104TH CONGRESS
2d Session

SENATE

EXEC. REPT.
104–29

EXTRADITION TREATY WITH THE PHILIPPINES

JULY 30, 1996.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 104–16]

The Committee on Foreign Relations to which was referred the Extradition Treaty between the Government of the United States of America and the Government of the Republic of the Philippines, signed at Manila on November 13, 1994, having considered the same, reports favorably thereon with one proviso and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution 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 November 13, 1994, the President signed an extradition treaty with the Philippines. The Treaty was transmitted to the Senate for its advice and consent to ratification on September 5, 1995. In recent years the Departments of State and Justice have led an effort to modernize 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 Untied 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 provides 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. MAJOR 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 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 Philippine Treaty states that the Requested State shall grant extradition for an offense committed outside the Requesting State's territory if the Requested State's laws provide that an offense committed outside its territory is punishable in similar circumstances (art. 2(4)). If the Requested State's laws do not provide that an offense committed outside its territory is punishable in similar circumstances, the executive branch of the Requested State has discretionary authority to submit the extradition request to its courts for decision (art. 2(4b)).

In the proposed treaty an obligation to extradite depends mostly on whether the Requested State also punishes offenses outside its territory "in similar circumstances." This, in effect, appears to be a dual criminality clause applied to extraterritorial offenses. The phrase "in similar circumstances" is undefined in each of the treaties that have such a requirement and in the Letters of Submittal from the Department of State to the President. The phrase appears to be sufficiently vague to give a reluctant Requested State "wiggle

room" to avoid its possible obligation to extradite individuals for crimes committed outside its territory.

3. Political offense exception

In recent years the United States has been promoting a restrictive view of the political offense exception in furtherance of its campaign against terrorism, drug trafficking, and money laundering. The political offense exception in the Philippine Treaty is a broader provision than is contained in other extradition treaties.

The exclusion of certain violent crimes, (i.e. murder, kidnapping, and others) from the political offense exception has become standard in many U.S. extradition treaties, reflecting the concern of the United States government and certain other governments with international terrorism.

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.

4. The death penalty exception

The United States and other countries appear to have different views on capital punishment. Under the proposed treaties, the Requested State 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.

Unlike other extradition treaties, The Philippine Treaty unequivocally states that a party may not refuse extradition on the ground the person sought is one of its citizens (art. 6).

6. Retroactivity

The proposed treaty states that it shall apply to offenses committed before as well as after it enters into force (art. 19). 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 Malaysia Treaty (art. 13) contains exceptions to the rule of specialty that 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 Philippine Treaty has no provision denying extradition if barred by the statute of limitations of either the Requesting or Requested State.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

This Treaty shall enter into force upon the exchange of instruments of ratification.

B. TERMINATION

This Treaty shall terminate six months after receipt of notice that one Party intends to terminate the Treaty.

V. Committee Action

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

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, Pharoah 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, transhipment 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 Treaty

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.

TECHNICAL ANALYSIS OF THE EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE PHILIPPINES

On November 13, 1994, the United States signed a treaty on extradition with the Republic of the Philippines ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of a highly successful effort to modernize our law enforcement relations. The Treaty, which will be the first extradition treaty to enter into force between the United States and this important ally in the Western Pacific,[1] represents a major step forward in United States efforts to win the cooperation of Asian countries in combating organized crime, transnational terrorism and international drug trafficking.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 18, United States Code, Section 3184 *et seq*. No new implementing legislation will be needed. The Philippines has its own internal law[2] that will apply to United States requests under the Treaty.

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

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[1] The United States and the Philippines signed an extradition treaty on November 27, 1981, but that treaty was not ratified.

[2] See Philippines Presidential Decree No. 1069 of Jan. 13, 1977 ("Philippine Extradition Law"). The key sections of the law that are germane to the interpretation and implementation of the Treaty are discussed in more detail in this technical analysis. The Philippine delegation stated that under the Philippine Constitution, treaties enjoy priority over municipal law. Thus, if the terms of the Treaty conflict with the Extradition Law, the terms of the Treaty will prevail.

