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EXTRADITION TREATY WITH HUNGARY

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

REPORT

[To accompany Treaty Doc. 104–5]

The Committee on Foreign Relations, to which was referred the Treaty Between the United States of America and the Government of the Republic of Hungary on Extradition, signed at Budapest on December 1, 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 December 1, 1994, the President signed an extradition treaty with Hungary. The Treaty was transmitted to the Senate for its advice and consent to ratification on May 8, 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 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 I 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 Hungary 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, under the Hungary Treaty the Requested State nevertheless has discretionary authority to grant extradition (art. 2(4)).

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 Hungary Treaty is narrower than other U.S. extradition treaties.

The Hungary treaty starts out with standard language that extradition shall not be granted for political offenses (art. 4 (1)). It then goes on to list several categories of offenses that are not considered political: a murder or other willful crime against a head of state or a member of his or her family; certain specified crimes, including murder, kidnapping, and placing explosive devices; an offense for which both parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or submit the case to their authorities for prosecution; and an attempt or conspiracy to commit any of the foregoing acts, or participation in the commission of those acts. The first category of offenses not considered political—a criminal attack on a head of state or members of his family—is a carryover from older 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 Hungary Treaty does not contain such an exclusion in their political offense exception.

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

4. The death penalty exception

The United States and other countries appear to have different views on capital punishment. Under the proposed treaty a party 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 Hungary Treaty contains the traditional nationality clause providing that neither party is obligated to extradite its own na-

tionals, but that they may do so at their discretion (art. 3). Upon a refusal to extradite, the Requested State may be required by the Requesting State to submit the case to its authorities for prosecution.[1]

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 Hungary Treaty (art. 17) 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 Hungary Treaty contains rules that preclude extradition of offenses barred by an applicable statute of limitations. Extradition is barred if the statute of limitations has run under the laws of the Requesting State, not the Requested State (art. 6).

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 may be terminated by either Party, effective six months after receipt of notice by a Party of the intention of the other Party 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 Wednesday, July 24, 1996, and ordered the proposed treaty favorably reported with one proviso by voice vote, with the

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

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 HUNGARY

On December 1, 1994, the United States signed a treaty on extradition with the Republic of Hungary ("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 current treaty in force between the two countries, the Convention for the Mutual Delivery of Criminals, Fugitives from Justice, in Certain Cases[2] ("the 1856 Treaty"), which is the oldest United States extradition treaty still in force.

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. Hungary has internal extradition legislation[3] 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 persons charged with or convicted of extraditable offenses, subject to the provisions of the Treaty.

Article 1 refers to charges brought by authorities "in" the Requesting State rather than "of" the Requesting State, thereby obligating Hungary to extradite fugitives to the United States for state and local prosecutions as well as federal cases. The term "found guilty" is used instead of "convicted" because in Hungary, a person is not considered convicted until a sentence is imposed, whereas in the United States, a sentence ordinarily is not imposed until after a presentence report is prepared and reviewed. The negotiators intended to make it clear that the Treaty applies to persons adjudged guilty who flee the jurisdiction prior to sentencing.[4]

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.

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 inadvertently fails to cover an important type of criminal activity punishable in both Contracting Parties.

During the negotiations, the Hungarian delegation stated that key offenses such as drug trafficking, including operating a con-

[2] July 3, 1856, 11 Stat. 691, T.S. 9, 5 Bevans 211.

[3] See Act I of 1973, Criminal Procedure Code of the Hungarian People's Republic, §§.389–393. The key sections of Hungarian law that are germane to the interpretation and implementation of the Treaty are discussed in more detail in this technical analysis.

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

tinuing criminal enterprise,[5] money laundering, and offenses under the RICO statutes[6] are considered extraditable under the Treaty.

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition should also be granted for attempting to commit, or otherwise participating in, an extraditable offense. 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. Hungary has no general conspiracy statute like Title 18, United States Code, Section 371. Therefore, paragraph 2 creates an exception to the "dual criminality" rule of paragraph 1 by expressly making conspiracy an extraditable crime. Similarly, this paragraph makes the Hungarian offense of association to commit an offense an extraditable offense.

