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EXTRADITION TREATY WITH SWITZERLAND

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

REPORT

[To accompany Treaty Doc. 104–9]

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 Swiss Confederation, signed at Washington on November 14, 1990, 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 14, 1990, the President signed an extradition treaty with Switzerland. The Treaty was 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 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 an 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 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 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 Switzerland 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. 1(2)). Even if the Requested State does not punish offenses committed outside its territory in similar circumstances, the Switzerland treaty requires the Requested State to grant extradition in the case of an extraterritorial crime if either the fugitive or the victim is a national of the Requesting State (art. 1(2b)).

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 Switzerland Treaty is a broader provision than is contained in other extradition treaties.

Generally, the standard offense not considered political—a criminal attack on a head of state or members of his family is included in this provision. The Switzerland Treaty does not contain exclude this offense. 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, including this one, 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. While the United States is a party to all the multilateral agreements listed in the introduction, Switzerland has been less inclined to participate in such agreements. For example, as of January 1, 1995, Switzerland was not a party to the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961, nor to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[1]

The Switzerland Treaty is distinguished primarily for granting a Requested State discretion to deny extradition for violations of "currency policy, trade policy, or economic policy," or acts "intended exclusively to reduce taxes or duties" (art. 3(3)). According to the Secretary of State's Letter of Submittal, this provision was included in the treaty at Swiss behest because Swiss law for the most part prohibits extradition for purely fiscal or tax offenses.[2] The Letter of Submittal also states, in what appears to be an expression of hope, that "[T]his provision would not be used to shield from extradition underlying criminal conduct, such as fraud, embezzlement, or falsification of public documents, if that conduct is otherwise extraditable." No similar statement appears in the treaty itself.

4. The death penalty exception

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

[1] Department of State, "Treaties in Force on January 1, 1995," 391.
[2] Letter of Submittal dated May 1, 1995, from Secretary of State Warren Christopher to President Clinton.

quested 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.

The Switzerland Treaty provides that the Requested State may not decline to extradite its own nationals unless it has jurisdiction to prosecute them for the acts for which extradition is sought (art. 8). For example, if a Swiss national commits a murder in the United States and then flees to Switzerland, he would be extraditable by the United States under the treaty despite his Swiss nationality unless Switzerland has jurisdiction to prosecute its nationals for murders committed outside its treaty.

6. Retroactivity

The proposed treaty states that it shall apply to offenses committed before as well as after it enters into force (art. 22). 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 Switzerland Treaty (art. 13) contains exceptions to the rule of speciality 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 Switzerland 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 180 days after the exchange of instruments of ratification.

B. TERMINATION

This Treaty may be terminated by either Party five years from the date of entry into force, after six months notice by a Party that it 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, 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 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 SWITZERLAND

On November 11, 1990, the United States signed a treaty on extradition with the Swiss Confederation ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of an ongoing effort to modernize our law enforcement relations. The Treaty is intended to replace the extradition treaty currently in force between the United States and Switzerland[3] and the two supplementary extradition conventions to that treaty.[4]

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. Switzerland has its own internal extradition legislation[5] 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.

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 pursuant to the provisions of the Treaty persons charged with or found guilty of an extraditable offense, or subject to a detention order in the Requesting State. The term "found guilty" was used instead of "convicted" because in Switzerland, a person is not considered convicted until a sentence has been imposed, whereas in the United States, a sentence is ordinarily not imposed on a convicted person until after a presentence report has been prepared and reviewed. The negotiators intended to make it clear that the Treaty applies to persons who have been adjudged guilty but flee prior to sentencing.[6]

Paragraph 2 deals with the fact that many federal crimes involved acts committed wholly outside of United States territory. Our jurisprudence recognizes the jurisdiction of our courts to hear criminal cases involving offenses committed outside of 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.[7] Therefore, paragraph

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[3] May 14, 1900, 31 Stat. 1928, T.S. 354, 11 Bevans 904.

[4] Jan. 10, 1935, 49 Stat. 3192, T.S. 889, 11 Bevans 924; Jan. 31, 1940, 55 Stat. 1140, T.S. 969, 11 Bevans 938.

[5] See Swiss Federal Act on International Mutual Assistance in Criminal Matters of March 20, 1981 ("I.M.A.C."). The key sections of Swiss law that are germane to the interpretation and implementation of the Treaty are discussed in more detail in this technical analysis.

[6] See Stanbrook and Stanbrook, "Extradition: The Law and Practice" 25–26 (1979).

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

2(a) requires the extradition of persons sought for offenses which took place outside the territory of the Requesting State if the Requested State would possess extraterritorial jurisdiction in similar circumstances. There are similar provisions in many recent United States extradition treaties.[8] This provision will greatly improve the ability of the United States to obtain extradition for serious crimes such as narcotics trafficking and terrorism.

