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# EXTRADITION TREATY WITH BELGIUM AND SUPPLEMENTARY EXTRADITION TREATY WITH BELGIUM

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Mr. HELMS, from the Committee on Foreign Relations, submitted the following

# REPORT

[To accompany Treaty Docs. 104–7 and 104–8]

The Committee on Foreign Relations to which was referred the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987 and the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1987, having considered the same, reports favorably thereon with one proviso to each treaty and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolutions of ratification.

## I. PURPOSE

Modern extradition treaties (1) identify the offenses for which extradition will be granted, (2) establish procedures to be followed in presenting extradition requests, (3) enumerate exceptions to the duty to extradite, (4) specify the evidence required to support a finding of a duty to extradite, and (5) set forth administrative provisions for bearing costs and legal representation.

## II. BACKGROUND

On April 27, 1987, the President signed two extradition treaties with Belgium. The Treaties were transmitted to the Senate for its advice and consent to ratification on June 12, 1995. In recent years the Departments of State and Justice have undertaken a modernization effort for U.S. bilateral extradition treaties to better combat international criminal activity, such as drug trafficking, terrorism and money laundering. The United States is a party to

approximately 100 bilateral extradition treaties. According to the Justice Department, during 1995 131 individuals were extradited to the United States and 79 individuals were extradited from the United States.

The increase in international crime also has prompted the U.S. Government to become a party to several multilateral international conventions which, although not themselves extradition treaties, deal with international law enforcement and provide that the offenses which they cover shall be extraditable offenses in any extradition treaty between the parties. These include: The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague), art. 8; the Convention to Discourage Acts of Violence Against Civil Aviation (Montreal), art. 8; the Protocol Amending the Single Convention on Narcotic Drugs of 1961, art. 14 amending art. 36(2)(b)(I) of the Single Convention; the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (Organization of American States), art. 3; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8; the International Convention against the Taking of Hostages, art. 10; the Convention on the Physical Protection of Nuclear Materials, art. 11; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna). These multilateral international agreements are incorporated by reference in the United States' bilateral extradition treaties.

## III. SUMMARY

### A. GENERAL

An extradition treaty is an international agreement in which the Requested State agrees, at the request of the Requesting State and under specified conditions, to turn over persons who are within its jurisdiction and who are charged with crimes against, or are fugitives from, the Requesting State. Extradition treaties can be bilateral or multilateral, though until recently the United States showed little interest in negotiating multilateral agreements dealing with extradition.

The contents of recent treaties follow a standard format. Article 1 sets forth the obligation of contracting states to extradite to each other persons charged by the authorities of the Requesting State with, or convicted of, an extraditable offense. Article 2, sometimes referred to as a dual criminality clause, defines extraditable offenses as offenses punishable in both contracting states by prison terms of more than one year. Attempts or conspiracies to commit an extraditable offense are themselves extraditable. Several of the treaties provide that neither party shall be required to extradite its own nationals. The treaties carve out an exception to extraditable crimes for political offenses. The trend in modern extradition treaties is to narrow the political offense exceptions.

The treaties include a clause allowing the Requested State to refuse extradition in cases where the offense is punishable by death in the Requesting State, unless the Requesting State pro-

vides assurances satisfactory to the Requested State that the individual sought will not be executed.

In addition to these substantive provisions, the treaties also contain standard procedural provisions. These specify the kinds of information that must be submitted with an extradition request, the language in which documents are to be submitted, the procedures under which documents submitted are to be received and admitted into evidence in the Requested State, the procedures under which individuals shall be surrendered and returned to the Requesting State, and other related matters.

## B. SUMMARY OF PRIMARY PROVISIONS

### *1. Extraditable offenses: The dual criminality clause*

Article 2 contains a standard definition of what constitutes an extraditable offense: an offense is extraditable if it is punishable under the laws of both parties by a prison term of at least one year. Attempts and conspiracies to commit such offenses, and participation in the commission of such offenses, are also extraditable. If the extradition request involves a fugitive, it shall be granted only if the remaining sentence to be served is more than six months.

The dual criminality clause means, for example, that an offense is not extraditable if in the United States it constitutes a crime punishable by imprisonment of more than one year, but it is not a crime in the treaty partner or is a crime punishable by a prison term of less than one year. In earlier extradition treaties the definition of extraditable offenses consisted of a list of specific categories of crimes. This categorizing of crimes has resulted in problems when a specific crime, for example drug dealing, is not on the list, and is therefore not extraditable. The result has been that as additional offenses become punishable under the laws of both treaty partners the extradition treaties between them need to be renegotiated or supplemented. A dual criminality clause obviates the need to renegotiate or supplement a treaty when it becomes necessary to broaden the definition of extraditable offenses.

### *2. Extraterritorial offenses*

In order to extradite individuals charged with extraterritorial crimes (offenses committed outside the territory of the Requesting State) such as international drug traffickers and terrorists, provision must be made in extradition treaties. The Belgium treaty and the Supplementary Belgium treaty are silent on the extraditionality of extraterritorial offenses. The Belgium treaty applies only to extraditable offenses within "the jurisdiction" of one of the contracting states (art. 1). Although the term "jurisdiction" could be interpreted as referring to the power of the courts of the Requesting State to try the alleged offender, historically the United States has interpreted it as referring only to the territorial jurisdiction of the Requesting State.[1] Thus, it would appear that the Belgium treaty applies only to offenses committed on the territory of one of the parties.

[1] Michael Abbell and Bruno Ristau, 4 International Judicial Assistance 64 (International Law Institute, 1990).

*3. Political offense exception*

In recent years the United State has been promoting a restrictive view of the political offense exception in furtherance of its campaign against terrorism, drug trafficking, and money laundering. Though some of the treaties considered by the Committee have taken a narrower view than others of the political offense exception, all of them give it a more limited scope than earlier U.S. extradition treaties. In general, the political offense exception is narrower in the Supplementary Belgium treaty, which excludes certain violent crimes, (i.e. murder, kidnapping, and others) from the political offense exception.