Paragraph 3 reflects the intention of both Contracting Parties to interpret the principles of this article 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 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 this basis. This paragraph requires that such elements be disregarded in applying the dual criminality principle. For example, it will ensure that Hungarian authorities treat United States mail fraud charges[7] in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property[8] in the same manner as unlawful possession of stolen property. Paragraph 3 further requires a 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 each Contracting Party. A similar provision is contained in all recent United States extradition treaties.

Paragraph 4 deals with the fact that many federal crimes involve acts committed wholly outside United States territory. Our jurisprudence recognizes jurisdiction in our courts to hear 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.[9] In Hungary, however, the government's ability to prosecute extraterritorial offenses is very different.[10] Paragraph 4 therefore reflects Hungary's agreement to recognize United States jurisdiction to prosecute offenses committed outside the United States if Hungarian law permits it to prosecute similar offenses committed outside Hungary in corresponding circumstances. If the law of the Requested State does not provide for such prosecu-

[5] See 21 U.S.C. § 848.
[6] See 18 U.S.C. §§ 1961–68.
[7] See U.S.C. § 1341.
[8] See U.S.C. § 2314.
[9] 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).
[10] For example, Hungary can prosecute its citizens for offenses committed outside Hungary.

tion, paragraph 4 nevertheless permits the executive authority of the Requested State to decide, at its discretion, to grant the extradition. For the United States, this decision is made by the Secretary of State, and for Hungary, by the Minister of Justice. A similar provision appears in several recent United States treaties.[11]

Paragraph 5 states that when extradition is 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 Hungary 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 are also recognized as criminal offenses in Hungary. 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 perspective 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.

Some recent United States extradition 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 on the outstanding sentence. 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 felt that the particular sentence imposed or outstanding is not necessarily an adequate measure of the seriousness of the crime.[12] They preferred the exercise of discretion and good judgment in considering the remainder of a sentence to be served, not arbitrary limits imposed in the terms of the Treaty, as the better approach to promote the Treaty's goals. A similar provision is found in our extradition treaties with other countries, including Australia, Canada, Jamaica, New Zealand, and the United Kingdom.

Article 3—Nationality

Paragraph 1 specifically states that each Contracting Party has the discretionary power to extradite its own nationals unless prohibited from doing so by internal legislation. This paragraph, like the clause in article IV of the 1901 Treaty that it replaces, is in-

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[11] See Protocol Amending U.S.-Canada Extradition Treaty, Jan. 11, 1988, art. 1, T.I.A.S. No. —; Protocol Amending U.S.-Australia Extradition Treaty, Sept. 4, 1990, art. III, T.I.A.S. No. —.

[12] Cf. *United States* v. *Clark,* 470 F. Supp. 976, 978 (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.

tended to permit the United States to extradite its nationals to Hungary, in accordance with established United States policy favoring such extraditions.[13] However, since Hungary is barred by its law from extraditing Hungarian nationals,[14] it is unlikely that Hungary will actually surrender its nationals to the United States under the Treaty unless Hungarian law is amended in the future.

Paragraph 2 requires that if the Requested State refuses extradition solely on the basis of nationality, that State must submit the case to its authorities for prosecution if asked to do so by the Requesting State.

Similar provisions are found in many recent United States extradition treaties.[15]

Article 4—Political and military offenses

Paragraph 1 prohibits extradition for political offenses. This is a common provision in United States extradition treaties.

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

Paragraph 2(a) provides that the political offense exception to extradition does not apply when there is a murder or other willful crime against the life of a Head of State of a Contracting Party, or a member of the head of State's family.

