 2, ¶4(B), S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Korean Extradition Treaty*, Art.2, ¶6, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Polish Extradition Treaty*, Art.3, S. Treaty Doc. 105-14 (eff.

## Extraterritoriality.

As a general rule, crimes are defined by the laws of the place where they are committed. There have always been exceptions to this general rule under which a nation was understood to have authority to outlaw and punish conduct occurring outside the confines of its own territory. Historically, our extradition treaties applied to crimes “committed within the [territorial] jurisdiction” of the country seeking extradition.<sup>38</sup> Largely as a consequence of terrorism and drug trafficking, however, the United States now claims more sweeping extraterritorial application for our criminal laws than recognized either in our more historic treaties or by many of today’s governments.<sup>39</sup> Here, our success in eliminating extradition impediments by negotiating new treaty provisions has been mixed. More than a few call for extradition regardless of where the offense was committed.<sup>40</sup> Yet perhaps an equal number of contemporary treaties permit or require denial of an extradition request that falls within an area where the countries hold conflicting views on extraterritorial jurisdiction.<sup>41</sup>

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Sept. 17, 1999); *but see*, *Extradition Treaty with Luxembourg*, Art. 5, S. Treaty Doc. 105-10 (eff. Feb. 1, 2002) (“The executive authority of the Requested State shall have discretion to deny extradition when the offense for which extradition is requested is a fiscal offense [*i.e.*, purely a tax, customs, or currency offense]”).

<sup>38</sup> ABBELL & RISTAU at 64-7, 278-80.

<sup>39</sup> Even among countries with a fairly expansive view of the extraterritorial jurisdiction, there may be substantial differences between the perceptions of common law countries and those of civil law countries, Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH LAW REVIEW 685.

<sup>40</sup> *E.g.*, *Bolivian Extradition Treaty*, Art. II, ¶3(b), S. Treaty Doc. 104-22 (eff. Nov. 21, 1966) (“To determine . . . whether an offense is punishable under the laws in the Requested State, it shall be irrelevant . . . where the act or acts constituting the offense were committed”); *Jordanian Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 104-3 (eff. July 29, 1995) (“An offense described in this Article shall be an extraditable offense regardless of where the act or acts constituting the offense were committed”); *Austrian Extradition Treaty*, Art.2, ¶6, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Indian Extradition Treaty*, Art.2, ¶1(4) (eff. July 21, 1999); *Extradition Treaty with Luxembourg*, Art.2, ¶1(4), S. Treaty Doc. 105-10, (eff. Feb. 1, 2002).

<sup>41</sup> *E.g.*, *Hungarian Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“If the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for the punishment of an offense committed outside of its territory in similar circumstances. If the laws of the Requested State do not so provide, the executive authority of the Requested State may, in its discretion grant extradition”); *Extradition Treaty with the Bahamas*, Art. 2, ¶4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)(“An offense described in this Article shall be an extraditable offense whether or not the offense was committed within the territory of the Requesting State. However, if the offense was committed outside the territory of the Requesting State, extradition shall be granted if the law of the Requested State provides for punishment of an offense committed outside of its territory in similar circumstances”); *Italian Extradition Treaty*, Art III, 35 U.S.T. 3028 (1984) (“When an offense has been committed outside the territory of the Requesting Party, the Requested Party shall have the power to grant extradition if its laws provide for the punishment of such an offense or if the person sought is a national of the Requesting Party”); *Extradition Treaty with Uruguay*, Art. 2, ¶2, 35

## Nationality.

The right of a country to refuse to extradite one's own nationals is probably the greatest single obstacle to extradition. The United States has long objected to the impediment<sup>42</sup> and recent treaties indicate that its hold may not be as formidable as was once the case. At one time it was fair to say that "United States extradition treaties contained generally three types of such provisions. The first does not refer to nationals specifically, but agrees to the extradition of all persons. Judicial construction, as well as executive interpretation, of such clauses have consistently held that the word 'person' includes nationals, and therefore refusal to surrender a fugitive because he is a national cannot be justified . . . . The second and most common type of treaty provision provides that 'neither of the contracting parties shall be bound to deliver up its own citizens or subjects . . . .' [Congress has enacted legislation to overcome judicial construction that precluded the United States from surrendering an American under such provision.<sup>43</sup>] The third type of treaty provision states that 'neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper do so.'"<sup>44</sup>

These basic three have been joined by a number of variants. A growing number go so far as to declare that "Extradition shall not be refused on the ground that the fugitive is a citizen or national of the Requested State."<sup>45</sup> Another form limits the

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U.S.T. 3206 (1973)(" . . . When the offense for which extradition has been requested has been committed outside the territory of the requesting Party, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances"); *French Extradition Treaty*, Art. 2, ¶4, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002)("Extradition shall be granted for an extraditable offense committed outside the territory of the Requesting State, when the laws of the requested Party authorize the prosecution or provide the punishment of that offense in similar circumstances").

<sup>42</sup> 1 RESTATEMENT, §475, *Reporters' Note 4*.

<sup>43</sup> The Supreme Court in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), held that a national exemption clause that denied an obligation to extradition denied the United States the authority to honor a treaty request to surrender an American. Congress sought to reverse the result with the enactment of 18 U.S.C. 3196 ("If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met"). At least two lower federal courts have held that the statute grants the government authority to extradite an American, *Hilario v. United States*, 854 F.2d 165 (E.D.N.Y. 1994); *Gouveia v. Vokes*, 800 F.Supp. 241 (E.D.Pa. 1992); see also, *Lopez-Smith v. Hood*, 121 F.3d 1322, 1325-326 (9th Cir. 1997)(section 3196 and a treaty provision stating that the parties "may" extradite their own nationals affords to the Secretary of State discretion).

<sup>44</sup> BASSIOUNI at 683-84; ABBELL & RISTAU at 67-71, 186-87, 280-81.

<sup>45</sup> *Argentine Extradition Treaty*, Art.3, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Extradition Treaty with Belize*, Art.3, S. Treaty Doc. 106-38 (eff. Mar. 20, 2000); *South African Extradition Treaty*, Art.3, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition*

nationality exemption to nonviolent crimes;<sup>46</sup> a third allows a conflicting obligation under a multinational agreement to wash the exemption away.<sup>47</sup> Even where the exemption is preserved, contemporary treaties more regularly refer to the obligation to consider prosecution at home of those nationals whose extradition has been refused.<sup>48</sup>

### **Double Jeopardy.**

Depending on the treaty, extradition may also be denied on the basis of a number of procedural considerations. Double punishment and/or double jeopardy (also know as *non bis in idem*) clauses are among these.<sup>49</sup> The more historic clauses are likely to bar extradition for a second prosecution of the “same acts” or the “same event” rather than the more narrowly drawn “same offenses.”<sup>50</sup> The new model

*Treaty with the Bahamas*, Art. 4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 3, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art IV, 35 U.S.T. 3028 (1983); *Extradition Treaty with Uruguay*, Art. 4, 35 U.S.T. 3206 (1973).

<sup>46</sup> *Bolivian Extradition Treaty*, Art. III, ¶1(b), S. Treaty Doc. 104-22 (eff. Nov. 21, 1966) (“Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to . . . (b) murder; voluntary manslaughter; kidnaping; aggravated assault; rape; sexual offenses involving children; armed robbery; offenses related to the illicit traffic in controlled substances; serious offenses related to terrorism; serious offenses related to organized criminal activity; fraud against the government or involving multiple victims; counterfeiting of currency; offenses related to the traffic in historical or archeological items; offenses punishable in both States by deprivation of liberty for a maximum period of at least ten years; or (c) an attempt or conspiracy, participation in, or association regarding the commission of any of the offenses described in subparagraphs (a) and (b)”).

<sup>47</sup> *Bolivian Extradition Treaty*, Art. III, ¶1(a), S. Treaty Doc. 104-22 (eff. Nov. 21, 1966) (“Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to: (a) offenses as to which there is an obligation to establish criminal jurisdiction pursuant to multilateral international treaties in force with respect to the Parties”).