The exclusion from the political offense exception for crimes covered by multilateral international agreements, and the obligation to extradite for such crimes or submit the case to prosecution by the Requested State, is now a standard exclusion and is contained in the proposed treaty. The incorporation by reference of these multilateral agreements is intended to assure that the offenses with which they deal shall be extraditable under an extradition treaty. But, extradition for such offenses is not guaranteed. A Requested State has the option either to extradite or to submit the case to its competent authorities for prosecution. For example, a Requested State could refuse to extradite and instead declare that it will itself prosecute the offender.

The Belgium treaty and Supplementary Belgium treaty list for the most part the same exclusions to the political offense exception as are in other treaties, but take a somewhat different approach in dealing with these exclusions. First, it should be noted that the Belgium treaty itself contains a broad political offense exception with an exclusion only for attacks on a head of state or member of his family. It is the Supplementary Belgium treaty, which was negotiated for the specific purpose of limiting the political offense exception in order to facilitate the extradition of terrorists, that contains substantially the larger list of exclusions. However, the Supplementary Belgium treaty provides that the categories of offenses excluded from the political exception shall be extraditable, but only at the discretion of the Requested State, unless they create a collective danger to the life or liberty of any persons, affect an innocent bystander, involve the use of cruel or vicious means, or involve the taking of a hostage. In any of these latter situations, extradition, when requested, shall be mandatory rather than discretionary (arts. 2 and 3). In effect, the Supplementary Belgium treaty reserves for the Requested State discretion whether or not to grant extradition for certain types of offenses, except when they are considered to be part of a terrorist plot or attack, in which case it is under an obligation to extradite.

*4. The death penalty exception*

The United States and other countries appear to have different views on capital punishment. Under the proposed treaties, Belgium may refuse extradition for an offense punishable by the death penalty in the Requesting State if the same offense is not punishable by the death penalty in the Requested State, unless the Requesting State gives assurances satisfactory to the Requested State that the death penalty will not be imposed or carried out.

*5. The extradition of nationals*

The U.S. does not object to extraditing its own nationals and has sought to negotiate treaties without nationality restrictions. Many countries, however, refuse to extradite their own nationals. U.S. extradition treaties take varying positions on the nationality issue.

The Belgium treaty contains the traditional nationality clause providing that neither party is obligated to extradite its own nationals, but that they may do so at their discretion (Belgium, art. 3). Upon a refusal to extradite, the Requested State may be required by the Requesting State to submit the case to its authorities for prosecution.[2]

*6. Retroactivity*

The proposed treaty states that it shall apply to offenses committed before as well as after it enters into force (art. 20). These retroactivity provisions do not violate the Constitution's prohibition against the enactment of ex post facto laws which applies only to enactments making criminal acts that were innocent when committed, not to the extradition of a defendant for acts that were criminal when committed but for which no extradition agreement existed at the time.

*7. The rule of speciality*

The rule of speciality (or specialty), which prohibits a Requesting State from trying an extradited individual for an offense other than the one for which he was extradited, is a standard provision included in U.S. bilateral extradition treaties, including the six under consideration. The Belgium treaty expresses the basic prohibition and also includes the following exceptions: an extradited individual may be tried by the Requesting State for an offense other than the one for which he was extradited if the Requested State (which may request the submission of additional supporting documents) waives the prohibition; the extradited individual leaves the territory of the Requesting State and voluntarily returns to it; the extradited individual does not leave the territory of the Requesting State within 15 days of the day on which he or she is free to leave; or, the extradited individual voluntarily consents to being tried for an offense other than the one for which he was extradited (art. 15). These exceptions to the speciality rule are designed to allow a Requesting State some latitude in prosecuting offenders for crimes other than those for which they had been specifically extradited.

*8. Lapse of time*

The Belgium treaty states that extradition shall be denied if prosecution of an offense or execution of a penalty is barred by the statute of limitations of the Requested State (art. 2(6)).

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[2] An article in the Washington Post, A25, of June 28, 1996, reported that the Constitutional Court in Italy refused to allow the extradition to the United States of an Italian-born U.S. citizen or resident under the U.S.-Italy extradition treaty for a murder he committed in the United States despite U.S. assurances he would not be subject to the death penalty.

## IV. Entry Into Force and Termination

### A. ENTRY INTO FORCE

Both Treaties will enter into force on the first day of the second month after the exchange of instruments of ratification.

### B. TERMINATION

Both Treaties shall terminate six months after notice by a Party of an intent to terminate the Treaty.

## V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed treaties on Wednesday, July 17, 1996. The hearing was chaired by Senator Helms. The Committee considered the proposed treaties on July 24, 1996, and ordered the proposed treaties favorably reported with one proviso to each treaty by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaties.

## VI. Committee Comments

The Committee on Foreign Relations recommended favorably the proposed treaty. The Committee believes that the proposed treaty is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. In 1996 and the years ahead, U.S. law enforcement officers increasingly will be engaged in criminal investigations that traverse international borders. Certainly, sovereign relationships have always been important to prosecution of suspected criminals. The first recorded extradition treaty dates as far back as 1280 B.C. under Ramses II, Pharaoh of Egypt. The United States entered into its first extradition treaty in 1794 with Great Britain. Like these early treaties, the basic premise of the treaties is to facilitate, under specified conditions, the transfer of persons who are within the jurisdiction of one nation, and who are charged with crimes against, or are fugitives from, the nation requesting extradition. Despite the long history of such bilateral treaties, the Committee believes that these treaties are more essential than ever to U.S. efforts to bring suspected criminals to justice.