Paragraph 2(b) states that the political offense exception does not apply to offenses for which both Contracting Parties have the obligation, pursuant to a multilateral treaty, convention or international agreement, either to extradite the person sought or to submit the matter for prosecution. The conventions to which this clause applies at present include the Convention on Offenses and Certain Other Acts Committed on Board Aircraft;[16] the Convention for the Suppression of Unlawful Seizures of Aircraft (Hijacking);[17] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage);[18] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents;[19] and the International Convention Against the Taking of Hostages.[20] In addition, Hungary is expected to ratify the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances[21] in the near future. In the meantime, both the United States and Hungary are parties to the Single Convention on Nar-

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[13] 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 those 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 treaties that permit but do not expressly require surrender of citizens, as long as the other requirements of the treaty are met. 18 U.S.C. § 3196.

[14] See Act IV of 1978, Criminal Code of the Hungarian People's Republic, § 9(1).

[15] 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, 31 U.S.T. 5059, T.I.A.S. No. 9656.

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

[17] Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

[18] Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.

[19] Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

[20] Dec. 17, 1979, T.I.A.S. No. 11081.

[21] Dec. 20, 1988, T.I.A.S. No.—.

cotic Drugs[22] and the Amending Protocol to the Single Convention;[23] this provision of the Treaty applies to both conventions.

Subparagraphs 2(c), (d) and (e) specify that the Requested State shall not consider any of the following crimes to be political offenses: murder, manslaughter or any other offense involving substantial bodily harm; offenses involving kidnapping or any form of unlawful detention, including hostage-taking; and placement or use of a device, incendiary, or destructive device capable of endangering life, of causing substantial bodily harm, or of causing substantial property damage. Thus, the Treaty is similar to recent United States extradition treaties with the United Kingdom, Canada, Germany, and Spain, in each of which the scope of the political offense exception is substantially narrowed to eliminate its application to certain crimes typically committed by terrorists.

Paragraph 2(f) states that the political offense exception does not apply to conspiracy or any type of association to commit, attempt to commit, or participation in, the commission or attempted commission of the foregoing offenses.

Paragraph 3 provides that extradition shall not be granted if the executive authority of the Requested State finds that the request is politically motivated. This is consistent with longstanding United States law and practice, under which the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.[24] Similar provisions appear in many United States extradition teeaties.[25]

Paragraph 4 provides that extradition may be denied by the executive authority of the Requested State if the request relates to an offense under military law that is not an offense under ordinary criminal law.[26]

Article 5—Prior prosecution

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 prohibits extradition if the fugitive has been convicted or acquitted in the Requested State for the offense for which extradition is requested. This is similar to language found in many United States extradition treaties. The paragraph also permits extradition to be denied if the charges in the Requesting State have been "dismissed by a court order with binding effect. * * *" This refers to the dismissal of charges by the court "with prejudice," a situation which raises double jeopardy concerns. This paragraph will, however, permit extradition in situations in which the activities of the fugitive result in his being charged with different offenses in both Contracting Parties arising out of the same basic transaction.

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[22] Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.

[23] Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.

[24] 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).

[25] 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.

[26] An example of such a crime is desertion. See, e.g., In re *Suarez-Mason,* 694 F. Supp. 676, 703 (N.D. Cal. 1988).

Paragraph 2 makes it clear that neither Contracting Party can 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 by 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.

Article 6—Lapse of time

This article states that extradition must be denied if at the time the extradition request is received, the prosecution of the offense or the enforcement of the penalty or detention order is barred by lapse of time under the law of the Requesting State. Similar provisions appear in several United States extradition treaties. The reference to "enforcement of the penalty or of the detention order" reflects the fact that Hungary, like many civil law countries, has a statute of limitations relating to such matters in addition to a statute of limitation on prosecutions. The article indicates that the Requested State should not deny the request if the statute of limitations expires after the requested State receives the request.

Article 7—Capital punishment

Paragraph 1 permits the requested State to refuse extradition in cases in which the offense for which extradition is sought is punishable by death in the Requesting State, but is not punishable by death in the Requested State, unless the Requesting State provides assurances that the death penalty will not be imposed, or, if imposed, will not be carried out. Similar provisions are found in many recent United States extradition treaties.[27]

The Hungarian delegation insisted on this provision because Hungary has abolished the death penalty and usually denies extradition in cases in which the person sought might be executed. However, the Hungarian delegation assured the United States delegation that in an extraordinarily egregious case. Hungary might be persuaded to grant extradition without assurances pursuant to this paragraph.