Paragraph 2(b) deals with two other circumstances in which the Requested State must surrender offenders sought for extraditable offenses which occurred outside of the territory of the Requesting State. The first portion of paragraph 2(b) provides for extradition of a person wanted for an extraterritorial offense if the offender is a national of the Requesting State. This provision is especially important to Switzerland, where the courts have jurisdiction to prosecute Swiss citizens for offenses committed outside of Swiss territory.[9] A similar provision is found in many recent United States extradition treaties.[10]

The second portion of paragraph 2(b) provides for extradition of a person wanted for an extraterritorial offense if the offense was committed against a national of the Requesting State. The clause was requested by the Swiss because Swiss law provides for jurisdiction over crimes committed against Swiss nationals outside of Switzerland.[11] This clause is unusual, and, in fact, none of the other United States extradition treaties contains similar language.

The United States has traditionally opposed such passive personality jurisdiction in most cases because if may unfairly expose Americans to foreign criminal liability for actions which are lawful where they take place, expose them to double jeopardy, constitute unfair surprise as to the possibility of prosecution and the maximum punishment in the country of the victim's nationality, or conflict with other, more secure bases of jurisdiction such as territoriality (the place of the offense).

The Swiss government specifically requested this provision in the Treaty. Under the unique circumstances set forth by the Swiss, the United States decided that the provision is acceptable without compromising United States interests. First, Swiss law permits prosecution based on passive personality only when an offense is criminal under the laws of the country where an activity takes place and only permits punishment to the extent authorized by the law of the territorial state. This addresses the fairness and unfair surprise concerns. Second, the Treaty precludes transfers for acts for which a person was already been convicted or acquitted ("non bis in idem"), and Swiss law does not permit duplicative prosecutions

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[8] See, e.g., U.S.-Sweden Supplementary Extradition Convention, Mar. 14, 1983, art. IV, T.I.A.S. No. 10812; U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 2(3), T.I.A.S. No. 10733; U.S.-Jamaica Extradition Treaty, June 14, 1983, art. I(2), T.I.A.S. No.—; U.S.-Thailand Extradition Treaty, Dec. 14, 1983, art. 1(2), T.I.A.S. No. —.

[9] See STGB, C.P. COD. PEN., Swiss Federal Criminal Code, art. 6.

[10] See, e.g., U.S.-Sweden Supplementary Convention on Extradition, Mar. 14, 1983, art. IV(1)(b), T.I.A.S. No. 10812; U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 2(3), T.I.A.S. No. 10733; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 1(2)9b), 31 U.S.T. 5059, T.I.A.S. No. 9656; U.S.-Italy Extradition Treaty, Oct. 13, 1983, art. III, T.I.A.S. No. 10837; U.S.-Japan Extradition Treaty, Mar. 3, 1978, art. VI(1), 31 U.S.T. 892, T.I.A.S. No. 9625, 1203 U.N.T.S. 225.

[11] See STGB, C.P., COD. PEN., Swiss Federal Criminal Code, art. 5. It is not anticipated that this clause will be invoked often, for Switzerland rarely seeks to exercise authority under this statute.

based upon passive personality. This addresses the double jeopardy concern. Third, under the Treaty, the United States may and will deny extradition if we have criminal jurisdiction over the offender, or decide to honor the extradition request of another country based upon such factors as the nationality of the offender or the site of the crime. This addresses the concern that passive personality is less broadly acceptable basis of jurisdiction that territoriality or nationality. Thus, in accepting this provision, the United States government does not intend it to represent a shift in the traditional United States antipathy to such clauses. We have informed the Swiss government of the basis for our acceptance of this provision, and our anticipation that it will be rarely invoked.

Article 2—Extraditable offenses

This article contains the basic guidelines for determining what are extraditable offenses. The Treaty, like 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 permits 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 this manner 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 inadventently fails to cover an important type of criminal activity punishable by both Contracting Parties.

In order to ensure that extradition is not requested for minor offenses, paragraph 1 requires that if the person has already been sentenced, the person must have at least six months of that sentence still to serve. Provisions of this kind are not preferred,[12] but they do appear in some United States extradition treaties.[13]

Paragraph 2 reflects the intention of both Contracting Parties to interpret the principles of this article broadly. Judges in foreign courts are often 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 foreign judges know of no similar requirement 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 he disregarded in applying the dual criminality principle. For example, Swiss authorities must treat United States mail fraud charges[14] in the same manner as fraud charges under state laws and must view the federal crime of interstate transportation of stolen property[15] in the same manner as unlawful possession of stolen property. This paragraph also requires a Requested State to disregard differences in the categorization of the offense in

[12] For example, recent United States extradition treaties with Australia, Canada, Jamaica, New Zealand, and the United Kingdom contain no such requirement.
[13] See, e.g., U.S.-Italy Extradition Treaty, Oct. 13, 1983, art. II(1), T.I.A.S. No. 10837.
[14] See 18 U.S.C. § 1341.
[15] See 18 U.S.C. § 2314.

determining whether dual criminality exists and to overlook mere differences in the terminology used to define the offense under the laws of each Contracting Party. A similar provision is contained in all recent United States extradition treaties.