In 1995, 131 persons were extradited to the U.S. for prosecution for crimes committed in the U.S., and the U.S. extradited 79 individuals to other countries for prosecution. After the Senate ratified an extradition treaty with Jordan in 1995, the U.S. Attorney General was able to take into custody an alleged participant in the bombing of the World Trade Center. His prosecution would not be possible without an extradition treaty. Crimes such as terrorism, transshipment of drugs by international cartels, and international banking fraud are but some of the international crimes that pose serious problems to U.S. law enforcement efforts. The Committee believes that modern extradition treaties provide an important law enforcement tool for combating such crimes and will advance the interests of the United States.

The proposed resolution of ratification includes a proviso that reaffirms that ratification of this treaty does not require or authorize

legislation that is prohibited by the Constitution of the United States. Bilateral extradition treaties rely on relationships between sovereign countries with unique legal systems. In as much as U.S. law is based on the Constitution, this treaty may not require legislation prohibited by the Constitution.

## VII. Explanation of Proposed Treaties

The following is the Technical Analysis of the Extradition Treaty submitted to the Committee on Foreign Relations by the Departments of State and Justice prior to the Committee hearing to consider pending extradition treaties.

### A. Technical Analysis of the Extradition Treaty Between the United States of America and the Kingdom of Belgium

On April 27, 1987, in Brussels, the United States signed a treaty on extradition with the Kingdom of Belgium ("the Treaty"). The Treaty is intended to replace the outdated treaties currently in force between the United States and Belgium[3] with a modern agreement for facilitating the extradition of serious offenders. No new legislation is needed in Belgium or in the United States in order to implement the provisions of the Treaty.

The following technical analysis of the Treaty was prepared by the United States delegation that conducted the negotiations.

*Article 1—Obligation to extradite*

This article formally obligates each Contracting State to extradite to the other Contracting State persons charged with or convicted of an extraditable offense, subject to the other provisions of the Treaty.

*Article 2—Extraditable offenses*

This article contains the basic guidelines for determining what constitutes an extraditable offense. The Treaty is similar to recent United States extradition treaties with Canada (Protocol), Jamaica, Italy, Ireland, Thailand, Sweden (Supplementary Convention), Costa Rica, Switzerland and the Bahamas in that it does not list the offenses for which extradition may be granted.

Paragraph 1 permits extradition for any offense punishable under the laws of both Contracting States by deprivation of liberty (i.e., imprisonment or other form of detention) for more than one year. By defining extraditable offenses in terms of "dual criminality" rather than attempting to list each extraditable crime, the Treaty obviates the need to renegotiate or supplement it should the Contracting States pass criminal laws dealing with a new type of criminal activity, or should the list inadvertently fail to cover an important type of criminal activity punishable in both countries.

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[3] Extradition between the United States and Belgium is currently governed by the following: (1) the Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium ("the 1901 Treaty"), Oct. 26, 1901, 32 Stat. 1894, T.S. 409, 5 Bevans 508; (2) the Supplementary Convention to the Extradition Convention of October 26, 1901, June 20, 1935, 49 Stat. 3276, T.S. 900, 5 Bevans 566; and (3) the Supplementary Extradition Convention, Nov. 14, 1963, 15 U.S.T. 2252, T.I.A.S. No. 5715, 522 U.N.T.S. 237 ("the Supplementary Conventions").

If extradition is sought for the execution of a sentence, paragraph 2 requires that the original sentence imposed be for imprisonment for a period of at least one year.[4]

Paragraph 3, which is similar to provisions in many other recent United States extradition treaties, expressly provides that extradition be granted for attempting to commit an extraditable offense, being an accessory to an extraditable offense, and conspiring to commit an extraditable offense (in violation of United States law) or being a member of an "association of wrongdoers" (the Belgian legal equivalent of a conspiracy).

Paragraphs 4 (a) and (b) state that in determining whether an offense is extraditable, the Contracting States "shall consider only the essential elements of the offense punishable under the laws of both states," and shall not consider as an essential element of an offense any element included in the offense (such as use of the mails or interstate transportation of stolen goods) for the purpose of establishing jurisdiction in a United States federal court. Foreign judges are often confused by the fact that many United States federal statutes require proof of certain elements solely to establish jurisdiction in United States federal courts. These judges know of no similar requirement in their own criminal law and on occasion have denied the extradition of fugitives sought by the United States on federal charges on this basis. Paragraph 4 requires that such elements be disregarded in applying the dual criminality principle. Thus, this clause will ensure that Belgian authorities treat United States requests for extradition for charges such as mail fraud[5] in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property[6] in the same manner as unlawful possession of stolen property. A similar provision is contained in all recent United States extradition treaties.

Paragraph 4(c) states that the Contracting States "shall disregard that the respective laws do not place the offense within the same category of offenses or describe the offense by the same terminology" in determining whether the offense is extraditable. This clause requires each Contracting State to disregard differences in the categorization of the offense in determining whether dual criminality exists and to overlook mere differences in the terminology used to define the offense under the laws of each Contracting State. This reflects the intention of both countries to interpret the principles of paragraph 1 broadly. Similar clauses are found in most recent United States extradition treaties.

Paragraph 5, which is similar to provisions in most recent United States extradition treaties, permits extradition for crimes that otherwise are not extraditable under the Treaty solely because they are misdemeanors, when extradition is granted with respect to an-

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[4] Some recent United States extradition treaties state that persons who have been convicted of an extraditable offense and sentenced to imprisonment may be extradited only if at least a certain portion of the sentence (often six months) remains to be served on the outstanding sentence. The Treaty contains no such requirement. The negotiators concluded that while there is merit in attempting to limit extradition to serious cases because of the significant costs associated with the process, the sentence imposed is a better measure of the seriousness of the offense than the portion of the sentence remaining to be served.