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 8—Extradition procedures and required documents

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

Paragraph 1 requires that each formal request for extradition be submitted through the diplomatic channel. A formal extradition re-

[27] 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.

quest may be preceded by a request for the provisional arrest of the fugitive under article 11, and provisional arrest request need not be initiated through diplomatic channels if the requirements of article 11 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(e) calls for "a statement of the provisions of law describing any time limit on the prosecution or enforcement of the penalty or the detention order," thereby enabling the Requested State to determine easily whether lapse of time would be a valid basis for denying extradition under article 6.

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 a copy of the outstanding arrest warrant, the formal charges, and "such evidence as would justify the committal for trial of the person if the offense had been committed in the Requested State." This is consistent with fundamental extradition jurisprudence in the United States, under which this language is interpreted to require evidence of probable cause.[28] The Hungarian delegation assured the United States delegation that under Hungarian law, the outstanding United States arrest warrant would constitute sufficient evidence to satisfy this standard.

Paragraph 4 lists the information needed to extradite a person convicted of an offense in the Requesting States. 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.[29] 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 documentation required under paragraph 3. This is consistent with the longstanding United States policy of requiring such documentation in extradition proceedings of persons convicted *in absentia.*

Article 9—Admissibility of documents

This article governs the authentication procedures for documentation intended for use in extradition proceedings.

Paragraph (a) states that evidence intended for use in extradition proceedings shall be admissible if it is certified by the principal diplomatic or consular officer of the Requested State. This provision

[28] 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).

[29] 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); *Clark*, 470 F. Supp. 976.

primarily accommodates the authentication procedures required by United States law.[30]

Paragraph (b) permits such evidence to be admitted if it is authenticated in any manner accepted by the laws of the Requested State. This provision ensures that relevant evidence that would normally satisfy the evidentiary rules of the Requested State is not excluded at the extradition hearing simply because of an inadvertent error or omission in the authentication process. This clause is especially important because Hungary has no laws or regulations regarding authentication of documents for extradition cases. It was agreed that paragraph (b) ensures that documents in support of United States extradition requests would not require special authentication.

Article 10—Translation

This standard treaty provision requires that all documents submitted in support of an extradition request be translated into the language of the Requested State. Thus, requests from Hungary to the United States would be translated into English and United States requests to Hungary would be translated into Hungarian.

Article 11—Provisional arrest

This article describes the process by which a person in the Requested State 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 directly between the United States Department of Justice and the Hungarian Ministry of Justice. The request may also be made via the Interpol channel. Experience has shown that the ability to use such 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 any denial.

Paragraph 4 provides that the fugitive may be released from detention if the executive authority of the Requested State does not receive the fully documented extradition request within 60 days of the provisional arrest.[31] When the United States is the Requested State, the "executive authority" for purposes of paragraph 4 would include the Secretary of State or the United States Embassy in Budapest.[32]

Paragraph 4 states that the person arrested may be released from custody if the documents are not received within the 60-day period. However, the proceedings against the fugitive need not be dismissed, as paragraph 5 makes it clear that 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.

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[30] See 18 U.S.C. § 3190.

[31] Under Section .390(2) of Hungary's extradition law, the documents must be received within three months.