<sup>48</sup> *E.g.*, *Hungarian Extradition Treaty*, Art. 3, ¶2, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution”); *Austrian Extradition Treaty*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Extradition Treaty with Cyprus*, Art.3, ¶¶1, 2, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999); *Bolivian Extradition Treaty*, Art. III, ¶3, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with Thailand*, Art. 8, ¶2, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 8, ¶2, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. VII, ¶¶2, 3, S. Treaty Doc. 98-18 (eff. July 7, 1991)(but also requiring extradition if a fugitive is a national of both the Requesting and Requested State).

<sup>49</sup> BASSIOUNI at 693-707; ABBELL & RISTAU at 96-100, 192-98, 290-93.

<sup>50</sup> *Italian Extradition Treaty*, Art VI, 35 U.S.T. 3030 (1984) (“Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same act for which extradition is requested”); *Extradition Treaty with the United Kingdom*, Art. V, ¶1(a), 28 U.S.T. 230 (1977) (“Extradition shall not be granted if: (a) the person sought would, if proceeded



limits the exemption to fugitives who have been convicted or acquitted of the same offense and specifically denies the exemption where an initial prosecution has simply been abandoned.<sup>51</sup>

### Lapse of Time.

Lapse of time or statute of limitation clauses are prevalent as well. “Many [states] . . . preclude extradition if prosecution for the offense charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested state,<sup>52</sup> in others that of the requesting state;<sup>53</sup> under some treaties extradition is precluded if either state’s statute of limitations has run.<sup>54</sup> . . . When a treaty provides for a time-bar only under the law of the requesting state, or only under the law of the requested state, United States courts have generally held that time-bar of the state not mentioned does not bar extradition. If the treaty contains no reference to the effect of a lapse of time neither state’s statute of limitations will be applied.”<sup>55</sup> Left unsaid is the fact that

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against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State”).

<sup>51</sup> *E.g.*, *Bolivian Extradition Treaty*, Art. V, ¶2, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966) (“Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Extradition shall not be precluded by the fact that the authorities of the Requested State have decided to refrain from prosecuting the person sought for the acts for which extradition is requested or to discontinue any criminal proceedings which have been initiated against the person sought for those acts.”); *see also*, *Extradition Treaty with Sri Lanka*, Art.5, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *Extradition Treaty with Trinidad and Tobago*, Art.5, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Extradition Treaty with the Bahamas*, Art. 5, ¶¶1, 2, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 5, ¶¶1, 2, S. Treaty Doc. 104-3 (eff. July 29, 1995). Some include language to avoid confusion over whether an American dismissal with prejudice is the same as an acquittal, *Hungarian Extradition Treaty*, Art. 5, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“Extradition shall not be granted when the person sought has been convicted or acquitted or the case dismissed by court order with finding and final effect in the Requested State for the offense for which extradition is requested”).

<sup>52</sup> *E.g.*, *Argentine Extradition Treaty*, Art.7, ¶1, S. Treaty Doc. 105-18 (eff. June 15, 2000); *French Extradition Treaty*, Art.8, ¶1, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002).

<sup>53</sup> *E.g.*, *Austrian Extradition Treaty*, Art. 7, S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Indian Extradition Treaty*, Art.7, S. Treaty Doc. 105-30 (eff. July 21, 1999); *Extradition Treaty with the Bahamas*, Art. 6, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Hungarian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Italian Extradition Treaty*, Art VII, 35 U.S.T. 3030 (1983).

<sup>54</sup> *E.g.*, *Extradition Treaty with Uruguay*, Art. 5, ¶3, 35 U.S.T. 3207 (1973); *see also*, *Jordanian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Extradition Treaty with the United Kingdom*, Art. V, ¶1(b), 28 U.S.T. 230 (1977).

<sup>55</sup> 1 RESTATEMENT §476, *Comment e*; *see also*, BASSIOUNI at 707-12; ABBELL & RISTAU at 94-6, 187-90, 289-90.

some treaties declare in no uncertain terms that the passage of time is no bar to extradition.<sup>56</sup>

In cases governed by American law and in instances of American prosecution following extradition, applicable statutes of limitation and due process determine whether pre-indictment delays bar prosecution<sup>57</sup> and speedy trial provisions govern whether post-indictment delays preclude prosecution.<sup>58</sup>

## Procedure for Extradition from the United States

A foreign country will ordinarily initiate the extradition process with a request submitted to the State Department<sup>59</sup> along with the documentation required by the treaty.<sup>60</sup> The Secretary of State, at his discretion, has the matter forwarded to the

<sup>56</sup> *E.g.*, *Jordanian Extradition Treaty*, Art. 6, S. Treaty Doc. 104-3 (eff. July 29, 1995) (“The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time”); *Extradition Treaty with Belize*, Art.8,106-38 (eff. Mar. 21, 2001); *Extradition Treaty with Cyprus*, Art.7, S. Treaty Doc.105-16 (eff. Sept. 14, 1999).

<sup>57</sup> U.S.Const. Amends. V, XIV; *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *United States v. MacDonald*, 456 U.S. 1, 8 (1982); *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2002); *United States v. Farmer*, 312 F.3d 933, 936 (8<sup>th</sup> Cir. 2003).

<sup>58</sup> U.S.Const. Amends. VI, XIV; *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. White Horse*, 316 F.3d 769, 774 (8<sup>th</sup> Cir. 2003); *United States v. Cope*, 312 F.3d 757, 777-78 (6<sup>th</sup> Cir. 2003).

<sup>59</sup> “[T]hrough the diplomatic channel” seems to be the phrase favored most recently, *see e.g.*, *Hungarian Extradition Treaty*, Art. 8, ¶1, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“All requests for extradition shall be made through the diplomatic channel”); *Polish Extradition Treaty*, Art.9, ¶1, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Korean Extradition Treaty*, Art. 8, ¶1, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Extradition Treaty with the Bahamas*, Art. 8, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 8 ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty*, Art. VI, ¶1, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Italian Extradition Treaty*, Art. X, 35 U.S.T. 3031 (1983); *Extradition Treaty with Uruguay*, Art. 10, ¶1, 35 U.S.T. 3210 (1973).

<sup>60</sup> *Jordanian Extradition Treaty*, Art. 8 ¶¶2, 3, & 4, S. Treaty Doc. 104-3 (eff. July 29, 1995) (“2. All requests shall contain: (a) documents, statements, photographs (if possible), or other types of information which describe the identity, nationality, and probable location of the person sought; (b) information describing the facts of the offense and the procedural history of the case; (c) the text of the law describing the essential elements of the offense for which extradition is requested; (d) the text of the law prescribing the punishment for the offense; and (e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.”); 3. A request for extradition of a person who is sought for prosecution shall also contain: (a) a copy of the warrant or order of arrest issued by a judge or other competent authority; (b) a copy of the charging documents; and (c) such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested. 4. A request for extradition relating to a person who has been found guilty of the offense for which extradition is sought shall also contain: (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that the person has been found guilty; (b) information establishing that the person sought is the person to whom the finding

Department of Justice which begins the procedure, ordinarily as described in 18 U.S.C. 3184, for the arrest of the fugitive “to the end that the evidence of criminality may be heard and considered.”<sup>61</sup>

### Arrest and Bail.

Extradition treaties sometimes permit requests for the provisional arrest of a fugitive prior to delivery of a formal request for extradition.<sup>62</sup> Regardless of whether detention occurs pursuant to provisional arrest, as a consequence of the initiation of an extradition hearing or upon certification of extradition, the fugitive is not entitled

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of guilt refers; (c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and (d) in the case of a person who has been found guilty in absentia, the documents required in paragraph 3”); *see also*, *South African Extradition Treaty*, Art. 9, ¶¶2, 3 & 4 S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition Treaty with Luxembourg*, Art. 8, ¶¶2, 3 & 4, S. Treaty Doc. 105-10 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art. 8, ¶¶2, 3, & 4, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with the Bahamas*, Art. 8, ¶¶2, 3, & 4, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. VI, ¶¶2-6, S. Treaty Doc. 104-22 (eff. Nov. 21, 1996).

<sup>61</sup> “Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered,” 18 U.S.C. 3184; *see generally*, ABBELL & RISTAU at 159-71.