Paragraph 3 follows the pattern of recent extradition treaties of providing that extradition should also be granted for attempting to commit, or otherwise participating in, an extraditable offense, and for conspiring to commit an offense if the underlying criminal activity would also be a violation of law. Conspiracy charges are frequently used in United States criminal cases, particularly those involving complex transnational criminal activity, so it is especially important that the treaty be clear on this point. Switzerland has no general conspiracy statute like Title 18, United States Code, Section 371, so paragraph 3 makes it clear that conspiracy is an extraditable crime if the underlying criminal activity passes the dual criminality test of paragraph 1 (i.e., whenever the offender conspired to commit an act punishable in both the Requesting and Requested State by deprivation of liberty for more than one year or a more severe penalty). It also makes extraditable acts in preparation of homicide, aggravated assault, robbery, arson, hostage-taking and kidnapping under the laws of Switzerland.[16] Thus, most Swiss and United States inchoate crimes and accessorial conduct will be covered by the Treaty.

Paragraph 4 states that when extradition has been granted for an extraditable offense, it shall also be granted for any other offense punishable by the laws of both Contracting Parties regardless of the requirement as to length of sentence. For example, if Switzerland agrees to extradite to the United States a fugitive wanted for prosecution on a felony charge, the United States will also be permitted to obtain extradition for any misdemeanor offenses charged, as long as those misdemeanors would also be recognized as criminal offenses in Switzerland. 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 extradition offense. This practice is generally desirable from the standpoint of both the fugitive and the prosecuting country in that it permits all charges against the fugitive to be disposed of more quickly, thereby facilitating trials while evidence is still fresh and permitting the possibility of concurrent sentences. Similar provisions are found in recent extradition treaties with Australia, Ireland, Italy, and Costa Rica.

The Treaty, like all of our recently negotiated extradition treaties, makes the kidnapping of one's own child in violation of local law ("parental child abduction") an extraditable offense, provided the conditions of the Treaty, including dual criminality, are met. Thus, under the Treaty, there will be the possibility of extradition requests being made while child custody is being addressed under civil or domestic relations procedures, including the Convention on the Civil Aspects of International Child Abduction, done at the Hague October 25, 1980, which is in force for both the United States and Switzerland ("Hague Convention").

[16] See STGB, C.P., COD. PEN., Swiss Federal Criminal Code, art. 260 bis.

The policy of the United States government, as reflected in the sense of Congress regarding the 1993 International Parental Kidnapping Crime Act which created the federal offense, is that Hague Convention procedures "in circumstances in which they are applicable, should be the option of first choice for a parent who seeks the return of a child." President Clinton reiterated this view in his signing statement in connection with the law. Consequently, although the federal offense was intended to serve as a basis for international extradition, prosecutors must remain aware that extradition procedures do not necessarily result in the return of the child. Given concerns for the welfare of an abducted child, it is essential that the prosecutor and the left-behind parent consider carefully the impact of a criminal prosecution on the welfare of an abducted child. In some cases, it will be desirable to delay extradition proceedings until after the child has been returned to the appropriate parent or custodian or to the child's place of habitual residence.

In consultations in connection with the Treaty, the Contracting Parties concurred that civil measures or proceedings, including Hague Convention proceedings, are the preferred means to accomplish the return of a child following a parental child abduction. In the consultations, the delegations did not rule out criminal prosecutions if the civil proceedings were unsuccessful or in other appropriate cases. In addition, the consultations reflected that both Contracting Parties were sensitive to the fact that prior to making any extradition request, and more particularly in these cases, efforts should be made to ensure that the request is backed by a legitimate law enforcement interest in the prosecution of the case.

Article 3—Political, fiscal, and military offenses

Paragraph 1 prohibits extradition if the act for which extradition is requested constitutes a political offense. This is similar to political offense provisions in many modern United States extradition treaties.