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

Article 12—Additional information

This article provides for the submission of additiona information if the original request, including supporting documentation, is viewed as insufficient by the Requested State. It is intended to permit the Requesting State to cure any defects in the request and accompanying materials which are found by a court in the Requested State or by the attorney acting on behalf of the Requesting State, and to permit the court, in appropriate cases, to grant a reasonable continuance to obtain, translate, and transmit additional materials. This provision also states that the person sought may be released form custody if the additional information is not received within the time specified, but such release shall not preclude a subsequent request on the same or different offenses at a later time. The Requested State must notify the Requesting State of such a release. A similar provision is found in other United States extradition treaties.[33]

Article 13—Decision and surrender

This article requires the Requested State promptly to notify the Requesting State of its decision on the extradition request. If extradition is denied, the Requested State must provide the reasons for the denial. If extradiction is granted, the articles requires that the two 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 for the same offense. United States law requires that surrender occur within two calendar months of the finding that the offender is extraditable,[34] or of the conclusion of any litigation challenging that finding,[35] whichever is later. According to the Hungarian delegation, the law in Hungary does not specify the time in which the surrender must take place, as such matters are usually dealt with the surrender decree signed by the Minister of Justice.

Article 14—Deferred and temporary surrender

Occasionally, a person sought of extradition may be 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 sought and the service of any punishment imposed. Similar provisions appear in our recent extradition treaties with the Bahamas and Australia.

Paragraph 1 provides that the executive authority to the Requested State may postpone the extradition proceedings against a person who is being prosecuted or serving a sentence in the Requested State until the conclusion of the prosecution or the full

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[33] See, e.g., U.S.-Costa Rico Extradiction Treaty, Dec. 4, 1982, art. 10, T.I.A.S. No.—; U.S.-Italy Extradition Treaty, Oct. 13, 1983, art. XI, T.I.A.S. No. 10837.

[34] 18 U.S.C. § 3188.

[35] *Jiminez* v. *United States 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).

execution of the punishment which has been imposed.[36] The provision permits the Requested State to postpone the surrender of the person as well as the initiation of extradiction proceedings against a person facing prosecution proceedings against a person facing prosecution or serving a sentence.

Paragraph 2 provides for the temporary surrender of a person wanted for prosecution in the Requesting State who is being proscecuted 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 temporarily 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) subject to the laws in each Contracting Party, it makes possible serving any sentence in the Requested 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 extradiction treaties.

Article 15—Requests for extradition by several states

This article reflects the practice of many recent United States extradition treaties to list some of the factors that the executive authority of the Requested State must consider in determining to which country a person should be surrendered when reviewing requests from two or more countries for extradition. For the United States, the Secretary of State makes this decision.[37]

Article 16—Seizure and surrender of property

This article provides for the seizure by the Requested State of all property—articles, instruments, objects of value, documents, or other evidence—relating to the offense for which extradition is requested, to the extent permitted by the Requested State's internal law. The article also provides that these objects shall be surrendered to the Requesting State upon the granting of extradition or even if extradition cannot be effected due to the death, disappearance, or escape of the fugitive.

Paragraph 2 states that the Requested State may condition its surrender of property in such a way as to ensure its return as soon as practicable, and may defer surrender altogether if the property is needed as evidence in the Requested State. The obligation to surrender property under this article is expressly made subject to due respect for the rights of third parties in such property.

Article 17—Rule of specialty

This article covers the principle known as the rule of specialty, which is a standard aspect of United States extradition practice. Designed to ensure that a fugitive surrendered for one offense is

[36] Under United States law and practice, the Secretary of State makes this decision. *Koskotas* v. *Roche,* 740 F. Supp. 904, 920 (a) (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).

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

not tried for other crimes, the rule of specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of a sentence on different charges that may not be extraditable under the Treaty or properly documented at the time that the request is granted.

Since a variety of 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) offenses committed after the extradition; or (3) other offenses 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 defendant for 90 days while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third country for an offense committed prior to extradition under the Treaty without the consent of the Requested State.

Finally, paragraph 3 permits the detention, trial, or punishment of an extraditee for additional offenses, or extradition a third country, if the extraditee (1) leaves and returns to the Requesting State, or (2) does not leave the Requesting State within ten days of being free to do so.