Article 1—Obligation to extradite

This article, like the first article in every recent United States extradition treaty, formally obligates each Contracting Party to extradite to the other Contracting Party persons charged with or convicted of an extraditable offense, subject to the provisions of the Treaty. The article refers to charges brought by authorities "in" the Requesting State rather than "of" the Requesting State because the Philippine obligation to extradite to the United States involves state and local as well as federal cases. The negotiators also agreed that the term "convicted" includes instances in which the person has been found guilty but the sentence has not yet been imposed.[3] The negotiators intended to make it clear that the Treaty applies to persons who have been adjudged guilty but have fled prior to sentencing.

Article 2—Extraditable offenses

This article contains the basic guidelines for determining what constitutes an extraditable offense. The Treaty, similar to the recent United States extradition treaties with Jamaica, Italy, Ireland, Thailand, Sweden (Supplementary Convention) and Costa Rica, does not list the offenses for which extradition may be granted. Instead, paragraph 1 permit extradition for any offense punishable under the laws of both Contracting Parties by deprivation of liberty (i.e, imprisonment or other form of detention) for more than one year, or by a more severe penalty such as capital punishment. Defining extraditable offenses in terms of "dual criminality" rather than attempting to list each extraditable crime obviates the need to renegotiate the Treaty or supplement it if both Contracting Parties pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover an important type of criminal activity punishable in both countries.

During the negotiations, the United States delegation received assurances from the Philippine delegation that major United States offenses such as operating a continuing criminal enterprise[4] are extraditable under the Treaty, and that offenses under the Racketeer Influenced and Corrupt Organizations ("RICO") statutes[5] are extraditable if the predicate offense is an extraditable offense. The Philippine delegation also stated that the extradition is possible for offenses such as drug trafficking, terrorism, money laundering, tax fraud or tax evasion, crimes against environmental law and antitrust violations punishable by both Contracting Parties.

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition be granted for attempting or conspiring to commit, aiding or abetting, counseling, causing, or procuring, or otherwise being an accessory to an extraditable offense. As conspiracy charges are frequently used in United States criminal cases, particularly those involving complex transnational criminal activity, it is especially important that the Treaty be clear on this point. The Philippines has no general conspiracy statute similar to Title 18, United States Code, Section 371. Therefore, paragraph 2 cre-

[3] See Stanbrook and Stanbrook, "Extradition: The Law and Practice" 25–26 (1979).
[4] See, e.g., 21 U.S.C. § 848.
[5] See 18 U.S.C. §§ 1961–68.

ates an exception to the dual criminality rule of paragraph 1 by expressly making inchoate crimes such as conspiracy extraditable offenses if the inchoate offense is punishable in the Requesting State by deprivation of liberty for a period of more than one year, or by a more severe penalty, and if the object of the inchoate offense is an extraditable offense pursuant to paragraph 1.

Paragraph 3 reflects the intention of the Contracting Parties to have the principles of this article interpreted broadly. Judges in foreign countries often are confused by the fact that many United States federal statutes require proof of certain elements (such as use of the mails or interstate transportation) solely to establish jurisdiction in United States federal courts. Because these judges know of no similar requirements in their own criminal law, they occasionally have denied the extradition of fugitives sought by the United States on federal charges on this basis. This paragraph requires that such elements be disregarded in applying the dual criminality principle. For example, it will ensure that Philippine authorities treat United States mail fraud charges[6] in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property[7] in the same manner as unlawful possession of stolen property. This paragraph also requires the Requested 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 the Contracting Parties. A similar provision is contained in all recent United States extradition treaties.

Paragraph 4 deals with the fact that federal crimes may involve acts committed wholly outside United States territory. Our jurisprudence recognizes the jurisdiction of our courts to hear criminal cases involving offenses committed outside the United States if the crime was intended to, or did, have effects in this country, or if the legislative history of the statute shows clear Congressional intent to assert such jurisdiction.[8] In the Philippines, however, the government's ability to prosecute extraterritorial offenses is much more limited.[9] Paragraph 4 reflects the Philippine government's agreement to recognize United States jurisdiction to prosecute offenses committed outside the United States if Philippine law would permit the Philippines to prosecute similar offenses committed abroad in corresponding circumstances. If the Requested State's law does not provide for such punishment, paragraph 4(b) permits the executive authority of the Requested State to decide, in its dis-

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[6] See 18 U.S.C. § 1341.

[7] See 18 U.S.C. § 2314.

[8] Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Blakesley, "United States Jurisdiction over Extraterritorial Crime," 73 J. Crim. L. & Criminology 1109 (1982).