Paragraph 1 also provides that the Requested State shall deny extradition if the request was politically motivated.[17] In the United States the longstanding law and practice has been that the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.[18]

Paragraph 2 states that the political offense exception shall not apply to offenses included in a multilateral treaty, convention, or agreement to which both Switzerland and the United States are parties and which require the parties to either extradite the person sought or submit the matter for prosecution. The conventions to which this clause would apply at present include the Convention on Offenses and Certain Other Acts Committed on Board Aircraft;[19] the Convention on the Suppression of Unlawful Seizures of Aircraft

[17] Similar provisions appear in many United States extradition treaties. See, e.g., U.S.-Jamaica Extradition Treaty, June 14, 1983, art. III(3), T.I.A.S. No.—; U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 4, T.I.A.S. No. 10733; U.S.-Ireland Extradition Treaty, July 13, 1983, art. IV(c), T.I.A.S. No. 10813; U.S.-Spain Extradition Treaty, May 29, 1970, art. 5(4), 22 U.S.T. 737, T.I.A.S. No. 7136, 796 UNTS 245.

[18] *See Eain* v. *Wilkes*, 641 F.2d 504, 513–18 (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).

[19] Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

(Hijacking),[20] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage);[21] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents;[22] and the International Convention Against the Taking of Hostages.[23] In addition, Switzerland is expected to ratify the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances[24] in the near future. Both the United States and Switzerland are parties to the Single Convention on Narcotic Drugs[25] and the Amending Protocol to the Single Convention;[26] this provision of the Treaty would pay to those conventions.

Paragraphs 3 (a) and (b) permit the Requested State to deny extradition for acts that are exclusively violations of currency policy, trade policy, or economic policy, or are intended exclusively to reduce taxes or duties. These provisions were included in the Treaty because Swiss law prohibits extradition for purely "fiscal" or tax offenses.[27] However, the Swiss delegation stated that criminal conduct would not be shielded from extradition under these provisions to the extent that the conduct is prohibited by conventional penal concepts. For example, fraud and embezzlement are crimes which may have economic motives and effects but are clearly extraditable offenses under the Treaty. Certain violations of antitrust, environmental, or tax laws may be interpreted by Switzerland to fall within this category of non-extraditable offenses. Nonetheless, the underlying conduct prohibited by such laws may be accompanied by other offenses—for example, falsification of public documents in the course of concealing an environmental crime—and extradition will remain available for those other offenses.

Paragraph 3(c) provides that extradition may be denied by the Requested State if the request relates to a matter that constitutes an offense only under military law.[28]

Article 4—Non bis in idem

This article will permit extradition in situations in which the fugitive is charged with different offenses in each Contracting Party arising out of the same basic transaction.

Paragraph 1, which prohibits extradition if the offender has been convicted or acquitted in the Requested State for the same acts for which extradition is requested, is similar to language found in many United States extradition treaties.

Paragraph 2 follows most modern United States extradition treaties in giving the Requested State the option of instituting proceedings regarding the same acts against the person for whom extradition is sought, in the event it has jurisdiction to do so. Alter-

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[20] Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.
[21] Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.
[22] Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.
[23] Dec. 17, 1979, T.I.A.S. No. 11081.
[24] Dec. 20, 1988, T.I.A.S. No.—.
[25] Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.
[26] Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.
[27] I.M.A.C. article 3(3) states: "A request shall not be granted if the subject of the proceeding is an offense which appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade, or economic policy. * * *" I.M.A.C. art. 3(3).
[28] 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).

natively, it permits the Requested State to simply extradite the person to the Requesting State.

Paragraph 3 makes it clear that neither Contracting Party may refuse to extradite an offender to the other on the ground that the Requested State's authorities declined to prosecute the offender, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings. This provision was included because a decision of the Requested State to forego prosecution, or to drop charges already filed, may be the result of a failure to obtain sufficient evidence or witnesses for trial, whereas the prosecution in the Requesting State may not suffer from the same impediments. This provision should enhance the ability to extradite to the jurisdiction with the better chance of a successful prosecution.

Overall, this article will permit extradition to or from the United States in situations in which the fugitive is charged with different offenses by the Contracting Parties for different activities arising from the same course of conduct. For example, a person in the United States who prints counterfeit Swiss currency and uses it in an attempt to defraud other persons located in the United States could be prosecuted in the United States for fraud and, if not prosecuted in the United States for counterfeiting Swiss currency, could be extradited to Switzerland for prosecution for counterfeiting.

Article 5—Lapse of time

This article states that extradition shall not be granted when the prosecution or the enforcement of the penalty or sanction has become barred by a lapse of time according to the law of the Requesting State. Similar provisions appear in several United States extradition treaties. The reference to "enforcement of the penalty or sanction" reflects the fact that Switzerland, like many civil law countries, has a statute of limitations relating to such matters, in addition to a statute of limitation on prosecutions.