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 that when a fugitive consents to return 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 would be no need for the formal documents described in article 8, or for 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 Hungary 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. Therefore, the second sentence of article 18 states that the rule of specialty in article 17 will not apply to cases in which this article is utilized.[39]

Article 19—Transit

Paragraph 1 gives each Contracting Party the power to authorize transit through its territory of persons being surrendered the other Contracting Party by third countries, and to hold such persons in custody during the period of transit. Transit requests under this

[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, like provisional arrest requests under article 11, may be transmitted via the Interpol channel. Each request for transit must contain a description of the person whose transit is proposed and a brief statement of the facts of the case with respect to which the person is being surrendered to the Requesting State.

Paragraph 2 describes the procedure each Contracting Party should follow when seeking to transport a person in custody through the territory of the other Contracting Party. Under this provision, no advance authorization is needed if the person in custody is in transit to a Contracting Party, is travelling by aircraft, and no landing is scheduled in the territory of the other Contracting Party. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request in its discretion. 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 its execution.

Article 20—Representation and expenses

Paragraph 1 provides that in extradition proceedings under the Treaty, the Requested State shall advise, assist, and appear in court on behalf of the Requesting State, and shall represent the interests of the Requesting State by all legal means within its power. The phrase "all legal means within its power" was included because the law and practice of the United States and Hungary differ on this issue.

The United States will represent Hungary in connection with requests from Hungary for extradition before courts in the United States. However, under Hungarian law, the Requesting State is not a party to extradition litigation before Hungarian courts and cannot be represented in such proceedings. The Hungarian Public Prosecutor appears in court to represent the interests of Hungary, but does not represent the interests of the Requesting State and cannot be compelled to argue for extradition if the Public Prosecutor believes that the court should deny the request.[40] The Hungarian delegation indicated that there is no possibility that Hungary would modify this aspect of its internal procedure. However, the delegations did agree to revisions of article 20 to address this issue.

Paragraph 2 provides that the Requested State will bear all expenses of extradition except those expenses relating to the ultimate transportation of a fugitive to the Requesting State and the translation of documents, which are to be paid by the Requesting State. Cases may arise in which it may be necessary for the Requesting State 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 the arrest, detention, examination, and surrender of the fugitive. This includes any claim by the fugitive for

[40] The Hungarian delegation assures the United States delegation that it is almost inconceivable that the Public Prosecutor would ever argue against extradition.

damages or reimbursement of legal fees or other expenses occasioned by the execution of the extradition request.

Article 21—Consultation

This article provides that the United States Department of Justice and the Hungarian Ministry of Justice may consult with each other directly or through Interpol channels with regard to individual extradition cases and extradition procedures in general. A similar provision is found in other United States extradition treaties awaiting ratification.[41]

As discussed in connection with article 20, the Hungarian Public Prosecutor appears in court during extradition proceedings but does not represent the interests of the Requesting State. The delegations agreed that article 21 will provide the United States with the opportunity to consult with the Public Prosecutor's Office to the extent necessary to make certain that the attorney appearing in court understands the United States case and intends to argue in favor of extradition.

Article 22—Application

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

Article 23—Ratification, entry into force, and termination

This article contains standard treaty language providing for the exchange of instruments of ratification at Washington, D.C., and states that the Treaty will enter into force immediately upon the exchange.

Paragraph 3 provides that the 1856 Treaty will cease to have effect upon the entry into force of the Treaty, but extradition requests pending before the courts when the Treaty enters into force will nevertheless be processed to conclusion under the 1956 Treaty. Article 18 of the Treaty, which deals with simplified extradition, will be available in such extradition proceedings. The paragraph also states that article 17 of the Treaty, which concerns the rule of specialty, will apply to persons found extraditable under the 1856 Treaty.

Paragraph 4 contains standard treaty language describing the procedure for termination of the Treaty by either Contracting Party, and indicates that the termination shall become effective six months after notice of termination has been received.

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 Treaty Between The Government of the United States of America and The Government of the Republic of Hungary on Extradition, signed at Budapest on December 1, 1994. The Senate's advice and consent

[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.-Philippines Extradition Treaty, Nov. 13, 1994, art. 18, T.I.A.S. No. —.

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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