[9] Article 2 of the Philippine Penal Code states that the Code may apply to crimes committed outside the Philippines only if the crime took place aboard a Philippine vessel; involved forgery or passing of forged Philippine coin, currency, or obligations; was committed by a Philippine public officer or employee in the exercise of official duties; or was a "crime against national security and the law of nations, as defined in Title One Book Two of this Code," i.e., treason, espionage, inciting war, corresponding with hostile countries, and piracy. The Philippines does not appear to have extraterritorial jurisdiction to prosecute drug offenses. As the Philippines cannot prosecute those who violate its drug laws outside the Philippines, it would have difficulty extraditing to the United States drug traffickers who acted outside the United States. The Philippine delegation assured the United States that it would recommend that its government change Philippine law to remedy this situation.

cretion, to submit the case to its courts for the purpose of extradition. For the United States, this decision is made by the Secretary of State, and for the Philippines, by the Minister of Justice. A similar provision appears in several recent United States extradition treaties.[10] Paragraph 4(b) is worded in terms of the executive authority's decision to submit the case to the courts for approval because Philippine authorities need the approval of Philippine courts to extradite.

Paragraph 5 states that when extradition has been granted for an extraditable offense, it shall also be granted for any other offense for which all of the requirements for extradition are met, except for the requirement that the offense be punishable by more than one year of imprisonment. For example, if the Philippines agrees to extradite to the United States a fugitive wanted for prosecution on a felony charge, the United States may also obtain extradition for any misdemeanor offenses that have been charged, as long as those misdemeanors are also recognized as criminal offenses in the Philippines. Thus, the Treaty incorporates recent United States extradition practice by permitting extradition for misdemeanors committed by a fugitive when the fugitive's extradition is granted for a more serious extraditable offense. This practice is generally desirable from the standpoint of both the fugitive and the Requesting State in that it permits all charges to be disposed of more quickly, thereby facilitating trials while evidence is fresh and permitting the possibility of concurrent sentences. Similar provisions are found in recent United States extradition treaties with Australia, Ireland, Italy and Costa Rica.

Some recent treaties provide that persons who have been convicted of an extraditable offense and sentenced to imprisonment may be extradited only if at least a certain specified portion of the sentence (often six months) remains to be served. The Treaty contains no such requirement. Provisions of this kind are an attempt to limit extradition to serious cases because of the significant costs associated with the process. However, the negotiators of the Treaty felt that the particular sentence imposed or outstanding is not necessarily an adequate measure of the seriousness of the crime.[11] The Contracting Parties concluded that the Treaty's goals can be better served by the exercise of discretion and good judgment in the administration of the Treaty without arbitrary limits imposed in its terms. This approach has been taken in some of our extradition treaties with other countries, including Australia, Canada, Jamaica, New Zealand and the United Kingdom.

Article 3—Political and military offenses

Paragraph 1 prohibits extradition for political offenses. This is standard provision in recent United States extradition treaties.

Paragraph 2 describes three categories of offenses that shall not be considered political offenses.

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[10] See Protocol Amending U.S.-Canada Extradition Treaty, Jan. 11, 1988, art. I, T.I.A.S. No. —; Protocol Amending U.S.-Australia Extradition Treaty, Sept. 4, 1990, art. III, T.I.A.S. No. —.

[11] Cf. *United States* v. *Clark,* 470 F. Supp. 976 (D. Vt. 1979) ("Leniency in sentencing does not give rise to a bar to extradition"). Reliance on the amount of the sentence remaining to be served can also produce anomalous results. For instance, a murderer who escapes from custody with less than six months to serve on a sentence can hardly resist extradition on the basis that murder is not a serious offense.

First, the political offense exception does not apply to murder or other willful crimes against the person of a Head of State of the Contracting Parties, or a member of the Head of State's family.

Second, the political offense exception does not apply to offenses for which both Contracting Parties have an obligation pursuant to a multilateral international agreement either to extradite the person sought or to submit the case to their competent authorities for prosecution. The conventions to which this clause applies at present include the Convention on Offenses and Certain Other Acts Committed on Board Aircraft,[12] the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking),[13] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage),[14] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,[15] and the International Convention Against the Taking of Hostages.[16] In addition, the Philippines is expected to ratify the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [17] in the near future. In the interim, both the United States and the Philippines are parties to the Single Convention on Narcotic Drugs [18] and the Amending Protocol to the Single Convention; [19] this provision applies to those conventions as well.