In addition, this clause ensures that a court in the Requested State will not apply the Requested State's statute of limitations under the erroneous belief that it should do so in order to determine whether dual criminality exists.[29] Such an analysis is wholly inappropriate, for statutes of limitations are designed by countries to complement their criminal laws and procedures. Applying a statute of limitations designed for one country's legal system to that of another country is likely to impose unfortunate and unintended restrictions on the Requesting State's ability to obtain extradition of persons who have committed serious violations of its laws. Therefore, this article provides that extradition must be denied only if the Requesting State's statute of limitations bars prosecution or enforcement of the sentence.

Article 6—Capital punishment

This article permits the Requested State to refuse extradition in cases where the offense for which extradition is sought is punish-

[29] Such an analysis has been rejected by a number of United States courts. See, e.g., *Theron* v. *U.S. Marshal*, 832 F.2d 492, 499 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988) (focus of dual criminality analysis is on the conduct that the law criminalizes, not the statute of limitations); see also *Merino* v. *U.S. Marshal*, 326 F.2d 5, 12 (9th Cir. 1963) (in absence of treaty provisions, the statute of limitations may not be raised in extradition proceedings); *Kamrin* v. *United States*, 725 F.2d 1225, 1227 (9th Cir.), cert. denied, 469 U.S. 817 (1984).

able by death in the Requesting State, but is not punishable by death in the Requested State, unless the Requesting State provides such assurances that the Requested State considers sufficient that the death penalty will not be carried out. Switzerland insisted on this provision because Switzerland has abolished the death penalty,[30] and Swiss extradition law prohibits extradition in cases in which the person sought might be executed.[31] Similar provisions are found in many recent United States extradition treaties.[32]

Article 7—Conviction in absentia

This article gives the Requested State the discretion to refuse to extradite a fugitive who has been convicted in absentia (i.e., one who was convicted without ever appearing in connection with the proceeding) in the Requesting State. The laws of the United States and Switzerland differ on who should make this decision. This clause will enable the Secretary of State to carry out the longstanding United States policy of permitting extradition in such cases only when the person sought will have the opportunity for a hearing on the issue of guilt in the Requesting State or has knowingly failed to protect the person's ability to have such a hearing.

Article 8—Extradition of nationals

Paragraph 1 states that the Requested State shall not decline to extradite because the person sought is a national of the Requested State unless it has jurisdiction to prosecute that person for the acts for which extradition is sought. The United States will extradite its nationals to Switzerland in accordance with the established United States policy favoring such extraditions.[33] However, Switzerland is prohibited by its law from extraditing a Swiss national without the person's consent.[34] It is unlikely that Switzerland will surrender its nationals to the United States under the Treaty unless Swiss law is amended in the future.

Paragraph 2 requires that if the Requested State refuses extradition solely on the basis of nationality, the Requested State shall submit the case to its competent authorities for prosecution if asked to do so by the Requesting State. Similar provisions are found in many recent United States extradition treaties.[35]

Article 9—Request for extradition

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

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[30] See STGB, C.P., COD. PEN., Swiss Federal Criminal Code, art. 35.

[31] See I.M.A.C. art. 37(2).

[32] 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.

[33] 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 nationals of the United States and nationals of other countries 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 a treaty which 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.

[34] See I.M.A.C. §§ 7, 37.

[35] See, e.g., U.S.-Costa Rica Extradition Treaty, Dec. 4, 1982, art. 8, T.I.A.S. No. —; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 9(2), 31 U.S.T. 5059, T.I.A.S. No. 9656.

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 fugitive pursuant to article 13. Provisional arrest requests need not be initiated through diplomatic channels if the requirements of article 13 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 convicted 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 "the texts of the laws describing the essential elements of the offense for which extradition is requested, the punishment for the offense, and the time limit on the prosecution or the execution of the punishment for the offense." This information would enable the Requested State to determine easily whether lack of dual criminality or lapse of time would be a valid basis for denying extradition under article 2 or 5.

Paragraph 3 requires that if the fugitive has not yet been tried for the crime for which extradition is requested, the Requesting State must provide a copy of the outstanding arrest warrant, the formal charges, and "a summary of the facts of the case, of the relevant evidence, and of the conclusions reached, providing a reasonable basis to believe that the person sought committed the offense for which extradition is requested. * * *" This is consistent with fundamental extradition jurisprudence in the United States, under which this language is interpreted to require probable cause.[36] During the negotiations, the Swiss delegation assured the United States that under Swiss law, the outstanding United States arrest warrant would constitute sufficient evidence to justify extradition. Since the procedure for preparing international extradition requests differs in the United States and Switzerland, the Treaty specifies that "* * * in the case of Switzerland such a summary shall be written by a judicial authority and in the case of requests from the United States it shall be written by the prosecutor and shall include a copy of the charge."