[5] 18 U.S.C. § 1341.

[6] See 18 U.S.C. § 2314.

other more serious offense. This provision permits the early resolution of all pending charges in the Requesting State.[7]

Paragraph 6 requires the Requested State to deny extradition if prosecution of the offense for which extradition is sought would be barred by the Requested State's statute of limitations. The practical effect of this provision is to permit the Requested State to require the Requesting State to comply with the requirements of the Requested State's statute of limitations.

The requirements of the Requesting State's prosecution may not easily conform to the Requested State's statute of limitations; the burden imposed by paragraph 6 on the Requesting State, however, is lessened by the fact that this paragraph requires the Requested State to consider insofar as possible the effect of acts that in the Requesting State interrupt the running of the Requesting State's statute of limitations. For example, under United States law, a defendant's flight from the jurisdiction to avoid prosecution tolls the running of the statute of limitations. The negotiators intended that Belgian authorities keep this fact in mind when considering any United States extradition request in which the comparable Belgian statute of limitations arguably has expired.

*Article 3—Nationality*

This article states that each Contracting State has the discretionary power to extradite its own nationals unless prohibited from doing so by internal legislation. This clause, like the clause in article IV of the 1901 Treaty which it replaces, permits the United States to extradite its nationals to Belgium in accordance with established United States policy favoring such extraditions.[8] However, as Belgium is barred by its internal law from extraditing Belgian nationals,[9] it is unlikely that Belgium will actually surrender its nationals to the United States under the Treaty. The Treaty therefore includes a requirement that if the Requested States refuses extradition solely on the basis of nationality, the Requested State must submit the case to its authorities for prosecution if asked to do so by the Requesting State.

Similar provisions are found in many recent United States extradition treaties.[10]

*Article 4—Political and military offenses*

Paragraph 1 prohibits extradition for political offenses.

Paragraph 2 states that a murder or other criminal act directed against Heads of State of the Contracting States, or a member of their families, or an attempt to commit, conspiracy to commit, or being an accessory to such a crime, shall not be considered political offenses within the meaning of paragraph 1.

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[7] See, e.g., U.S.-Italy Extradition Treaty, Oct. 13, 1983, art. II(3) T.I.A.S. No. 10837.

[8] See generally Shearer, "Extradition in International Law," 110–14 (1970); Whiteman, "Digest of International Law," 871–76 (1968). Our policy of drawing no distinction between United States nationals and others in extradition matters has been underscored by Congress in legislation. Title 18, United States Code, Section 3196 authorizes the Secretary of State to extradite United States citizens pursuant to treaties that permit but do not expressly require surrender of citizens as long as the other requirements of the treaty have been met. 18 U.S.C. § 3196.

[9] See Loi du 15 Mars 1874 Sur Les Extraditions, Matieres Penales, Codes Belge, art. 1.

[10] See, e.g., U.S.-Costa Rica Extradition Treaty, Nov. 10, 1922, art. 8, 43 Stat. 1621, T.S. 668, 6 Bevans 1033; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 9, 31 U.S.T. 5059, T.I.A.S. No. 9656.

Paragraph 3 bars extradition when the executive authority of the Requested State determines that the request, although appearing to be for an extraditable offense, is in fact politically motivated. This paragraph is similar to provisions in other recent United States extradition treaties that permit denial of extradition if the Requested State determines that the request was made for political purposes or with political motivation.[11]

Paragraph 4 provides that extradition may be denied if the offense is an offense under military law that is not an offense under ordinary criminal law. An example of such a crime is desertion.[12]

The Treaty contains only a portion of the agreement between the two Contracting States concerning application of the political offense exception. Because of the seriousness with which both countries view acts of terrorism, the Contracting States signed the Supplementary Treaty on Extradition to Promote the Repression of Terrorism ("the Supplementary Treaty") on March 17, 1987. The Supplementary Treaty further restricts the application of the political offense exception, making it unavailable for the offenses of murder, hostage-taking, and other crimes typically committed by terrorists.

Paragraph 5 establishes that when the provisions of paragraphs 1 through 4 conflict with provisions of the Supplementary Treaty, the terms of the Supplementary Treaty control.

*Article 5—Prior jeopardy for the same offense*

Paragraph 1, which prohibits extradition if the person sought has been found guilty, convicted, or acquitted in the Requested State for the offense for which extradition is requested, is similar to provisions in many United States extradition treaties. This paragraph permits extradition, however, if the person sought is charged in each Contracting State with different offenses arising out of the same basic transaction.

Paragraph 1 prohibits extradition when the person sought has been "found guilty" or "convicted" of the same offense in the Requested State. While these terms are synonymous under United States law, they are distinct concepts in civil law systems. Both terms are used in this paragraph to ensure that extradition is barred after either a finding of guilt or a conviction for the same offense under Belgian law.

Paragraph 2 prohibits the Requested State from refusing to extradite a person sought on the basis that the Requested State's authorities declined to prosecute or instituted and later discontinued criminal proceedings against the person. This provision was included in the Treaty because a decision by the Requested State to forego prosecution or to drop charges previously filed may be the result of a failure to obtain sufficient evidence or witnesses for

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[11] CF. U.S.-Jamaica Extradition Treaty, June 14, 1983, art. III(3), T.I.A.S. No. —; U.S.-Spain Extradition Treaty, May 29, 1970, art. 5(5), 22 U.S.T. 737, T.I.A.S. No. 7136, 796 U.N.T.S. 245; U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 4(1), T.I.A.S. No. 10733; U.S.-Ireland Extradition Treaty, July 13, 1983, art. IV(c), T.I.A.S. No. 10813.

