No. 24-_____

IN THE

Supreme Court of the United States

TAHAWWUR HUSSAIN RANA,

Petitioner,

—v.—

W.Z. JENKINS II,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN D. CLINE
LAW OFFICE OF JOHN D. CLINE
600 Stewart Street, Suite 400
Seattle, Washington 98101
(360) 320-6435

JOSHUA L. DRATEL
Counsel of Record
LAW OFFICES OF
DRATEL & LEWIS
29 Broadway, Suite 1412
New York, New York 10006
(212) 732-0707
jdratel@dratellewis.com

CHRISTY O'CONNOR
THE LAW OFFICE
OF CHRISTY O'CONNOR
360 East 2nd Street, Suite 800
Los Angeles, California 90012
(323) 716-5959

Counsel for Petitioner

QUESTION PRESENTED

Whether the term "offense" in the double jeopardy provision of the United States-India extradition treaty and many other extradition treaties refers to the conduct underlying the charges in the two countries, as the Second Circuit has held, or to the elements of the crimes charged, as the Fourth Circuit has held and as the Ninth Circuit held in this case.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Tahawwur Hussain Rana and Respondent W.Z. Jenkins II, Warden, Metropolitan Detention Center, Los Angeles, California.

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Ninth Circuit in *Tahawwur Hussain Rana v. W.Z. Jenkins II*, No. 23-1827, filed August 15, 2024. The decision of the Ninth Circuit is reported at 113 F.4th 1058.

This petition is related to the following proceedings in the United States District Court for the Central District of California:

1. *In re the Matter of the Extradition of Tahawwur Hussain Rana*, Case No. 2:20-cv-7309. The Magistrate Judge certified Rana for extradition on May 16, 2023. The decision is reported at 673 F. Supp.3d 1109.

2. *Tahawwur Hussain Rana v. W.Z. Jenkins II*, Case No. 2:23-cv-4223. Judgment was entered August 10, 2023. The decision appears at 2023 U.S. Dist. LEXIS 140007.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Tahawwur Hussain Rana petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1a) is reported at 113 F.4th 1058. The district court's order denying Rana's petition for a writ of habeas corpus (App. 33a) is unreported but appears at 2023 U.S. Dist. LEXIS 140007. The Magistrate Judge's decision certifying Rana for extradition (App. 39a) is reported at 673 F. Supp.3d 1109.

JURISDICTION

The decision of the court of appeals was issued on August 15, 2024. App. 1a.[1] That court denied a timely petition for rehearing en banc on September 23, 2024. App. 99a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 6 of the United States-India extradition treaty, titled "Prior Prosecution," provides:

---

[1] The appendix to this petition is cited as "App." The excerpts of record in the court of appeals are cited as "ER." Extradition court filings are cited by docket number ("Doc.") and page. Habeas corpus filings in the district court are cited by docket number ("Habeas Doc.") and page.

1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

2. Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested, or to discontinue any criminal proceedings which have been instituted against the person sought for those acts.

The complete United States-India extradition treaty appears at App. 101a.

STATEMENT

Three decades ago, this Court struggled with the meaning of "offence" in the Fifth Amendment Double Jeopardy Clause. In the context of successive prosecutions, does "offence" refer to the *conduct* underlying the two crimes or to the *elements* of those crimes? The Court settled on the elements test, drawn from *Blockburger v. United States*, 284 U.S. 299 (1932). *See United States v. Dixon*, 509 U.S. 688, 710-11 (1993) (applying elements test to successive prosecutions), *overruling Grady v. Corbin*, 495 U.S. 508, 521-22 (1990) (applying conduct test).

The circuits are now split over the meaning of "offense" in double jeopardy provisions that appear in most extradition treaties to which the United States is a party. The Second Circuit has held that "offense" in such a provision refers to the conduct underlying the domestic and foreign crimes. *Sindona v. Grant*,

619 F.2d 167 (2d Cir. 1980). The Fourth Circuit in *Gon v. Holt*, 774 F.3d 207 (4th Cir. 2014), and the Ninth Circuit in this case apply *Blockburger* and hold that "offense" refers to the elements of the two crimes; unless the foreign crime has the same elements as the United States crime (or the elements of one crime are completely subsumed in the elements of the other), the double jeopardy provision does not bar extradition. *See also United States v. Trabelsi*, 845 F.3d 1181, 1191 (D.C. Cir. 2017) (declining to adopt either elements test or conduct test); *id.* at 1193 (Pilard, J., concurring in part) (advocating *Blockburger* elements test).