Paragraph 4 lists the information needed to extradite a person found guilty 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.[37]

Paragraph 5 states that if the person sought was found guilty in absentia, the documentation required for extradition must include

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

[37] See, e.g., *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).

both proof of conviction and the documentation required under paragraphs 2 and 4.

Article 10—Supplementing the request

This article, which is similar to provisions in other recent United States extradition treaties,[38] provides for the submission of additional evidence or information if the original request and supporting documentation are viewed as insufficient by the Requested State. This is intended to permit the Requesting State to have an opportunity to cure any defects in the request and accompanying materials found by a court in the Requested State.

Article 11—Translation

This article requires that all documents submitted in support of an extradition request be translated into the language of the Requested State. Swiss requests to the United States must be translated into English. Since Switzerland has several official languages, United States requests to Switzerland must be translated into the language spoken in the Swiss canton in which the fugitive's extradition hearing will be conducted, which will be French, German, or Italian.[39]

Article 12—Admissibility of documents

This article governs the authentication procedures for documentation provided in extradition cases.

Paragraph (a) states that evidence intended for use in extradition proceedings in Switzerland must be certified by a judge, magistrate or other United States official and must be sealed by the Secretary of State.

Paragraph (b) states that evidence intended for use in extradition proceedings in the United States shall be admissible if it is certified by the principal diplomatic or consular officer of the United States resident in Switzerland. This provision primarily accommodates the authentication procedures required by United States law.[40]

Paragraph (c) provides an alternative 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. Under this paragraph, relevant evidence that would normally satisfy the evidentiary rules of the Requested State should not be excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

Article 13—Provisional arrest

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

Paragraph 1 expressly provides that a request for provisional arrest may be made either through the diplomatic channel or directly between the United States Department of Justice and the Swiss

[38] See, e.g., U.S.-Jamaica Extradition Treaty, June 14, 1983, art. I(2), T.I.A.S. No. —.
[39] See I.M.A.C. art. 28(5).
[40] See 18 U.S.C. § 3190.

Federal Department of Justice and Police.[41] Experience has shown that the ability to use such direct channels in emergency situations can be crucial when a fugitive is posed 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 take appropriate steps to arrest the person sought, and shall advise the Requesting State without delay of the result of its request.

Paragraph 4 provides that the fugitive may be released from detention if the Requesting State does not receive the fully documented extradition request within 40 days of the provisional arrest. This period may be extended by a maximum of 20 additional days upon request. When the United States is the Requesting State, documents must be received by the "executive authority," which would include the Secretary of State or the United States Embassy in Bern.[42] When Switzerland is the Requesting State, the documents must be received by "the competent authorities," a term which includes the Swiss courts.

Paragraph 5 states that the person arrested may be released from custody if the documents are not received within the 60-day period. However, the person may be taken into custody again and the extradition proceedings may be re-commenced when the formal request is presented at a later date.

Article 14—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 the reasons for the denial. If extradition is granted, the article requires that the Contracting Parties agree on a time and place for surrender of the person. The Requesting State must remove the fugitive 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. Under United States law, such surrender must occur within two calendar months of the finding that the offender is extraditable,[43] or of the conclusion of any litigation challenging that finding,[44] whichever is later. Under Swiss law, the surrender must take place within ten days of the finding that the offender is extraditable, or of the conclusion of any litigation challenging that finding, whichever is later, and that period can be extended for 30 days upon request.[45]

Article 15—Deferred and temporary surrender

Occasionally, a person sought for extradition already may be facing prosecution or serving a sentence on other charges in the Requested State. This article provides a means for the Requested

[41] It is understood that the United States Department of Justice and the Swiss Federal Department of Justice and Police may use the facilities of Interpool for such requests. See I.M.A.C. art. 44.

[42] *Clark,* 470 F. Supp. 976, 979.

[43] 18 U.S.C. § 3188.

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

[45] I.M.A.C. art. 61.

State to defer extradition in such circumstances until the conclusion of the proceedings against the person sought and the service of any punishment imposed. Similar provisions appear in our recent extradition treaties with the Bahamas and Australia.

Paragraph (a) provides that the executive authority of the Requested State may defer the surrender of a person who is serving a sentence in the Requested State until the conclusion of the proceedings against that person or the full execution of any punishment that may or may not have been imposed.[46]

Paragraph (b) provides for the temporary surrender for the purpose of prosecution in the Requesting State of a person 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 against that person in the Requesting State, in accordance with conditions to be determined by mutual agreement of the Contracting Parties. 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 possible the service of any sentence 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.