In the United States, longstanding law and practice have been that the Secretary of State alone has the discretion to determine whether or not a foreign country's request is based on improper political motivation. See *Eain* v. *Wilkes,* 641 F.2d 504, 513–18 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Paragraph 3 follows this jurisprudence in specifying that the "executive authority" of the Requested State makes this determination.

[12] See, e.g., Matter of Extradition of Suarez-Mason, 694 F. Supp. 676, 703 (N.D. Cal. 1988).

trial, while the prosecution in the Requesting State may not suffer from the same impediments. This provision should enhance the Contracting Parties' ability to extradite to the jurisdiction that has the better chance of a successful prosecution.

*Article 6—Humanitarian considerations*

Paragraph 1 permits the Requested State to refuse extradition when the offense for which extradition is sought is punishable by death in the Requesting State, but not in the Requested State, unless the Requesting State provides assurances the Requested State considers sufficient that if the death penalty is imposed, it will not be carried out. Similar provisions are found in many recent United States extradition treaties.[13]

Paragraph 2 permits the executive authority of the Requested State broad discretion to deny extradition on humanitarian grounds in accordance with its internal law. Similar provisions are found in United States extradition treaties with the Netherlands, Sweden, Norway, and Finland. The United States does not favor including such broad discretion to deny extradition in our treaties; the Belgian delegation, however, insisted on this provision to satisfy requirements of Belgian law.[14]

*Article 7—Extradition procedures and required documents*

This article, which is similar to provisions in most recent United States extradition treaties, sets out the documentary and evidentiary requirements for an extradition request.

Paragraph 1 requires that each formal request for extradition be submitted through the diplomatic channel. A formal extradition request may be preceded by a request for the provisional arrest of the person sought pursuant to article 8. Provisional arrest requests need not be initiated through the diplomatic channel provided the requirements of article 8 are met.

Paragraph 2 outlines the information that must accompany every request for extradition under the Treaty.

Paragraph 3 lists the additional information needed when the person is sought for trial in the Requesting State. Paragraph 3(c) requires that if the person sought has not yet been convicted of the crime for which extradition is requested, the Requesting State must provide "such evidence as would justify the committal for trial of the person if the offense had been committed in the Requested State."

Paragraph 4 sets forth the information needed, in addition to the requirements of paragraph 2, when the person sought has already been tried and convicted in the Requesting State.

Under United States law, persons are committed for trial upon a showing of probable cause; therefore, when Belgium is the Requesting State, this paragraph requires that it submit sufficient evidence to establish probable cause that the crime for which extradition is requested was committed and the person sought committed it. As in the case of a probable cause finding at a preliminary

[13] See, e.g., U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 7, T.I.A.S. No. 10733; US-Ireland Extradition Treaty, July 13, 1983, art. VI T.I.A.S. No. 10813; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 8, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[14] See Loi du 15 Mars 1874 Sur Les Extraditions, Matieres Penales, Codes Belge, art 2.

hearing in the United States, the extradition magistrate's finding of probable cause may be based on hearsay evidence in whole or in part.

Under Belgian law, the quantum of evidence needed to "justify the committal to trial" of a person charged with an offense is essentially the equivalent of probable cause,[15] although the term "probable cause" is not present in Belgian law. Thus, paragraph 3(c) has the practical effect of requiring the United States to provide a showing of probable cause in order to obtain the extradition of a fugitive from Belgium.

Paragraph 4 makes it clear that once a conviction has been obtained, no showing of probable cause is required. In essence, the fact of conviction speaks for itself, a position taken in recent United States court decisions, even absent a specific treaty provision.[16] Paragraph 4(d) states that when a person has been convicted but not yet sentenced, the Requesting State must provide a copy of the arrest warrant and must affirm that a sentence will be imposed.

Paragraph 4(e) states that if a person sought was found guilty in absentia, the documentation required for extradition includes both proof of conviction and the same documentation required in cases in which no conviction has been obtained. This is consistent with the longstanding United States policy of requiring such documentation in extraditions of persons convicted in absentia.

*Article 8—Admissibility of documents*

This article establishes that evidence submitted in support of an extradition request shall be admissible at an extradition proceeding if authenticated by one of three methods.

Subparagraph (a) states that United States extradition requests to Belgium shall be authenticated by the Department of State, thus codifying existing practice in this matter.

Subparagraph (b) describes the procedure for authenticating Belgian requests to the United States. It follows the authentication requirements set forth in Title 18, United States Code, Section 3190.[17]

Subparagraph (c) provides a third method for authenticating evidence for an extradition proceeding: such evidence is admissible if it is authenticated in any manner accepted by the laws of the Requested State. This provision was inserted in order to prevent a situation in which relevant evidence that normally satisfies the evidentiary rules of the Requested State would be inadmissable at an extradition hearing due to an inadvertent error or omission in the authentication process.

*Article 9—Translation*

This article follows the standard practice of requiring that extradition documents be written in or translated into the language of the Requested State. Because Belgium has two official languages, French and Flemish (Dutch), the United States has the option of translating its requests into either language.

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[15] See Chapitre I, Titre II, Matieres Penales, Codes Belge, art. 221.

[16] See *Spatola* v. *United States,* 741 F. Supp. 362, 374 (E.D.N.Y. 1990), aff'd, 925 F.2d 615 (2d Cir. 1991); *United States* v. *Clark,* 470 F. Supp. 976 (D. Vt. 1979).

[17] See 18 U.S.C. § 3190.

*Article 10—Provisional arrest*

This article describes the process by which a person sought in one Contracting State may be arrested and detained in the other while the formal extradition documentation is prepared.

Paragraph 1 provides that a request for provisional arrest may be made directly between the United States Department of Justice and the Belgian Ministry of Justice; Interpol also may be used as a channel to transmit messages in this regard. Experience has shown that the ability to call upon Interpol channels in emergency situations can be crucial when a fugitive is poised to flee.