Paragraph 2(c) states that the political offense exception does not apply to conspiring or attempting to commit, or aiding or abetting the commission or attempted commission of, any of the foregoing offenses.

Paragraph 3 provides that extradition shall not be granted if the executive authority of the Requested State determines that the request is politically motivated.[20] United States law and practice have been that the Secretary of State has the sole discretion to determine whether an extradition request is based on improper political motivation.[21] Paragraph 3 also permits denial of extradition if the executive authority determines that the request relates to a military offense that is not punishable under non-military penal legislation.[22]

Article 4—Prior prosecution

This article permits extradition when the person sought is charged by each Contracting Party with different offenses arising out of the same basic transaction.

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[12] Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.
[13] Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.
[14] Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.
[15] Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.
[16] Dec. 17, 1979, T.I.A.S. No. 11081.
[17] Dec. 20, 1988, T.I.A.S. No. —.
[18] Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.
[19] Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.
[20] There are similar provisions in many recent treaties. See 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(4), 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, T.I.A.S. No. 10733; and U.S.-Ireland Extradition Treaty, July 13, 1983, art. IV(c), T.I.A.S. No. 10813.
[21] See *Eain* v. *Wilkes,* 641 F.2d 504, 513–518 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *Koskotas* v. *Roche,* 740 F. Supp. 904 (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).
[22] An example of such a crime is desertion. See "Matter of the Extradition of Suarez-Mason," 694 F. Supp. 676, 703 (N.D. Cal. 1988).

Paragraph 1, which prohibits extradition if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested, is similar to language present in many United States extradition treaties. This provision applies only when the person sought has been convicted or acquitted in the Requested State of exactly the same crime that is charged in the Requesting State. It is not enough that the same facts were involved. Thus, if the person sought is accused by one Contracting Party of illegally smuggling narcotics into that country, and is charged by the other Contracting Party with unlawfully exporting the same shipment of drugs, an acquittal or conviction in one Contracting Party does not insulate that person from extradition because different crimes are involved.

Paragraph 2 makes it clear that neither Contracting Party may refuse to extradite a person sought on the basis that the Requested State's authorities declined to prosecute the person or instituted and later discontinued proceedings against the person. This provision was included because a decision of the Requested State to forego prosecution or to drop charges previously filed many be the result of a failure to obtain sufficient evidence or witnesses for trial, whereas the Requesting State's prosecution may not suffer from the same impediments. This provision should enhance the ability of the Contracting Parties to extradite to the jurisdiction with the better chance of a successful prosecution.

Article 5—Capital punishment

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.[23]

Paragraph 2 provides that when the Requesting State gives assurances in accordance with paragraph 1, the assurances shall be respected, and the death penalty, if imposed, shall not be carried out.

Article 6—Extradition of nationals

Some countries refuse to extradite their own nationals for trial and/or punishment. The United States does not deny extradition on the basis of the offenders' citizenship[24] and neither does the Philippines. Accordingly, this article provides that each Contracting Party may not refuse extradition on the basis that the person sought is a citizen of the Requested State.

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[23] See, e.g., U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 7, T.I.A.S. No. 10733; U.S.-Ireland Extradition Treaty, July 13, 1983, art. 6, T.I.A.S. No. 10813.

[24] See generally Shearer, "Extradition in International Law" 110–14 (1970); 6 Whiteman, "Digest of International Law" 871–76 (1968). Our policy of drawing no distinction between United States nationals and others in extradition matters is underscored by Title 18, United States Code, Section 3196, which authorizes the Secretary of State to extradite United States citizens pursuant to a treaty that permits but does not expressly require surrender of citizens as long as the other requirements of the treaty have been met. 18 U.S.C. § 3196.

Article 7—Extradition procedures and required documents

This article sets forth the documentary and evidentiary requirements for an extradition request. Similar articles are present in most recent United States extradition treaties.

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 9. Provisional arrest requests need not be initiated through the diplomatic channel provided that the requirements of article 9 are met.

Paragraph 2 outlines the information that must accompany every request for extradition under the Treaty. Paragraph 3 describes the additional information needed when the person is sought for trial in the Requesting State. Paragraph 4 describes the information needed, in addition to the requirements of paragraph 2, when the person sought has already been tried and found guilty in the Requesting State.