<sup>62</sup> *Extradition Treaty with Thailand*, Art. 10, ¶¶1, 2, S. Treaty Doc. 98-16 (eff. May 17, 1991)(“In case of urgency, either Contracting Party may request the provisional arrest of any accused or convicted person. Application for provisional arrest shall be made through the diplomatic channel or directly between the Department of Justice . . . and the Ministry of Interior in Thailand . . . (2) The application shall contain: a description of the person sought; the location of that person, if known; a brief statement of the facts of the case including, if possible, the time and location of the offense; a statement of the existence of a warrant of arrest or a judgment of conviction against that person . . . and a statement that a request for extradition of the person will follow”). Such provisions usually also call for the release of the fugitive upon the failure to submit a formal request within a designated period of time, *e.g.*, *id.*, Art. 10 ¶4 (60 days); *Argentine Extradition Treaty* (60 days), Art. 11, ¶4, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Korean Extradition Treaty* (two months), Art. 10, ¶4, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Hungarian Extradition Treaty* (60 days), Art. 11, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with the Bahamas* (60 days), Art. 10, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty* (60 days with a possible 30-day extension), Art. 11, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Bolivian Extradition Treaty* (60 days), Art. VIII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Italian Extradition Treaty* (45 days), Art. XII, 35 U.S.T. 3034-35 (1984); *Extradition Treaty with Uruguay* (45 days), Art. 11, ¶1, 35 U.S.T. 3212-213 (1973).

to release on bail exception under rare “special circumstances.”<sup>63</sup> This limited opportunity for pre-extradition release may be further restricted under the applicable treaty.<sup>64</sup>

### Hearing.

The precise menu for an extradition hearing is dictated by the applicable extradition treaty, but a common check list for a hearing conducted in this country would include determinations that:

- “1. There exists a valid extradition treaty between the United States and the requesting state;
2. The relator is the person sought;
3. The offense charged is extraditable;
4. The offense charged satisfies the requirement of double criminality;
5. There is ‘probable cause’ to believe the relator committed the offense charged;
6. The documents required are presented in accordance with United States law, subject to any specific treaty requirements, translated and duly authenticated . . . ; and
7. Other treaty requirements and statutory procedures are followed.”<sup>65</sup>

An extradition hearing is not, however, “in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him. . . . Instead, it is essentially a preliminary examination to determine whether a case is

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<sup>63</sup> *Wright v. Henkel*, 190 U.S. 40, 61-3 (1903)(no bail following certification absent special circumstances); *United States v. Kin-Hong*, 83 F.3d 523, 524-25 (1st Cir. 1996) (no bail during pendency of extradition proceedings absent special circumstances); *In re Requested Extradition of Kirby*, 106 F.3d 855, 863 (9th Cir. 1996) (release on bail pending the completion of extradition hearings requires special circumstances); *Borodin v. Ashcroft*, 136 F.Supp.2d 125, 128-33 (E.D.N.Y. 2001); *Hababou v. Albright*, 82 F.Supp.2d 347, 349-52 (D.N.J. 2000); *see also, In re Extradition of Molnar*, 182 F.Supp.2d 684, 686-89 (N.D.Ill. 2002)(suggesting it may be easier to demonstrate special circumstances following provisional arrest than after a formal request has been presented); *Parretti v. United States*, 122 F.3d 758, 786 (9th Cir. 1997) (suggesting that the strong presumption against bail be abandoned), *opinion withdraw upon the flight of the respondent*, 143 F.3d 508 (9th Cir. 1998); *International Extradition and the Right to Bail*, 34 STANFORD JOURNAL OF INTERNATIONAL LAW 407 (1998).

<sup>64</sup> *See e.g., Costa Rican Extradition Treaty*, Art. 12, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991)(“A person detained pursuant to the Treaty shall not be released until the extradition request has been finally decided, unless such release is required under the extradition law of the Requested State or unless this Treaty provides for such release”).

<sup>65</sup> *In re Extradition of Valdez-Mainero*, 3 F.Supp.2d 1112, 1114-115 (S.D.Cal. 1998), *citing, Bassiouni*, at Ch. IX, §5.1; *see also, ABBELL & RISTAU* at 172-241; *cf., Cheung v. United States*, 213 F.3d 82, 88 (2d Cir. 2000)(“The judicial officer’s inquiry is confined to the following: whether a valid treaty exists, whether the crime charged is covered by the relevant treaty; and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof”); *In re Extradition of Salas*, 161 F.Supp.2d 915, 923 (N.D.Ill. 2001).

made out which will justify the holding of the accused and his surrender to the demanding nation. . . . The judicial officer who conducts an extradition hearing thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense.”<sup>66</sup>

The purpose of the hearing is in part to determine whether probable cause exists to believe that the individual committed an offense covered by the extradition treaty. The individual may offer evidence to contradict or undermine the existence of probable causes, but affirmative defenses that might be available at trial are irrelevant.<sup>67</sup> The rules of criminal procedure and evidence that would apply at trial have no application;<sup>68</sup> hearsay is not only admissible but may be relied upon exclusively;<sup>69</sup> the Miranda rule has no application;<sup>70</sup> initiation of extradition may be delayed without regard for the Sixth Amendment right to a speedy trial or the Fifth Amendment right of due process;<sup>71</sup> nor does the Sixth Amendment right to the

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<sup>66</sup> *LoDuca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996)(internal quotation marks omitted), quoting, *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Collins v. Loisel*, 259 U.S. 309, 316 (1922); and *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990); see also, *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997); *In re Extradition of Molnar*, 202 F.Supp.2d 782, 786 (N.D.Ill. 2002).

<sup>67</sup> *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997)(legal custodian defense to kidnaping charge), citing, *Charlton v. Kelly*, 229 U.S. 447 (1913), and *Collins v. Loisel*, 259 U.S. 309 (1922); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1324 (9th Cir. 1997)(due process bar to criminal trial of incompetent defendant); *In re Extradition of Schweidenback*, 3 F.Supp.2d 113, 117 (D.Mass. 1998)(evidence related to a defense is excludable); *In re Extradition of Diaz Medina*, 210 F.Supp.2d 813, 819 (N.D.Tex. 2002).

<sup>68</sup> *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997); *Then v. Melendez*, 92 F.3d 851, 855 (9th Cir. 1996); *In re Extradition of Fulgencio Garcia*, 188F.Supp.2d 921, 932 (N.D.Ill. 2002); F.R.CRIM.P. 54(b)(5), F.R.EVID. 1101(d)(3).

<sup>69</sup> *United States v. Kin-Hong*, 110 F.3d 103, 120 (1<sup>st</sup> Cir. 1997), citing, *Collins v. Loisel*, 259 U.S. 309, 317 (1922); *In re Extradition of Platko*, 213 F.Supp.2d 1229, 1237 (S.D.Cal. 2002).

<sup>70</sup> *In re Extradition of Powell*, 4 F.Supp.2d 945, 951-52 (S.D.Cal. 1998); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11<sup>th</sup> Cir. 2002)(noting that even compelled statements that incriminate the fugitive under the laws of the requesting country would be admissible in an extradition hearing); cf., *United States v. Balsys*, 524 U.S. 666 (1998)(the Fifth Amendment does not prohibit compelled statements simply because they are incriminating under the laws of a foreign nation).

<sup>71</sup> *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994); *McMaster v. United States*, 9 F.3d 47, 49 (8th Cir. 1993); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993); *Bovio v. United States*, 989 F.2d 255, 260 (7th Cir. 1993); *Sabatier v. Daborowski*, 586 F.2d 866, 869 (1st Cir. 1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976); *In re Extradition of Fulgencio Garcia*, 188F.Supp.2d 921, 932 (N.D.Ill. 2002)(internal citations omitted)(“the Sixth Amendment right to a speedy trial and the Fifth Amendment right against undue delay are inapplicable to an extradition. Likewise, the Sixth Amendment right to effective counsel does not apply to extradition proceedings. The Supreme Court has found no constitutional infirmity where those subject to extradition proceedings have been denied an opportunity to confront their accusers. Finally, the Fifth Amendment guarantee against double jeopardy and the right to a Miranda warning are inapplicable to an

assistance of counsel apply.<sup>72</sup> Due process, however, will bar extradition of informants whom the government promised confidentiality and then provided the evidence necessary to establish probable cause for extradition.<sup>73</sup>

Moreover, extradition will ordinarily be certified without “examining requesting country’s criminal justice system or taking into account the possibility that the extraditee will be mistreated if returned.”<sup>74</sup> This “non-inquiry rule” is premised on the view that, “[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.”<sup>75</sup>

## Review.

If at the conclusion of the extradition hearing, the court concludes there is some obstacle to extradition and refuses to certify the case, “[t]he requesting government’s recourse to an unfavorable disposition is to bring a new complaint before a different judge or magistrate, a process it may reiterate apparently endlessly.”<sup>76</sup>

extradition proceeding”).