Article 16—Rule of specialty

The Rule of Specialty as set forth in this article is substantively similar to the rule as embodied in other recent United States extradition treaties. Paragraph 1 provides that a person surrendered under the Treaty may be detained, proceeded against, or sentenced in the Requesting State only for an offense for which extradition was granted, an offense differently denominated but based on the same facts, an offense committed after the person's surrender, or an offense to which the Requested State consents. Subparagraph 1(a) further provides that before giving such consent, the Requested State may require the Requesting State to document its request as if it were an ordinary request under the Treaty. The Secretary of State will determine whether such consent should be given by the United States.[47]

Paragraph 1 also provides that a person extradited under the Treaty may not be extradited to a third country for any offense committed prior to surrender other than that for which extradition has been granted without the consent of the executive authority of the Requested State. In the case of the United States, the Secretary of State will decide whether such consent should be given.

Paragraph 1(b) permits the detention, trial, or punishment of an extraditee for additional offenses, or the extradition of that person to a third country if the extraditee (1) leaves and returns to the Re-

[46] Under United States law and practice, the Secretary of State makes this decision. See *Koskotas* v. *Roche,* 740 F. Supp. 904, 920 (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).
[47] See *Berenguer* v. *Vance,* 473 F. Supp. 1195 (D.D.C. 1979).

questing State, or (2) does not leave the Requesting State within 45 days of being free to do so.

Paragraph 2 recognizes that, under Swiss law, prosecutions in absentia may be required to avoid the running of the statue of limitations.

Paragraph 3 reiterates the basis proposition under both United States and Swiss law that extradition is granted for specific illegal acts by the fugitive which are punishable under both legal systems. Thus, once extradition is granted, the returned fugitive may be prosecuted—without a request for a waiver of the Rule of Specialty—for any charge that can be brought under the set of facts for which extradition was granted, as long as the penalties for the new charges are not greater than the penalties for those offenses for which extradition was granted. Thus, no waiver of the Rule of Specialty is required if an offense is differently denominated in the requesting State than in the Requested State, but is based on the same facts for which extradition was granted. Only if the factual basis for the charges is altered or the penalty is increased must a request for a waiver of the Rule of Specialty be made.

Paragraph 4 provides a mechanism for obtaining a waiver by the fugitive of the Rule of Specialty. Subparagraph 4(a) follows existing requirements of Swiss law for such a waiver. Subparagraph 4(b) follows United States law.

Article 17—Requests for extradition by several States

This article, which follows the practice set forth in many recent United States extradition treaties, lists some of the factors that the executive authority of the Requested State must consider in determining to which country to surrender a person whose extradition has been requested by two or more countries.[48] For the United States, the Secretary of State makes this decision.[49]

Article 18—Simplified 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 a framework for such a waiver and return. It states that when a fugitive consents in writing to be surrendered to the Requesting State and has been advised by a judicial authority of the right to a formal proceeding and its protections, the person's surrender may be granted by the Requested State without formal extradition proceedings. The negotiators anticipated that in such cases, the Requested State would have no need for the formal documents described in article 9 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 Switzerland before the United States Secretary of State signs a surrender warrant, the process would not be deemed an "extradition." Longstanding United States policy is that the Rule of Specialty does not apply to such cases. However, the second sentence of this article states that when Switzerland is the Requested State, the Rule of Specialty set forth in

[48] See I.M.A.C. art. 40.

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

article 16 will apply to cases in which article 18 was invoked. This is in accordance with Swiss law.[50] A similar requirement is found in other recent United States extradition treaties.[51]

Article 19—Surrender of property

This article provides for the seizure by the Requested State of all property—which might include articles, instruments, objects of value, documents, or other evidence—relating to the offense, to the extent permitted by the Requested State's internal law. The article also provides that these objects shall be surrendered to the Requested State upon the granting of the extradition or even if extradition cannot be effected for any reason, including the death, disappearance, or escape of the fugitive. Paragraph 2 states that the Requested State may condition its surrender of property upon satisfactory assurances that the objects will be returned to the Requested State as soon as practicable. The obligation to surrender property under this provision is expressly made subject to due respect for the rights of third parties in such property.

Article 20—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 third countries and to hold such persons in custody during the period of transit. Transit requests may be transmitted via the diplomatic channel. Each request must contain a description of the person whose transit is being proposed, a brief statement of the facts of the case necessitating the surrender to the Requesting State, and other information as specified in paragraph 1. This paragraph also states that no advance authorization is needed if air transportation is being used and no landing was scheduled in the territory of the other Contracting Party.

Paragraph 2 states that if an unscheduled landing occurs, the transit shall be subject to the provisions of article 29(1). The person in transit may be kept in custody for up to 72 hours until a request for transit is received, and, if the request is granted, may remain in custody thereafter until the transit is complete.