Most of the items listed in paragraph 2 enable the Requested State to determine quickly whether extradition is appropriate under the Treaty. For example, paragraph 2(c) calls for "a statement of the provisions of law describing the essential elements of the offense for which extradition is requested," which enables the Requested State to determine easily whether a lack of dual criminality is an appropriate basis for denying extradition. Some of the items listed in paragraph 2, however, are required strictly for information purposes. Thus, paragraph 2(e) calls for "a statement of the provisions of the law describing any time limit on prosecution or the execution of the punishment for the offense," even though the Treaty does not permit denial of extradition based on a lapse of time. The United States and Philippine delegations agreed that paragraph 2(e) should require this information so that the Requested State is fully informed about the charges brought in the Requesting State.

Paragraph 3 requires that if the fugitive has not yet been convicted of the crime for which extradition is requested, the Requesting State must provide such evidence as would provide probable cause for the arrest and committal for trial of the person if the offense had been committed in the Requested State. This is consistent with extradition law in the United States[25] and the Philippines,[26] and is similar to language in other United States extradition treaties.[27]

During the negotiations, the United States delegation told the Philippine delegation its concern about the fact that serious criminal charges may be filed in the Philippines by a complainant with-

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[25] Courts applying Title 18, United States Code, Section 3184 long have required probable cause for international extradition. Restatement (Third) of the Foreign Relations Law of the United States § 476 comment b (1987).

[26] The Philippine Extradition Law does not specify the standard of proof in international extradition matters; Philippine practice is to specify this in the treaty itself.

The Philippine Extradition Law provides: "Upon conclusion of the [extradition] hearing, the court shall render a decision granting extradition, and giving his reasons therefor upon showing the existence of a prima facie case. Otherwise, it shall dismiss the petition." Philippine Extradition Law § 10. However, the Philippine delegation noted that the term "prima facie case" merely means that all requirements of the Treaty appear to have been met, and the Treaty itself must be consulted for the quantum of evidence needed for surrender.

[27] See, e.g., U.S.-Bahamas Extradition Treaty, Mar. 9, 1990, art. 8(3)(b), T.I.A.S. No. —.

out the permission or support of a prosecutor. United States military personnel have reported that in the past, criminal charges or the threat of criminal charges seem to have been used against United States servicemen stationed in the Philippines for improper purposes such as extortion, harassment, or to gain improper advantage in civil litigation for debt collection. The United States delegation noted that United States courts generally do not attempt to evaluate the credibility of affiants in extradition proceedings, but that the Department of Justice does carefully consider and weigh credibility in assessing extradition requests, while the Department of State takes credibility into account in deciding whether to issue the surrender warrant necessary to effect an extradition. If it appears that complainants or key witnesses involved in a Philippine extradition request brought the charges solely for improper motives, their tainted credibility could vitiate probable cause, thereby compelling the United States to deny extradition under paragraph 3. The Philippine delegation acknowledged this possibility.

Paragraph 4 lists the information needed to extradite a person who has been convicted of an offense in the Requesting State. This paragraph 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.[28] Subsection (d) states that if the 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 the extradition of persons convicted in absentia.

Paragraph 5 governs the authentication procedures for documents intended for use in extradition proceedings. Paragraph 5(a) deals with evidence intended for use in extradition proceedings in United States and Philippine courts; current United States and Philippine authentication requirements are virtually identical.[29] Paragraph 5(b) provides a second method for authenticating evidence in an extradition proceeding—by permitting such evidence to be admitted if it is authenticated in any manner accepted by the laws of the Requested State. This paragraph should ensure that relevant evidence that usually satisfies the evidentiary rules of the Requested State is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

Article 8—Language

The Philippines has two official languages, English and Pilipino (which is based on Tagalog). Several other languages such as Cebuano, Bicol, Ilocano and Pampango are widely used. This article requires that all extradition documents be translated into English.

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

[29] Compare Philippine Extradition Law § 9(2) with 18 U.S.C. § 3190.

Article 9—Provisional arrest

This article describes the process by which a person in one Contracting Party may be arrested and detained while the formal extradition papers are being prepared.

Paragraph 1 expressly provides that a request for provisional arrest may be made through the diplomatic channel or directly between the United States Department of Justice and the Philippine Department of Justice.[30] Experience has shown that the ability to use direct channels in emergency situations can be crucial when a fugitive is poised to flee a jurisdiction.