<sup>72</sup> *DeSilva v. DiLeonardi*, 181 F.3d 865, 868-69 (7<sup>th</sup> Cir. 1999).

<sup>73</sup> *Valenzuela v. United States*, 286 F.3d 1223, 1229-230 (11<sup>th</sup> Cir. 2002).

<sup>74</sup> *In re Extradition of Cheung*, 968 F.Supp. 791, 798-99 (D.Conn, 1997)(“The rule of non-inquiry is well-established in the circuits and has been applied in extraditions to a panoply of nations. *Martin v. Warden*, 993 F.2d 824 (11th Cir. 1993)(Canada); *Koskotas v. Roche*, 931 F.2d 169 (1st Cir. 1991)(Greece); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986 (U.K.); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981)(Israel); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir. 1980)(Mexico) . . .”); *see also*, *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); *United States v. Smyth*, 61 F.3d 711, 714 (9th Cir. 1995)(explaining the exception in the U.K. Supplementary Treaty); *see also*, Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL LAW REVIEW 1198 (1991).

*Gallina v. Fraser*, 278 F.3d 77 (2d Cir. 1960), declined to depart from the rule but observed that under some circumstance an extraditee might face “procedures or punishments so antipathetic to a federal court’s sense of decency as to require re-examination” of the question. The courts appear to have rarely if ever encountered such procedures or punishments, *In re Extradition of Marinero*, 990 F.Supp. 1208, 1230 (S.D.Cal. 1997)(“There is no legal support for a judicially created ‘humanitarian exception’ [of the type foreseen in *Gallina*] in an extradition proceeding”); *In re Extradition of Sandhu*, 886 F.Supp. 318, 322 (S.D.N.Y. 1993)(“The ‘*Gallina* exception’ to the rule of non-inquiry has yet to be applied”); *Corneljo-Barreto v. Seifert*, 218 F.3d 1004, 1010 (9th Cir. 2000)(“Our research failed to identify any case in which this [humanitarian exception] has been applied . . .”).

<sup>75</sup> *Martin v. Warden*, 993 F.2d 824, 829-30 (11th Cir. 1993), quoting, *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

<sup>76</sup> *Gill v. Imundi*, 747 F.Supp. 1028, 1039 (S.D.N.Y. 1990), citing, *In re Doherty*, 786 F.2d 491, 503 (2d Cir. 1986); *In re Extradition of Massieu*, 897 F.Supp. 176, 179 (D.N.J. 1995); *Hooker v. Klein*, 573 F.2d 1360, 1365 (9th Cir. 1978), citing *inter alia*, *Collins v. Loisel*, 262 U.S. 426 (1923); ABBELL & RISTAU at 252-54.

If the court concludes there is no such obstacle to extradition and certifies to the Secretary of State that the case satisfies the legal requirements for extradition, the fugitive has no right of appeal, but may be entitled to limited review under habeas corpus.<sup>77</sup> “[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”<sup>78</sup> In this last assessment, appellate courts will only “examine the magistrate judge’s determination of probable cause to see if there is ‘any evidence’ to support it.”<sup>79</sup>

### **Surrender.**

If the judge or magistrate certifies the fugitive for extradition, the matter then falls to the discretion of the Secretary of State to determine whether as a matter of policy the fugitive should be released or surrendered to the agents of the country that has requested his or her extradition.<sup>80</sup> The procedure for surrender, described in treaty<sup>81</sup> and statute,<sup>82</sup> calls for the release of the prisoner if he or she is not claimed

<sup>77</sup> *Sidali v. I.N.S.*, 107 F.3d 191, 195 (3d Cir. 1997), citing, *Collins v. Miller*, 252 U.S. 364, 369 (1920); *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998); ABBELL & RISTAU at 243-52.

Under some circumstances, an individual subject to an extradition order may appeal under the Administrative Procedures Act when to surrender him would be contrary to our obligations under the Torture Convention as implemented by statute and regulation, *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1010-15 (9th Cir. 2000).

<sup>78</sup> *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997), quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009-10 (9th Cir. 2000); *Sidali v. I.N.S.*, 107 F.3d 191, 195 (3d Cir. 1997); *Smith v. United States*, 82 F.3d 964, 965 (10th Cir. 1996).

<sup>79</sup> *United States v. Kin-Hong*, 110 F.3d 103, 116-17 (1st Cir. 1997), citing, *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Sidali v. I.N.S.*, 107 F.3d 191, 199-200 (3d Cir. 1997); and *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996); *Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002).

<sup>80</sup> *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997) (“It is then within the Secretary of State’s sole discretion to determine whether or not the relator should actually be extradited. See 18 U.S.C. §3186 (“The Secretary of State may order the person committed under section 3184 . . . of this title to be delivered to any authorized agent of such foreign government . . .”); *Executive Discretion in Extradition*, 62 COLUMBIA LAW REVIEW 1313 (1962).

<sup>81</sup> E.g., *Extradition Treaty with Thailand*, Art. 11, ¶3, S. Treaty Doc. 98-16 (eff. May 17, 1991) (“If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the laws of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within the prescribed time, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offense”); *Argentine Extradition Treaty*, Art.12, ¶6, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Austrian Extradition Treaty*, Art.14, ¶¶2, 3, S. Treaty Doc. 105-50 (eff. Jan. 1, 2002); *Hungarian Extradition Treaty*, Art. 13, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Costa Rican*

within a specified period of time,<sup>83</sup> often indicates how extradition requests from more than one country for the same fugitive are to be handled,<sup>84</sup> and frequently allows the fugitive to be held for completion of a trial or the service of a criminal sentence before being surrendered.<sup>85</sup>

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*Extradition Treaty*, Art. 13, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. IX, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with the Bahamas*, Art. 13, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. IX, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Jordanian Extradition Treaty*, Art. 12, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XIII, 35 U.S.T. 3036 (1984).

<sup>82</sup> 18 U.S.C. 3186 (“The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged. Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty. A person so accused who escapes may be retaken in the same manner as any person accused of any offense”).

<sup>83</sup> 18 U.S.C. 3188 (“Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.”)

<sup>84</sup> *E.g.*, *Hungarian Extradition Treaty*, Art. 15, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996) (“If the Requested State receives requests from the other Contracting Party and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State it will surrender the person. In making its decision, the Requested State shall consider all relevant factors, including but not limited to: a. whether the requests were made pursuant to treaty; b. the place where the offense was committed; c. the respective interests of the Requesting States; d. the gravity of the offense; e. the nationality of the victim; f. the possibility of further extradition between the Requesting State; and g. the chronological order in which the requests were received from the Requesting States”); *Extradition Treaty with Trinidad and Tobago*, Art.12, S Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Polish Extradition Treaty*, Art. 17, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Extradition Treaty with Thailand*, Art. 13, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 15, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jamaican Extradition Treaty*, Art. XIII, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with the Uruguay*, Art. 14, 35 U.S.T. 3214-215 (1973); *Bolivian Extradition Treaty*, Art. X, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Jordanian Extradition Treaty*, Art. 14, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XV, 35 U.S.T. 3037 (1984).