Article 21—Expenses

Paragraph 1 provides that the Requested State will bear all expenses of extradition except those expenses relating to the transportation of the fugitive to the Requesting State and the translation of documents, which are to be paid by the Requesting State. This is consistent with Swiss and United States law on this subject.[52]

Paragraph 2 provides that the Requested State shall provide for the representation of the Requesting State in any proceedings arising out of the request for extradition. Thus, the United States will represent Switzerland in connection with a request from Switzerland for extradition before the courts in this country, and the Swiss Federal Department of Justice and Police will arrange for the rep-

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[50] See I.M.A.C. art. 54.

[51] See, e.g., U.S.-Mexico Extradition Treaty, May 4, 1978, art. 18, 31 U.S.T. 5059, T.I.A.S. No. 9656; U.S.-Jamaica Extradition Treaty, June 14, 1983, art. 15, T.I.A.S. No.—.

[52] See 18 U.S.C. § 3195; I.M.A.C. art. 31.

resentation of United States interests in connection with United States extradition requests to Switzerland. In the past, such reciprocal representation arrangements have provided the United States with high quality legal representation in extradition cases. This arrangement also ensures better coordinated and more uniform handling of foreign extradition requests before United States courts.

Article 22—Application

The Treaty, like most other United States extradition treaties negotiated in the past two decades, expressly states that it applies to offenses committed before as well as after the date on which the Treaty enters into force.

Article 23—Effect on other treaties and laws

This article is intended to ensure uniform procedures for the execution of extradition requests. It provides that whenever the procedures provided by the Treaty would facilitate the extradition provided for under any other convention or under the law of the Requested State, the procedures provided by the Treaty shall be used. Thus, the Treaty supplies the procedures to be used in any extradition request arising under the Treaty or under any of the various specialized multilateral treaties that may contain extradition obligations. Without this article, the provisions of Swiss extradition law would apply to United States requests arising under these multilateral treaties, which possibly could lead to inconsistent results.

Article 24—Consultation

This article provides that the Contracting Parties shall consult, at the request of either Contracting Party, regarding the interpretation, application, or operation of the Treaty, either in general or with respect to a specific case. A similar provision is found in other recent United States extradition treaties awaiting ratification.[53]

Article 25—Entry into force and termination

This article contains standard treaty language providing for the ratification of the Treaty and the exchange of instruments of ratification at Washington, D.C., as soon as possible.

Paragraph 2 states that the Treaty will enter into force 180 days after the exchange of instruments of ratification.

Paragraph 3 provides that the extradition treaty currently in force and the supplementary treaties of 1935 and 1940 shall cease to have effect upon the entry into force of the Treaty, except with respect to extradition requests pending when the Treaty enters into force.

Paragraph 4 provides that the Treaty may be terminated by either contracting Party at any time after five years from the date of entry into force, provided that at least six months prior to the termination, written notice of termination was provided to the other Contracting Party.

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[53] See, e.g., U.S.-Jordan Extradition Treaty, March 28, 1995, art. 20. See, also, extradition treaties awaiting to be entered into force: U.S.-Belgium Extradition Treaty, Apr. 9, 1987, art. 19, T.I.A.S. No. —; U.S.-Philippines Extradition Treaty, Nov. 13, 1994, art. 18, T.I.A.S. No. —; U.S.-Hungary Extradition Treaty, Dec. 1, 1994, art. 21, T.I.A.S. No. —.

The Treaty, like all of our recently negotiated treaties, makes the kidnapping of one's own child in violation of local law (parental child kidnapping) an extraditable offense, provided there is dual criminality and the offense is punishable by imprisonment for at least one year in both Contracting Parties. However, both Contracting Parties are sensitive to the fact that prior to making any request for extradition, efforts should be made to ensure that the request is backed by a legitimate law enforcement interest in the prosecution of the case. Among the factors to be addressed would be the appropriateness of the prosecution itself and, particularly in cases in which the sole interest is the return of the child and not prosecution, the availability of civil or domestic relations procedures, including the Convention on the Civil Aspects of International Child Abduction, done at the Hague October 25, 1980, in force for the United States July 1, 1988 (the Hague Convention), to which Switzerland is also a party. Further, prosecutors must be cognizant of the fact that extradition procedures do not necessarily result in the return of the child and must weigh carefully whether it is in the best interest of the child to undertake the extradition of the kidnapper/parent while the child is still in the custody of that parent. In some cases, it is desirable for extradition proceedings to be delayed until after the child has been returned to the appropriate parent or custodian.

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 Swiss Confederation, signed at Washington on November 14, 1990. 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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