Paragraph 2 sets forth the information that the Requesting State must provide in support of such a request.

Paragraph 3 states that the Requesting State must be advised without delay of the outcome of the request and the reasons for its denial, if any.

Paragraph 4 provides that a person who has been provisionally arrested may be released from detention if the Requesting State does not submit a fully documented request for extradition to the executive authority of the Requested State within 60 days of the provisional arrest.[31] When the United States is the Requested State, the executive authority includes the Secretary of State and the United States Embassy in Manila.[32]

Paragraph 4 establishes that the person provisionally arrested may be released from custody if the formal extradition request, including supporting documentation, is not received within the 60-day period. However, the proceedings against the person need not be dismissed; paragraph 5 makes it clear that the person may be taken into custody and the extradition proceedings may be commenced again if the formal request is presented at a later date.

Article 10—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 in whole or in part, the Requested State must provide the reasons for the denial. If extradition is granted, this article requires that authorities of the Contracting Parties agree on a time and place for surrender of the person sought. The Requesting State must remove the person within the time prescribed by the law of the Requested State or the person may be discharged from custody, and the Requested State may subsequently refuse to extradite the person for the same offense. United States law requires that surrender occur within two calendar months of a finding that the person is extraditable,[33] or of

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[30] Many recent United States extradition treaties provide for transmission of provisional arrest requests via the International Criminal Police Organization (INTERPOL), as well as through diplomatic channels or directly between the Justice Departments of the two Contracting Parties. At the request of the Philippine delegation, the Treaty does not provide a role for INTERPOL in the provisional arrest process.

[31] Under Section 20 of the Philippine Extradition Law, provisional arrest requests are transmitted through the National Bureau of Investigation, and the fugitive must be released from custody if the supporting documentation is not received within 20 days of provisional arrest. Philippine Extradition Law § 20. Article 9(4) of the Treaty is intended to take precedence over this provision.

[32] *"Clark,"* 470 F. Supp. 976.

[33] 18 U.S.C. § 3188.

the conclusion of any litigation challenging that finding,[34] whichever is later. According to the Philippine delegation, the law in the Philippines does not specify the time in which the surrender must take place.

Article 11—Temporary and deferred surrender

Occasionally, a person sought for extradition may be already facing prosecution or serving a sentence on other charges in the Requested State. This article provides a means for the Requested State to defer extradition in such circumstances until the conclusion of the proceedings against the person and the full execution of any punishment imposed. Similar provisions appear in our recent extradition treaties with countries such as the Bahamas and Australia.

Paragraph 1 provides for the temporary surrender of a person wanted 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 will 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 resolution of the charges sooner; (2) it makes 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 extradition treaties.

Paragraph 2 provides that the executive authority of the Requested State may postpone the extradition proceedings against a person who is serving a sentence in the Requested State until the full execution of any punishment that has been imposed.[35] The provision allows the Requested State to postpone the surrender of a person facing prosecution or serving a sentence, as well as the initiation of extradition proceedings.

Article 12—Requests for extradition made by more than one State

This article reflects the practice of many recent United States extradition treaties in listing some of the factors that the executive authority of the Requested State must consider when reviewing requests from two or more countries for the extradition of the same person. For the United States, the Secretary of State decides to which country the person should be surrendered;[36] for the Philippines, the decision is made by the Secretary of Foreign Affairs in consultation with the Secretary of Justice.[37]

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[34] See *Jimenez* v. *U.S. District Court*, 84 S. Ct. 14, 11 L. Ed. 2d 30 (1963) (decided by Goldberg, J., in chambers); see also *Liberto* v. *Emery*, 724 F.2d 23 (2d Cir. 1983); in re *United States*, 713 F.2d 105 (5th Cir. 1983); *Barrett* v. *United States*, 590 F.2d 624 (6th Cir. 1978).

[35] Under United States law and practice, the Secretary of State makes this decision. *Koskotas* v. *Roche*, 740 F. Supp. 904 (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).

[36] *Cheng Na-Yuet* v. *Hueston*, 734 F. Supp. 988 (S.D. Fla. 1990), aff'd, 932 F.2d 977 (11th Cir. 1991).

[37] Philippine Extradition Law § 15.

Article 13—Rule of specialty

This article covers the rule of specialty, a standard principle of United States extradition law and 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 execution of a sentence on different charges that are not extraditable or properly documented in the request.