Paragraph 2 sets forth the information needed from the Requesting State in support of its provisional arrest request.

Paragraph 3 requires that the Requested State notify the Requesting State of the disposition of the provisional arrest request and advise it of any reasons for denial.

Paragraph 4 provides that the person who is provisionally arrested shall be detained for no more than 75 days and must be released from detention if the Requesting State does not file a fully documented request for extradition with the executive authority of the Requested State within that time period. When the United States is the Requested State, the executive authority is the Department of State.[18] Although the person provisionally arrested must be released from custody if the documents are not received within the 75-day period, the proceedings against the person need not be dismissed.

Paragraph 5 states that if the formal request with supporting documentation is presented at a later date, the person may be taken into custody again, and the extradition proceedings may be commenced anew.

*Article 11—Decision and surrender*

This article requires that the Requested State promptly notify the Requesting State through diplomatic channels of its decision on the extradition request. If extradition is denied, the Requested State must provide available information as to the reasons for the denial. If extradition is granted, article 11 requires the Requesting State to remove the person sought within the time period set by the law of the Requested State, or else the person may be released from custody and the Requested State may subsequently refuse extradition for the same offense.

*Article 12—Temporary and deferred surrender*

Paragraph 1 provides for the temporary surrender of a person sought for prosecution in the Requesting State who is being prosecuted or is serving a sentence in the Requested State. A person temporarily transferred pursuant to the Treaty is to be returned to the Requested State at the conclusion of the proceedings in the Requesting State. Such temporary surrender furthers the interests of justice in that it permits trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of a successful prosecution. Such transfer may also be advantageous to the person sought in that: (1) it permits resolu-

[18] See *Clark*, 470 F. Supp. 976, 979.

tion of the charges sooner; (2) it may make it possible for any sentence to be served in the Requesting State concurrently with the sentence in the Requested State; and (3) it permits defense against the charges while favorable evidence is fresh and more likely to be available. Similar provisions are found in many recent United States extradition treaties.

Paragraph 2 provides that the surrender of a person who is being prosecuted or serving a sentence in the Requested State may be deferred until the proceedings and execution of any punishment imposed are completed.

*Article 13—Requests for extradition made by several states*

This article follows the practice of many recent United States extradition treaties in listing factors that the Requested State must consider in determining to which country a person should be surrendered when reviewing requests from two or more countries for the extradition of the same person. For the United States, the Secretary of State makes this decision.

*Article 14—Seizure and surrender of property*

This article permits the seizure by the Requested State of all property—articles, documents and other evidence—connected with the offense to the extent permitted by the Requested State's internal law.

Paragraph 1 also provides that these items may be surrendered to the Requesting State upon the granting of the extradition or even if extradition cannot be affected due to the death, disappearance or escape of the person sought.

Paragraph 2 states that the Requested State may condition its surrender of the property upon satisfactory assurances that the property will be returned to the Requested State as soon as practicable. Surrender of property under this provision is expressly made subject to due respect for the rights of third parties in such property.

*Article 15—Rule of specialty*

This article covers the principle known as the rule of specialty, a standard aspect of United States extradition practice. Designed to ensure that a fugitive surrendered for one offense is not tried for other crimes, the rule of specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of a sentence on different charges that might not be extraditable or properly documented when the request is granted.

Since a variety of exceptions to the rule have developed over the years, this article codifies its current formulation by providing that a person extradited under the Treaty may only be detained, tried, or punished in the Requesting State for: (1) the offense for which extradition was granted, or a differently denominated offense based on the same facts, provided the offense is extraditable or a lesser included offense; (2) an offense committed after the extradition; or (3) an offense for which the executive authority of the Requested

State consents.[19] Paragraph 1(c)(ii) permits the Contracting State that is seeking consent to pursue new charges to detain the person extradited for at least 75 days, or for such longer period as the Requested State may authorize, while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person extradited to a third state without the consent of the state from which extradition was first obtained.

Paragraph 3 permits the detention, trial, or punishment of an extradited person for additional offenses, or extradition to a third state, if the extradited person: (1) leaves and returns to the Requesting State; (2) does not leave the Requesting State within 15 days[20] of being free to do so; or (3) voluntarily consents.

*Article 16—Waiver of extradition*

Persons sought for extradition frequently elect to waive their right to extradition proceedings in order to expedite their return to the Requesting State. This article provides that when a person sought waives extradition in accordance with the laws of the Requested State, the person may be returned to the Requesting State as expeditiously as possible and the rule of specialty does not apply. This amounts to a voluntary return of the fugitive to the Requesting State.

Longstanding United States practice that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requesting State is reflected in the express language of this provision. A similar rule appears in many recent United States extradition treaties.[21]

*Article 17—Transit*

Paragraph 1 gives each Contracting State the power to authorize transit through its territory of persons being surrendered to the other Contracting State by third states. A person in transit may be detained in custody for up to 24 hours. Requests for transit are to contain a description of the person being transported and a brief statement of the facts of the case for which the person is being surrendered. Requests for transit may be made through diplomatic channels or directly between the United States Department of Justice and the Ministry of Justice of Belgium. Requests for transit may be denied for a national of the Requested State or for a person sought for prosecution or to serve a sentence in the Requested State.

Paragraph 2 provides that no advance authorization is needed if the person in transit to one Contracting State is travelling by aircraft and no landing is scheduled in the territory of the other Contracting State. Should an unscheduled landing occur, a request for transit may be required at that time. The Treaty ensures that the person will be kept in custody for up to 24 hours until a request for transit is received and thereafter until transit is effected.

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[19] In the United States, the Secretary of State has the authority to consent to a waiver of the rule of specialty. See *Berenguer* v. *Vance,* 473 F. Supp. 1195, 1199 (D.D.C. 1979).

[20] Under article III of the 1901 Treaty, the extradited person has one month to leave the Requesting State.