<sup>85</sup> *E.g.*, *Jamaican Extradition Treaty*, Art. XII, S. Treaty Doc. 98-18 (eff. July 7, 1991) (“If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the territory of the Requested State for a different offence, the Requesting State shall, unless its laws otherwise provide, defer the surrender of the person sought until the conclusion of the proceedings against that person or the full execution of any punishment that may be or may have been imposed”); *Extradition Treaty with Sri*



## Constitutionality

The fact that the extradition turns on the discretion of the Secretary of State following judicial certification has led to the suggestion that the procedure established by the extradition statute is constitutionally offensive to the separation of powers, first broached by a district court in the District of Columbia,<sup>86</sup> but subsequently rejected by every appellate court to consider the question.<sup>87</sup>

## Trial in the United States: Extradition Issues

The laws of the country of refuge and the applicable extradition treaty govern extradition back to the United States of a fugitive located overseas. The request for extradition comes from the Department of State whether extradition is sought for trial in federal or state court or whether for execution of a criminal sentence under federal or state law.<sup>88</sup> The issues of treaty application by the authorities to whom the request is made — extraditable offenses, dual criminality, and the like — are the same as

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*Lanka*, Art.13, ¶2, S. Treaty Doc. 106-34 (eff. Jan. 12, 2001); *French Extradition Treaty*, Art. 16, ¶2, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Hungarian Extradition Treaty*, Art. 14, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with Thailand*, Art. 12, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Costa Rican Extradition Treaty*, Art. 14, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Bolivian Extradition Treaty*, Art. XI, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Jordanian Extradition Treaty*, Art. 13, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Italian Extradition Treaty*, Art XIV, 35 U.S.T. 3036-37 (1984).

<sup>86</sup> *Lobue v. Christopher*, 893 F.Supp. 65 (D.D.C. 1995), *vac'd on juris. grounds*, 82 F.3d 1081 (D.C.Cir. 1996).

<sup>87</sup> *In re Requested Extradition of Artt*, 158 F.3d 462, 469-70 (9th Cir. 1998), *redesignated after rehearing*, *In re Artt*, 248 F.3d 1197 (9th Cir. 2001); *LoDuca v. United States*, 93 F.3d 1100, 1105-10 (2d Cir. 1996); *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113 (7th Cir. 1997); *see also*, *Noel v. United States*, 12 F.Supp.2d 1300, 1304-305 (M.D.Fla. 1998); *In re Extradition of Lehming*, 951 F.Supp. 505, 508-9 (D.Del. 1996); *Sandhu v. Bransom*, 932 F.Supp. 822, 826 (N.D.Tex. 1996); *Werner v. Hickey*, 920 F.Supp. 1257, 1259 (M.D.Cal. 1996); *see also*, *Innocence Abroad: An Analysis of the Constitutionality of International Extradition*, 33 STANFORD JOURNAL OF INTERNATIONAL LAW 343 (1997).

<sup>88</sup> RESTATEMENT, §478, *Comment e* (“Requests for extradition of persons from foreign states may be made only by the Department of State. If the offense with which the person is charged or of which he has been convicted is one under federal law, the application for extradition must be submitted by the prosecutor to the Department of Justice, which will review the documents and, if satisfied of their sufficiency, transmit them to the Department of State for forwarding to the requested state. If the offense is one under [the law of any of the states of the United States], the application must be submitted by or with the endorsement of the Governor of the State, and must be reviewed by the Department of Justice before transmission to the Department of State. If the State Department is satisfied that the conditions for extradition under the applicable treaty have been met, it will request extradition in the name of the United States, and, where appropriate, will arrange for representation of the United States at the proceedings in the requested state. When extradition proceedings in the foreign state have been completed and the person sought has been certified to be extraditable, the Secretary or [her] authorized deputy may issue a warrant to federal or State officials to act as agents of the United States for the purpose of taking custody of the person in the requested state for return to the United States.”)

those posed when the United States is asked to extradite a fugitive found here. The only treaty issue likely to arise after extradition is whether the fugitive was surrendered subject to any limitations such as those posed by the doctrine of speciality.

### Specialty.

Under the doctrine of speciality, sometimes called speciality, “a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.”<sup>89</sup> The limitation, expressly included in many treaties,<sup>90</sup> however, is designed to preclude prosecution for different substantive offenses and does not bar prosecution for different or additional counts of the same offense.<sup>91</sup> And some courts have held that an offense whose prosecution would be

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<sup>89</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 661 (1992), quoting, *United States v. Rauscher*, 119 U.S. 407, 430 (1886); *see also*, *United States v. LeBaron*, 156 F.3d 621, 626 (5th Cir. 1998); *United States v. Tse*, 135 F.3d 200, 204 (1st Cir. 1998); *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002); Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 VIRGINIA JOURNAL OF INTERNATIONAL LAW 71 (1993); *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country*, 112 ALR FED. 473 (1993 & Oct. 2002 Supp.); BASSIOUNI at 511-69; ABBELL & RISTAU at 331-35.

<sup>90</sup> Although the wording varies, the content of these provisions roughly corresponds to those in the *Jamaican Extradition Treaty*, Art. XIV, S. Treaty Doc. 98-18 (eff. July 7, 1991)(“(1) A person extradited under this Treaty may only be detained, tried or punished in the Requesting State for the offence for which extradition is granted, or (a) for a lesser offence proved by the facts before the court of committal . . . (b) for an offence committed after the extradition; or (c) for an offence in respect to which the executive authority of the Requested State . . . consents to the person’s detention, trial or punishment. . . or (d) if the person (i) having left the territory of the Requesting State after his extradition, voluntarily returns to it; or (ii) being free to leave the territory of the Requesting State after his extradition, does not so leave within forty-five (45) days . . . (2) A person extradited under this Treaty may not be extradited to a third State unless (a) the Requested State consents; or (b) the circumstances are such that he could have been dealt with in the Requesting State pursuant to sub-paragraph (d) of paragraph (1)”); *see also*, *Extradition Treaty with Belize*, Art. 14, S. Treaty Doc. 106-38 (eff. March 21, 2001); *Polish Extradition Treaty*, Art. 19, S. Treaty Doc. 105-14 (eff. Sept. 17, 1999); *Extradition Treaty with Uruguay*, Art. 13, 35 U.S.T. 3213-214 (1973); *Hungarian Extradition Treaty*, Art. 17, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996); *Extradition Treaty with Thailand*, Art. 14, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Bolivian Extradition Treaty*, Art. XII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with the Bahamas*, Art. 14, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Jordanian Extradition Treaty*, Art. 16, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Costa Rican Extradition Treaty*, Art. 16, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Italian Extradition Treaty*, Art XVI, 35 U.S.T. 3038 (1984).

<sup>91</sup> *Gallo-Chamorro*, 233 F.3d 1298, 1305 (11<sup>th</sup> Cir. 2000)(“Rather than mandating exact uniformity between the charges set forth in the extradition request and the actual indictment, what the doctrine of speciality requires is that the prosecution be based on the same facts

barred by the doctrine may nevertheless be considered for purposes of the federal sentencing guidelines,<sup>92</sup> or for purposes of criminal forfeiture.<sup>93</sup>

The doctrine may be of limited advantage to a given defendant because the circuits are divided over whether a defendant has standing to claim its benefits.<sup>94</sup> Regardless of their view of fugitive standing, they agree that the surrendering state may subsequently consent to trial for crimes other than those for which extradition was had.<sup>95</sup>

## Other Features

### Expenses and Representation.

Our extradition treaties, particularly the more recent ones, often have other less obvious, infrequently mentioned features. Perhaps the most common of these deal with the expenses associated with the procedure and representation of the country requesting extradition before the courts of the country of refuge. The distribution of costs is ordinarily governed by a treaty stipulation, reflected in federal statutory provisions,<sup>96</sup> under which the country seeking extradition accepts responsibility for

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as those set forth in the request for extradition”); *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989); *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998)(“the appropriate test for a violation of specialty is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited”); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994); *United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994).

<sup>92</sup> *United States v. Lazsarevich*, 147 F.3d 1061, 1064-65 (9th Cir. 1998)(also noting that the doctrine of specialty “exists only to the extent that the surrendering country wishes” and there was no evidence of a demand that the doctrine be applied).

<sup>93</sup> *United States v. Saccoccia*, 58 F.3d 754, 784 (1st Cir. 1995).