Exceptions to the rule have developed over the years. This article codifies the current formulation of the rule 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 is 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.[38] Paragraph 1(c)(ii) permits the Contracting Party that is seeking consent to pursue new charges to detain the person extradited for 90 days or for such longer period as the Requested State may authorize while the Requested State makes it determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third state without the consent of the Requested State.

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

Article 14—Voluntary return

Persons sought for extradition frequently elect to waiver their right to extradition proceedings in order to expedite their return to the Requesting State. This article provides that when a fugitive consents to surrender to the Requesting State, the person may be returned to the Requesting State as expeditiously as possible without further proceedings. The negotiators anticipated that in such cases, there will be no need for the formal documentation described in article 7, or further judicial or administrative proceedings of any kind.

If the United States is the Requested State and the person sought elects to return voluntarily to the Philippines before the United States Secretary of State signs a surrender warrant, the process is not deemed an "extradition." Longstanding United States policy has been that the rule of specialty as described in article 13 does not apply to such cases.[39]

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[38] 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).

[39] Cf. U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 16, T.I.A.S. No. 10733.

Article 15—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.[40] Article 15 also provides that these objects may be surrendered to the Requesting State upon the granting of the extradition or even if extradition cannot be effected due to the death, disappearance or escape of the person sought. Paragraph 2 states that the Requested State may condition its surrender of property upon satisfactory assurances that the property will be returned to the Requested States as soon as practicable. Paragraph 2 also permits the surrender of property to be deferred if it is needed as evidence in the Requested State. Surrender of property under this provision is expressly made subject to due respect for the rights of third parties in such property.

Article 16—Transit

Paragraph 1 gives each Contracting Party the power to authorize transit through its territory of persons being surrendered to the other Contracting Party by a third state. A person in transit may be detained in custody during the transit period. Requests for transit are to contain a description of the person whose transit is proposed and a brief statement of the facts of the case with respect to which transit is sought. The transit request may be submitted through diplomatic channels or directly between the United States and Philippine Departments of Justice. The negotiators agreed that diplomatic channels will be employed as frequently as possible for requests of this nature.

Paragraph 2 describes the procedure each Contracting Party should follow when seeking to transport a person in custody through the territory of the other. Under this provision, no advance authorization is needed if the person in custody is in transit to one of the Contracting Parties and is travelling by aircraft and no landing is scheduled in the territory of the other. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request if, in its discretion, it is deemed appropriate to do so. The Treaty ensures that the person will be kept in custody for up to 96 hours until a request for transit is received and thereafter until it is executed.

Article 17—Representation and expenses

Paragraph 1 provides that the United States represents the Philippines in connection with requests from the Philippines for extradition before the courts in this country, and the Philippines Secretary of Justice arranges for the representation of the United States in connection with United States extradition requests to the Philippines.

Paragraph 2 requires that the Requested State 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, which are to be paid by the Requesting State. Cases may arise in which the Requesting State may wish

[40] See Philippine Extradition Law § 18.

to retain private counsel to assist in the presentation of the extradition request. It is anticipated that in such cases the fees of private counsel retained by the Requesting State must be paid by the Requesting State.

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

Article 18—Consultation

This article provides that the United States and Philippine Departments of Justice may consult with each other with regard to an individual extradition case or extradition procedures in general. A similar provision is found in other recent United States extradition treaties.[41]

Article 19—Application

This Treaty, like most United States extradition treaties negotiated in the past two decades, is expressly made retroactive and covers offenses that occurred before as well as after the Treaty enters into force.

Article 20—Ratification and entry into force

This article contains standard treaty language providing for the exchange of instruments of ratification at Manila. The Treaty is to enter into force immediately upon the exchange.

Article 21—Termination

This article contains standard treaty language describing the procedure for termination of the Treaty by either Contracting Party. Termination shall become effective six months after notice of termination is received.

[41] See, e.g., U.S.-Belgium Extradition Treaty, Apr. 9, 1987, art. 19, T.I.A.S. No. —; U.S.-Switzerland Extradition Treaty, Nov. 11, 1990, art. 24, T.I.A.S. No. —; U.S.-Hungary Extradition Treaty, Dec. 1, 1994, art. 21, T.I.A.S. No. —.

VIII. TEXT OF THE RESOLUTION 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 Government of the United States of America and the Government of the Republic of the Philippines, signed at Manila on November 13, 1994. 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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