[21] See, e.g., U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 16, T.I.A.S. No. 10733; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 18, 31 U.S.T. 5059, T.I.A.S. No. 9656.

*Article 18—Representation and expenses*

Under current extradition practice, the United States provides for the representation of Belgium in connection with Belgian requests for extradition before United States courts, and Belgium provides for the representation of the United States in connection with United States extradition requests to Belgium. Paragraph 1 codifies this practice.

Paragraph 2 provides that the Requested State will bear all expenses of extradition except those expenses relating to the ultimate transportation of the person surrendered to the Requesting State and the translation of documents. These expenses are to be paid by the Requesting State.

Paragraph 3 provides that neither Contracting State shall make a pecuniary claim against the other in connection with extradition proceedings, including arrest, detention, examination and surrender of persons sought. This includes any claim by fugitives for damages or reimbursement of legal fees or other expenses occasioned by the execution of the extradition request.

*Article 19—Consultation*

This article provides that the United States Department of Justice and the Belgian Ministry of Justice may consult with each other, directly or through Interpol, with regard to an individual extradition case or extradition procedures in general.

*Article 20—Application*

This Treaty, like most other United States extradition treaties negotiated in the past two decades, is expressly made retroactive to cover offenses committed before the Treaty enters into force, provided they constituted criminal offenses under the laws of both Contracting States at the time they were committed.

*Article 21—Ratification and entry into force*

This article contains standard treaty language providing for the exchange of instruments of ratification at Washington, D.C. and specifies the day on which the Treaty will enter into force after the exchange.

Paragraph 3 provides that the 1901 Treaty and the Supplementary Conventions of 1935 and 1963 will cease to have effect upon the entry into force of the Treaty. Extradition requests pending when the Treaty enters into force, however, will nevertheless be processed to conclusion under the 1901 Treaty and the Supplementary Conventions. Paragraph 3 further provides that articles 2, 12 and 15 of the Treaty will apply to extradition proceedings pending at the time of the exchange of instruments. Article 2 defines extraditable offenses, article 12 provides for temporary surrender, and article 15 implements the rule of specialty.

*Article 22—Termination*

This article contains the standard treaty language describing the procedure for termination of the Treaty by either Contracting State.

B. TECHNICAL ANALYSIS OF THE SUPPLEMENTARY TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF BELGIUM TO PROMOTE THE REPRESSION OF TERRORISM

The Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism ("the Supplementary Treaty") was signed in Washington, D.C. on March 17, 1987. The Supplementary Treaty is designed to facilitate the extradition of terrorists and is similar to other protocols to our extradition treaties with other countries.

The United States and Belgium also negotiated the Extradition Treaty Between the United States of America and the Kingdom of Belgium, which was signed at Brussels on April 27, 1987 ("the 1987 Treaty"). The 1987 Treaty is intended to replace the outdated treaty currently in place between the two countries ("the 1901 Treaty")[22] with a modern agreement. The Supplementary Treaty was negotiated, however, to augment our extradition relations generally and without regard to whether negotiations for the new basic extradition treaty, the 1987 Treaty, would be completed, or whether, if signed, the 1987 Treaty would enter into force. In other words, the Supplementary Treaty was negotiated with a view towards amending our extradition relations under the 1901 Treaty in force at the time of negotiations as well as under the 1987 Treaty which was subsequently signed on April 27, 1987.

The following technical analysis of the Supplementary Treaty was prepared by the United States delegation that conducted the negotiations.

*Article 1*

This article provides that the Supplementary Treaty applies only when a request for extradition of a fugitive would be denied under the basic extradition treaty currently in force because the offense is political or is not listed as an extraditable offense.

As previously explained, the Supplementary Treaty is intended to amend the 1901 Treaty if that treaty is still in effect at the time the Supplementary Treaty enters into force. Thus, subparagraph (b) is necessary, together with article 6, to amend the 1901 Treaty by permitting extradition for offenses in addition to those listed in the 1901 Treaty. If and when the 1987 Treaty enters into force, subparagraph (b) will become unnecessary inasmuch as the 1987 Treaty has no list of offenses but instead makes offenses extraditable on the basis of dual criminality.

This article also establishes that the Supplementary Treaty by itself cannot be used to extradite a fugitive. Instead, in appropriate cases, the Supplementary Treaty removes particular obstacles to the surrender of otherwise extraditable fugitives that exist under the basic treaty.

*Articles 2 and 3*

Articles 2 and 3 are more easily understood if read together.

Article 2 specifies that the Requested State may, in its discretion, consider any of the following crimes not to be political offenses:

[22] Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium, Oct. 26, 1901, 32 Stat. 1894, T.S. 409, 5 Bevans 508.

murder, voluntary manslaughter and voluntary assault and battery inflicting serious bodily harm; kidnapping, abduction, and hostage-taking; placement or use of a destructive device or automatic weapons that cause or are capable of causing serious bodily harm or substantial property damage; and attempts and conspiracies to commit the foregoing offenses. The provision also applies to any offense for which both the United States and Belgium have an international obligation to extradite or to submit the case for prosecution, including aircraft hijacking,[23] aircraft sabotage,[24] and other crimes on board aircraft.[25] This exclusion will extend to crimes similarly defined in future multilateral treaties.

Article 3 specifies that the Requested State shall not consider any offense described in article 2 to be a political offense, an offense connected to a political offense, or an offense inspired by a political offense if the crime involves any of four aggravating circumstances. The aggravating circumstances are: (1) the crime created a danger to the life, liberty, or safety of a group of persons; (2) it affected a person who is "foreign to the motives behind the offense" (i.e., an innocent bystander); (3) if cruel or vicious means were used to commit it; or (4) if the crime involved the taking of a hostage.