<sup>94</sup> *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995)(“The question of whether a criminal defendant has standing to assert a violation of the doctrine of specialty has split the federal circuit courts of appeals”), noting decisions in favor of defendant standing, *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990); *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986); and those holding to the contrary, *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985)); see also, *United States v. Antonakeas*, 255 F.3d 714, 719-20 (9th Cir. 2001)(defendant has standing to object to substantive but not procedural noncompliance with applicable treaty requirements); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167-68 (3d Cir. 1997); *The Extra in Extradition: The Impact of State v. Pang on Extraditee Standing and Implicit Waiver*, 24 JOURNAL OF LEGISLATION 111 (1998); *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 UNIVERSITY OF CHICAGO LAW REVIEW 1187 (1995); BASSIOUNI at 546-60.

<sup>95</sup> *United States v. Tse*, 135 F.3d 200, 205 (1st Cir. 1998); *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir. 1995); ; *United States v. Riviere*, 924 F.2d 1289, 1300-1 (3d Cir. 1991); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

<sup>96</sup> 18 U.S.C. 3195 (“All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

any translation expenses and the costs of transportation after surrender, and the country of refuge assumes responsibility for all other costs.<sup>97</sup> Although sometimes included in a separate article, contemporary treaties generally make the country of refuge responsible for legal representation of the country seeking extradition.<sup>98</sup>

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All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be. The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States”).

<sup>97</sup> *Hungarian Extradition Treaty*, Art. 20, ¶¶2 & 3, S. Treaty Doc. 104-5 (eff. Dec. 9, 1996)(“2. The Requesting State shall bear the expenses related to the translation of documents and transportation of the person surrendered. The Requested State shall pay all other expenses incurred in that State by reason of the extradition proceedings. 3. Neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons sought under this Treaty”); *Indian Extradition Treaty*, Art. 20, ¶2, S. Treaty Doc. 105-30 (eff. July 21, 1999); *French Extradition Treaty*, Art. 22, ¶2, S. Treaty Doc. 105-13 (eff. Feb. 1, 2002); *Jordanian Extradition Treaty*, Art. 19, ¶¶2 & 3, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Costa Rican Extradition Treaty*, Art. 18, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Extradition Treaty with Thailand*, Art. 18, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Jamaican Extradition Treaty*, Art. XVII, ¶¶1, 3 & 4, S. Treaty Doc. 98-18 (eff. July 7, 1991)(also requesting state may be subject to a claim due to special expenses or concerning third party interests in transferred property); *Extradition Treaty with the Bahamas*, Art. 18, ¶¶2 & 3, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Italian Extradition Treaty*, Art XXI, 35 U.S.T. 3041 (1984); *but see*, *Bolivian Extradition Treaty*, Art. XVI, ¶¶3 & 4, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966)(“The Requesting State shall bear expenses related to the translation of documents and the transportation of the person sought. 4. Neither Party shall make any pecuniary claim against the other arising from the arrest, detention, custody, examination, or surrender of a person sought under this Treaty”)(note absence of language as to the responsibility for cost other than transportation or translation); *Extradition Treaty with Uruguay*, Art. 18, 35 U.S.T. 3216 (similar).

<sup>98</sup> *Jordanian Extradition Treaty*, Art. 19, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995)(“The Requested State shall advise, assist, appear in court on behalf of the Requesting State, and represent the interests of the Requesting State, in any proceedings arising out of a request for extradition”); *Extradition Treaty with Luxembourg*, Art. 20, ¶1, S. Treaty Doc. 1-5-10 (eff. Feb. 1, 2002); *Extradition Treaty with Sri Lanka*, Art. 19, ¶1, S. Treaty Doc.106-34 (eff. Jan. 12, 2001); *Hungarian Extradition Treaty*, Art. 20, ¶1, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 18, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Costa Rican Extradition Treaty*, Art. 20, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Bolivian Extradition Treaty*, Art. XVI, ¶¶1 & 2, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with Uruguay*, Art. 18, 35 U.S.T. 3216 (1983); *Italian Extradition Treaty*, Art XX, 35 U.S.T. 3040 (1984) *Jamaican Extradition Treaty*, Art. XVII, ¶2, S. Treaty Doc. 98-18 (eff. July 7, 1991)(“The Requested State shall also provide for the representation of the Requesting State in any proceedings arising in the Requested State out of a request for extradition”); *Extradition Treaty with Thailand*, Art. 18, ¶2, S. Treaty Doc. 98-16 (eff. May 17, 1991).

## Transfer of Evidence.

Contemporary treaties regularly permit a country to surrender documents and other evidence along with an extradited fugitive. An interesting attribute of these clauses is that they permit transfer of the evidence even if the fugitive becomes unavailable for extradition. This may make some sense in the case of disappearance or flight, but seems a bit curious in the case of death.<sup>99</sup>

## Transit.

A somewhat less common clause permits transportation of a fugitive through the territory of either of the parties to a third country without the necessity of following the treaty's formal extradition procedure.<sup>100</sup>

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<sup>99</sup> The typical clause provides that "All articles, instruments, objects of value, documents, and other evidence relating to the offense may be seized and, upon granting of extradition, surrendered to the requesting State. The property mentioned in this Article may be surrendered even when extradition cannot be granted or effected due to the death, disappearance, or escape of the person sought. The rights of third parties in such property shall be duly respected," *Costa Rican Extradition Treaty*, Art. 18, ¶1, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *see also*, *South African Extradition Treaty*, Art.16, S. Treaty Doc. 106-24 (eff. June 25, 2001); *Extradition Treaty with Trinidad and Tobago*, Art. 13, ¶1, S. Treaty Doc. 105-21 (eff. Nov. 29, 1999); *Jordanian Extradition Treaty*, Art. 15, ¶1, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 20, ¶1, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 16, ¶1, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. XIV, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with Uruguay*, Art. 16, 35 U.S.T. 3215 (1983); *Italian Extradition Treaty*, Art XVIII, 35 U.S.T. 3039 (1984) *Jamaican Extradition Treaty*, Art. XVI, ¶1, S. Treaty Doc. 98-18 (eff. July 7, 1991); *Extradition Treaty with Thailand*, Art. 16, S. Treaty Doc. 98-16 (eff. May 17, 1991).

<sup>100</sup> *E.g.*, *Extradition Treaty with the Bahamas*, Art. 17, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994)(" (1) Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief statement of the facts of the case. (2) No authorization is required where air transportation is used and no landing is scheduled on the territory of the Contracting State. If an unscheduled landing occurs on the territory of the other Contracting State, transit shall be subject to paragraph (1) of this Article. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing"); *see also*, *Argentine Extradition Treaty*, Art. 18, S. Treaty Doc. 105-18 (eff. June 15, 2000); *Korean Extradition Treaty*, Art. 17, S. Treaty Doc. 106-2 (eff. Dec. 20, 1999); *Costa Rican Extradition Treaty*, Art. 19, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jordanian Extradition Treaty*, Art. 18, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 19, S. Treaty Doc. 104-5; *Bolivian Extradition Treaty*, Art. XV, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Extradition Treaty with Thailand*, Art. 17, S. Treaty Doc. 98-16 (eff. May 17, 1991); *Extradition Treaty with Uruguay*, Art. 17, 35 U.S.T. 3216 (1983); *Italian Extradition Treaty*, Art XIX, 35 U.S.T. 3040 (1984).

## U.K. Supplementary Treaty

Unique irritants in diplomatic relations between the United States and Great Britain stimulated a supplementary extradition treaty with singular characteristics.<sup>101</sup> “The Supplementary Treaty alters the extradition procedures in force under the 1977 Treaty in three significant ways: (1) it limits the scope of the political offense exception;<sup>102</sup> (2) it authorizes a degree of judicial inquiry into the factors motivating a request for extradition;<sup>103</sup> and (3) it creates a limited right to appeal an extradition decision,”<sup>104</sup> *In re Extradition of Artt*, 158 F.3d at 465 (9th Cir. 1998), redesignated, *In re Artt*, 248 F.3d 1197 (9<sup>th</sup> Cir. 2001).

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<sup>101</sup> “The Treaty was a response by the United States and British executive branches to several recent federal court decisions denying requests by the United Kingdom for the extradition of members of the Provisional Irish Republic Army . . . . [T]he denied requests were for PIRA members who had committed violent acts against British forces occupying Northern Ireland . . . . *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 559 F.Supp. 270 (S.D.N.Y. 1984); *In re Mullen*, No. 3-78-1099 MG (N.D.Cal. May 11, 1979),” *Questions of Justice; U.S. Courts’ Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty*, 62 NOTRE DAME LAW REVIEW 474, 475-76 n.8 (1987); *see also*, *Comparative Application of the Non-Discrimination Clause in the U.S.-U.K. Supplementary Extradition Treaty*, 5 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 493 (1993).

<sup>102</sup> “For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character: (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution; (b) murder, voluntary manslaughter, and assault causing grievous bodily harm; (c) kidnaping, abduction, or serious unlawful detention, including taking a hostage; (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense,” *British Supplementary Extradition Treaty*, Art. 1, S. Exec. Rep. 99-17 (eff. Dec. 23, 1986).

<sup>103</sup> “(a) Notwithstanding any other provision in this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions,” *id.* at Art. 3(a).

<sup>104</sup> “(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process,” *id.* at Art. 3(b).

## Alternatives to Extradition

The existence of an extradition treaty does not preclude the United States acquiring personal jurisdiction over a fugitive by other means, unless the treaty expressly provides otherwise.<sup>105</sup>

### Waiver.

Waiver or “simplified” treaty provisions allow a fugitive to consent to extradition without the benefit of an extradition hearing.<sup>106</sup> Although not universal, the provisions constitute the least controversial of the alternatives to extradition.

### Immigration Procedures.

Whether by a process similar to deportation or by simple expulsion, the United States has had some success encouraging other countries to surrender fugitives other than their own nationals without requiring recourse to extradition.<sup>107</sup> Ordinarily, American immigration procedures, on the other hand, have been less accommodating

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<sup>105</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Kasi v. Angelone*, 300 F.3d 487, 493-95 (4<sup>th</sup> Cir. 2002); *United States v. Noriega*, 117 F.3d 1206, 1212-213 (11<sup>th</sup> Cir. 1997); *United States v. Matt-Ballesteros*, 71 F.3d 754, 762-63 (9<sup>th</sup> Cir. 1995) .

<sup>106</sup> *E.g.*, *Extradition Treaty with Thailand*, Art. 15, S. Treaty Doc. 98-16 (eff. May 17, 1991) (“If the person sought irrevocably agrees in writing to extradition after personally being advised by the competent authority of his right to formal extradition proceedings and the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings”); *see also*, *Extradition Treaty with Cyprus*, Art.17, S. Treaty Doc. 105-16 (eff. Sept. 14, 1999); *Austrian Extradition Treaty*, Art. 20, S. Treaty Doc. 105-50 (eff. Jan. 1, 2000); *Costa Rican Extradition Treaty*, Art. 17, S. Treaty Doc. 98-17 (eff. Oct. 11, 1991); *Jordanian Extradition Treaty*, Art. 17, S. Treaty Doc. 104-3 (eff. July 29, 1995); *Hungarian Extradition Treaty*, Art. 18, S. Treaty Doc. 104-5; *Extradition Treaty with the Bahamas*, Art. 15, S. Treaty Doc. 102-17 (eff. Sept. 22, 1994); *Bolivian Extradition Treaty*, Art. XIII, S. Treaty Doc. 104-22 (eff. Nov. 21, 1966); *Italian Extradition Treaty*, Art XVII, 35 U.S.T. 3039 (1984); *Jamaican Extradition Treaty*, Art. XV, ¶1, S. Treaty Doc. 98-18 (eff. July 7, 1991); *see generally*, ABBELL & RISTAU at 143-46, 306-7.

<sup>107</sup> *United States v. Porter*, 909 F.2d 789, 790 (4<sup>th</sup> Cir. 1990); *United States v. Rezaq*, 134 F.3d 1121, 1126 (D.C.Cir. 1998); BASSIOUNI, at 183-248; ABBELL & RISTAU §13-5-2(2) (“In recent years, it has not been uncommon for foreign officials, particularly in lesser developed countries, to put a person sought by the United States on an airplane bound for this country in the custody of either United States law enforcement agents or their own law enforcement agents. Such deportation takes place without the requested country resorting to its formal administrative or judicial deportation procedures. It occurs most frequently in narcotics cases, and generally takes place where there is a close working relationship between United States law enforcement officers posted in that country and the police authorities of that country . . . . In addition to informal deportation by airplane, there is a large volume of informal deportations from Mexico to the United States. Most of these informal deportations are based on informal arrangements among local United States and Mexican law enforcement officials along the United States-Mexico border . . .”).

and have been called into play only when extradition has been found wanting.<sup>108</sup> They tend to be time consuming and usually can only be used in lieu of extradition when the fugitive is an alien. Moreover, they frequently require the United States to deposit the alien in a country other than one that seeks his or her extradition.<sup>109</sup> Yet in a few instances where an alien has been become naturalized by deception or where the procedures available against alien terrorists come into play, denaturalization or deportation may be considered an attractive alternative or supplement to extradition proceedings.<sup>110</sup>

### **Irregular Rendition/Abduction.**

Although far less numerous, American use of “irregular rendition” is a far more widely recognized alternative to extradition. An alternative of last resort, it involves kidnaping or deceit and has been reserved for terrorists, drug traffickers, and the like.<sup>111</sup> Kidnaping a defendant overseas and returning him to the United States for trial does not deprive American courts of jurisdiction unless an applicable extradition treaty explicitly calls for that result.<sup>112</sup> The individuals involved in the abduction, however, may face foreign prosecution, or at least be the subject of a foreign extradition request.<sup>113</sup> And the United States may be liable for claim under the Federal Tort Claims Act.<sup>114</sup>

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<sup>108</sup> E.g., *I.N.S. v. Doherty*, 502 U.S. 314 (1992); Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM LAW REVIEW* 317 (1992).

<sup>109</sup> E.g., *Kalejs v. I.N.S.*, 10 F.3d 441 (7th Cir. 1993)(deportation to Australia of a member of a German mobile killing unit in World War II who falsified immigration forms but who came to this country by way of Australia).

<sup>110</sup> The United States has denaturalized and deported former Nazi death camp guards who gained entry into the United States and/or American citizenship by concealing their pasts, e.g., *United States v. Balsys*, 524 U.S. 666 (1998); *United States v. Stelmokas*, 110 F.3d 302 (3d Cir. 1997); see also, *The Denaturalization and Extradition of Ivan the Terrible*, 26 *RUTGERS LAW REVIEW* 821 (1995); Bassiouni, at 183-232 (summarizing alternatives and criticizing their use in some instances).

<sup>111</sup> *United States v. Rezaq*, 134 F.3d 1121, 1130-132 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

<sup>112</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Torres Gonzalez*, 240 F.3d 14, 16 (1<sup>st</sup> Cir. 2001); *Kasi v. Angelone*, 300 F.3d 487, 493-500 (4<sup>th</sup> Cir. 2002); but see, *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 (9<sup>th</sup> Cir. 1995)(suggesting the possibility of a different result, “the only way we could exercise our supervisory powers in this particular case is if the defendant could demonstrate government misconduct ‘of the most shocking and outrageous kind,’ so as to warrant dismissal”).

<sup>113</sup> *Kear v. Hilton*, 699 F.2d 181 (4<sup>th</sup> Cir. 1983); *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnaping*, 81 *CALIFORNIA LAW REVIEW* 1541 (1993); *Transborder Abductions by American Bounty Hunters—The Jaffe Case and a New Understanding Between the United States and Canada*, 20 *GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* 489 (1990).

<sup>114</sup> *Alvarez-Machain v. United States*, 266 F.3d 1045, 1052-60 (9<sup>th</sup> Cir. 2001).