These two articles read together mandate that offenses that fall within one of the five categories of crimes in article 2 shall not be considered political offenses if one of the aggravating circumstances in article 3 is present. If an aggravating circumstance in article 3 is not present, the executive authority of the Requested State has discretion to determine that an offense listed in article 2 is not a political offense.

Thus, the Supplementary Treaty is similar to the recent United States treaties with the United Kingdom, Canada, Germany, and Spain,[26] in each of which the scope of the political offense exception is substantially narrowed. The key difference between the Supplementary Treaty and the other supplementary treaties is that this agreement underscores that while courts of the Requested State must deny extradition if the offense is one of the terrorist-type offenses listed in article 2, the executive branch of the Requested State retains final discretion to grant or deny the request or political offense grounds. This discretion does not exist if one of the aggravating factors in article 3 is present.

The negotiators contemplated that in considering an extradition request and a fugitive's claim for political offense protection, a court in the Requested State first will apply the terms of the basic extradition treaty to determine whether the fugitive is otherwise extraditable without regard to the political offense provision. If the fugitive is otherwise extraditable, the court turns its attention to the Supplementary Treaty. If the offense is included in article 2 of

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[23] See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

[24] See Convention for the Suppression of Unlawful acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.

[25] See Convention on Offenses and Certain Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.t. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

[26] See U.S.-Spain Second Supplementary Extradition Treaty, Feb. 9, 1988, T.I.A.S. No. —; U.S.-Canada Protocol Amending Extradition Treaty, Jan. 11, 1988, T.I.A.S. No. —; U.S.-West Germany Supplementary Treaty, Oct. 21, 1986, T.I.A.S. No. —; U.S.-United Kingdom Supplementary Extradition Treaty, June 25, 1985, T.I.A.S. No. —.

the Supplementary Treaty, extradition should not be denied as a matter of law. Instead, when the United States is the Requested State, the court certifies the person's extraditability to the Secretary of State under Title 18, United States Code, Section 3184, noting that the Supplementary Treaty removes the absolute legal barrier to extradition even if the fugitive is correct in contending that the offense is political. If the offense is not listed in article 2, the court continues with its analysis under the basic treaty to determine whether extradition should be barred by the political offense provision.

Under article 2, the Secretary of State upon receipt of the court's certification of extraditability has discretion (limited only by article 3) to grant or deny the surrender of the fugitive as a political offender. If one of the aggravating factors listed in article 3 is present, the Secretary may not refuse the fugitive's surrender as a matter of discretion based upon the political nature of the offense. The Secretary, of course, continues to maintain any discretionary authority otherwise possessed to deny the surrender.

*Article 4*

This article permits the Requested State to refuse extradition when the offense for which extradition is sought is punishable by death in the Requesting State, but not in the Requested State, unless the Requesting State provides assurances the Requested State considers sufficient that if the death penalty is imposed, it will not be carried out. A similar provision is found in many recent United States extradition treaties.[27]

The 1987 Treaty has a similar provision making this article redundant if and when both treaties enter into force.

The negotiators agreed that the decision whether to request assurances and the determination whether any assurances provided are sufficient will be made by the executive authority of the Requested State.[28]

*Article 5*

This article permits the executive authority of the Requested State to deny extradition on humanitarian grounds in accordance with its domestic law.[29] This provision is necessary to satisfy requirements of Belgian law.[30] A similar provision is present in the 1987 Treaty as well as in our recent extradition treaties with the Netherlands, Sweden, Norway and Finland.[31]

*Article 6*

This article amends the list of extraditable offenses contained in the 1901 Treaty if the treaty remains in effect if and when the

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[27] See, e.g., U.S.-Ireland Extradition Treaty, July 13, 1983, art. VI, T.I.A.S. No. 10813; U.S.-Thailand Extradition Treaty, Dec. 14, 1983, art. 6, T.I.A.S. No. —.

[28] This is consistent with United States law. See *Cheng Na-Yuet* v. *Hueston,* 734 F. Supp. 988, 994 (S.D. Fla. 1990), *aff'd,* 932 F.2d 977 (11th Cir. 1991).

[29] United States courts have recognized that the Secretary of State possesses the authority to determine whether to deny extradition on humanitarian grounds. See *Peroff* v. *Hylton,* 542 F.2d 1247 (4th Cir. 1976), 563 F.2d 1099 (4th Cir. 1977).

[30] See Loi du 15 Mars 1874 Sur Les Extraditions, Matieres Penales, Codes Belge, art. 2.

[31] See, e.g., U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 7(2), T.I.A.S. No. 10833; U.S.-Sweden Extradition Treaty, Oct. 24, 1961, art. V(6), 14 U.S.T. 1845, T.I.A.S. No. 5496, 494 U.N.T.S. 141.

Supplementary Treaty enters into force. As discussed in the analysis of article 1, under the 1901 Treaty, extradition may be granted only for those offenses contained in the list of extraditable offenses. This list does not include many offenses committed by terrorists that are viewed by the Contracting States as so serious as to warrant prosecution without fail. Article 6 therefore expands the list of extraditable offenses in the 1901 Treaty to include all offenses listed in article 2 of the Supplementary Treaty.

The 1987 Treaty will render article 6 unnecessary if and when the new treaty enters into force because it does not list specific extraditable offenses. Instead, the 1987 Treaty permits extradition for any offense punishable under the laws of both Contracting States by deprivation of liberty (i.e., imprisonment or other form of detention) for more than one year.

*Article 7*

This article contains standard treaty language providing for the exchange of instruments of ratification at Brussels and specifies the day on which the Supplementary Treaty will enter into force after the exchange.

*Article 8*

This article provides standard treaty language describing the procedure for termination of the Supplementary Treaty by either Contracting State.

## VIII. Texts of the Resolutions of Ratification

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

> Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1987. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

> Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

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