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## Appendix

### Countries with Whom the United States Has an Extradition Treaty

Country	Citation
Albania	49 Stat. 3313.
Antigua and Barbuda	T.Doc. 104-19 (entered into force 7/1/99)
Argentina	T.Doc. 105-18 (entered into force 6/6/01)
Australia	27 UST 957.
Austria	TIAS __ (entered into force 12/21/92)
Bahamas	T.Doc. 105-50 (entered into force 1/1/00)
	TIAS __ (entered into force 9/22/94)
Barbados	T.Doc. 105-20 (entered into force 3/3/00)
Belgium	T.Doc. 104-8 (entered into force 9/1/97)
Belize	T.Doc. 106-38 (entered into force 3/27/01)
Bolivia	TIAS__ (entered into force 11/21/96)
Brazil	15 UST 2093.
	15 UST 2112.
Bulgaria	43 Stat. 1886.
	49 Stat. 3250.
Burma	47 Stat. 2122.
Canada	27 UST 983.
	27 UST 1017.
	TIAS __ (entered into force 11/26/91)
Chile	32 Stat. 1850.
Colombia	TIAS __ (entered into force 3/4/82)
Congo	37 Stat. 1526.
	46 Stat. 2276.
	50 Stat. 1117.
	13 UST 2065.
Costa Rica	TIAS __ (entered into force 10/11/91)
Cuba	33 Stat. 2265.
	33 Stat. 2273.
	44 Stat. 2392.
Cyprus	T.Doc. 105-16 (entered into force 9/14/99)
Czech Republic	44 Stat. 2367.
	49 Stat. 3253.
Denmark	25 UST 1293.
Dominica	T.Doc. 105-19 (entered into force 5/25/00)
Dominican Republic	36 Stat. 2468.
Ecuador	18 Stat. 199.
	55 Stat. 1196.
Egypt	19 Stat. 572.
El Salvador	37 Stat. 1516.
Estonia	43 Stat. 1849.
	49 Stat. 3190.

Fiji	47 Stat. 2122. 24 UST 1965.
Finland	31 UST 944.
France	T.Doc. 105-13 (entered into force 2/1/02).
Gambia	47 Stat. 2122.
Germany, Federal Republic of	32 UST 1485. TIAS __ (entered into force: 3/11/93)
Ghana	47 Stat. 2122.
Greece	47 Stat. 2185. 51 Stat. 357.
Grenada	T.Doc. 105-19 (entered into force 9/14/99)
Guatemala	33 Stat. 2147. 55 Stat. 1097.
Guyana	47 Stat. 2122.
Haiti	34 Stat. 2858.
Honduras	37 Stat. 1616. 45 Stat. 2489.
Hong Kong	T.Doc. 105-3 (entered into force 1/21/98)
Hungary	T.Doc. 104-5 (entered into force 3/8/97)
Iceland	32 Stat. 1096. 34 Stat. 2887.
India	T.Doc. 105-30 (entered into force 7/21/99)
Iraq	49 Stat. 3380.
Ireland	TIAS 10813
Israel	14 UST 1707. 18 UST 382.
Italy	TIAS 10837.
Jamaica	47 Stat. 2122. TIAS __ (entered into force 7/7/91)
Japan	31 UST 892.
Jordan	T.Doc. 104-3 (entered into force:7/29/95)
Kenya	47 Stat. 2122. 16 UST 1866.
Kiribati	28 UST 227.
Korea	T.Doc. 106-2 (entered into force 12/20/99)
Latvia	43 Stat. 1738. 49 Stat. 3131.
Lesotho	47 Stat. 2122.
Liberia	54 Stat. 1733.
Liechtenstein	50 Stat. 1337.
Lithuania	43 Stat. 1835. 49 Stat. 3077.
Luxembourg	T.Doc. 105-10 (entered into force 2/1/02)
Malawi	47 Stat. 2122. 18 UST 1822.
Malaysia	T.Doc. 104-26 (entered into force 6/2/97).
Malta	47 Stat. 2122.
Mauritius	47 Stat. 2122.

Mexico	31 UST 5059 T.Doc. 105-46 (entered into force 5/21/01)
Monaco	54 Stat. 1780.
Nauru	47 Stat. 2122.
Netherlands <sup>115</sup>	TIAS 10733.
New Zealand	22 UST 1.
Nicaragua	35 Stat. 1869.
Nigeria	47 Stat. 2122.
Norway	31 UST 5619.
Pakistan	47 Stat. 2122.
Panama	34 Stat. 2851.
Papua New Guinea	47 Stat. 2122.
Paraguay	T.Doc. 106-4 (entered into force 3/9/01)
Peru	31 Stat. 1921.
Philippines	1994 UNTS 279 (entered into force 11/22/96)
Poland	T.Doc. 105-14 (entered into force 9/17/99)
Portugal	35 Stat. 2071.
Romania	44 Stat. 2020. 50 Stat. 1349.
Saint Christopher and Nevis	T.Doc. 105-19 (entered into force 2/23/00)
Saint Lucia	T.Doc. 105-19 (entered into force 2/2/00)
Saint Vincent & the Grenadines	T.Doc. 105-19 (entered into force 9/8/99)
San Marino	35 Stat. 1971. 49 Stat. 3198.
Seychelles	47 Stat. 2122.
Sierra Leone	47 Stat. 2122.
Singapore	47 Stat. 2122. 20 UST 2764.
Slovak Republic	44 Stat. 2367. 49 Stat. 3253.
Solomon Islands	28 UST 277.
South Africa	T.Doc. 106-24 (entered into force 6/25/01)
Spain	22 UST 737. 29 UST 2283 TIAS __ (entered into force 7/2/93) TIAS __ (entered into force 7/25/99)
Sri Lanka	T.Doc. 106-34 (entered into force 1/12/01)
Suriname	26 Stat. 1481. 33 Stat. 2257.
Swaziland	47 Stat. 2122. 21 UST 1930.
Sweden	14 UST 1845. TIAS 10812.

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<sup>115</sup> Treaty entered into force for: Kingdom in Europe, Aruba, and Netherlands Antilles.

CRS-37

Switzerland	T.Doc. 104-9 (entered into force 9/10/97).
Tanzania	47 Stat. 2122. 16 UST 2066.
Thailand	43 Stat. 1749. TIAS __ (entered into force 5/17/91)
Tonga	47 Stat. 2122. 28 UST 5290.
Trinidad and Tobago	T.Doc. 105-21 (entered into force 11/29/99)
Turkey	32 UST 3111.
Tuvalu	28 UST 227. 32 UST 1310.
United Kingdom	28 UST 227. TIAS 12050
Uruguay	TIAS 10850.
Venezuela	43 Stat. 1698.
Zambia	47 Stat. 2122.
Zimbabwe	T.Doc. 105-33(entered into force 4/26/00)



## Countries with Whom the United States Has No Extradition Treaty

Afghanistan	Georgia	Qatar
Algeria	Guinea	Russian Federation
Andorra	Guinea-Bissau	Rwanda
Angola	Indonesia	Sao Tome & Principe
Armenia		Saudi Arabia
	Iran	
Azerbaijan	Kazakhstan	Senegal
Bahrain	Korea, North	Slovenia*
Bangladesh	Kuwait	Somalia
Belarus		Sudan
Benin	Kyrgyzstan	Syria
	Laos	Taiwan
Bhutan	Lebanon	
Bosnia*	Libya	Tajikistan
and Herzegovina	Macedonia*	Togo
Botswana		Tunisia
Brunei	Madagascar	Turkmenistan
Burkina Faso	Maldives	Uganda
	Mali	
Burundi	Marshall Islands	Ukraine
Cambodia	Mauritania	United Arab Emirates
Cameroon		Uzbekistan
Cape Verde	Micronesia	Vanuatu
Central African Republic	Moldova	Vatican City
	Mongolia	
Chad	Morocco	Vietnam
China	Mozambique	Western Samoa
Comoros		Yemen, Republic of
Croatia*	Myanmar	Yugoslavia*
Ivory Coast (Cote D'Ivoire)	Namibia	Zaire
	Nepal	
Djibouti	Niger	
Equatorial Guinea	Oman	
Eritrea	Palua	
Ethiopia		

\* The United States had an extradition treaty with the former Yugoslavia prior to its breakup (32 Stat. 1890).

\* Although not specifically identified in the State Department's TREATIES IN FORCE (1998), the United States apparently has extradition agreements with the Republics of Palau, the Marshall Islands, and Micronesia, *cf.*, *In re Extradition of Lin*, 915 F.Supp. 206, 207 (D.Guam 1995); P.L. 99-239, 99 Stat. 1770 (1986); H.Rept. 99-188 (Pt.1) 192 (1985).