Petitioner Rana was tried and acquitted in federal court in the Northern District of Illinois (Chicago) on charges relating to the 2008 terrorist attack on Mumbai. India now seeks to extradite him for trial on charges based on the identical conduct at issue in the Chicago case. Under the Second Circuit's *Sindona* "conduct" standard, the double jeopardy provision of the United States-India extradition treaty would bar his extradition. But because he happens to be detained in the Ninth Circuit, the "elements" test applies. None of the Indian charges has the same elements as the charges on which Rana was tried in Chicago. So Rana now faces extradition to and a potential death sentence in India.

The Fourth and Ninth Circuits erred in transplanting the *Blockburger* elements test from the domestic to the international context. This Court has held that the Fifth Amendment Double Jeopardy Clause applies only to successive prosecutions by the same sovereign—the federal government or a single

state. *See, e.g., Gamble v. United States*, 587 U.S. 678, 681-82 (2019); *Heath v. Alabama*, 474 U.S. 82, 88 (1985). In such a single-sovereign double jeopardy regime, the legislature (either Congress or the legislature of a single state) can calibrate its criminal code with *Blockburger* in mind. If it intends to permit successive prosecutions for the same conduct, it can create two offenses, each of which has an element the other lacks.

In a dual sovereignty regime, however – and especially when the two sovereigns are separate countries – no such calibration occurs. Congress does not enact federal crimes with the elements of Indian crimes in mind. Nor does the Indian Parliament consider the elements of this country's crimes when crafting the Indian Penal Code. *See Sindona*, 619 F.2d at 178 ("Foreign countries could hardly be expected to be aware of *Blockburger*."). As a result, in practice, applying the elements test to the extradition treaty at issue herein, as well as to the dozens of other extradition treaties with identical language, renders the double jeopardy provision therein a nullity.

As a result, the application of the elements test in the extradition context is entirely haphazard — in Judge Friendly's phrase, a product of the "quiddity of the law of the requested country." *Id*. The elements of a United States crime will rarely match the elements of a foreign crime – so rarely, in fact, that, as far as our research discloses, it has never happened.

This case provides the ideal vehicle to resolve the split in the circuits and adopt *Sindona*'s "conduct"

standard. Petitioner Rana raised the double jeopardy issue at every stage of the extradition proceeding. The Ninth Circuit squarely addressed that issue in a published opinion. And the issue is outcome-determinative: if the "conduct" standard applies, Rana cannot be extradited. If the "elements" standard applies, he very likely will be sent to India to be put on trial a second time for the same conduct, with conviction and a death sentence ominously on the horizon for him.

In addition, resolution of this issue will have considerable and increasing impact, as the growing globalization of criminal law enforcement and international cooperation, which in turn has led to a dramatic rise in extraditions, will affect more and more individuals and nations going forward. As discussed below, this issue also implicates practice under dozens of extradition treaties to which the U.S. is a party.

STATEMENT OF THE CASE

1. Rana was previously prosecuted in the United States District Court for the Northern District of Illinois. *United States v. Rana et al.*, Case No. 1:09-cr-00830 (N.D. Ill.). The second superseding indictment charged him in three counts. Count 9 charged him with conspiring to provide material support to terrorism in India. 11-ER-2340. The alleged conspiracy began "in or about late 2005" and continued "through on or about October 3, 2009." 11-ER-2340. The centerpiece of the alleged conspiracy was the attack conducted by Lashkar e Tayyiba ("Lashkar") on various locations in Mumbai in

November 2008, resulting in the death of 164 persons. 11-ER-2335, ¶ 29. Rana's alleged co-conspirators included, among others, David Headley. Headley pleaded guilty and cooperated against Rana.

Count 9 incorporates by reference paragraphs 3 through 33 of Count 1. 11-ER-2341, ¶ 3. Those paragraphs allege conduct that mirrors the allegations in India's extradition request. *Compare* 2-ER-270-93 (summary of facts in extradition request) *with* 11-ER-2328-36 (¶¶ 3-33 of second superseding indictment).

Count 11 charged Rana with conspiracy to provide material support to terrorism in Denmark. 11-ER-2354. Count 12 charged him with providing material support to Lashkar, both in India and in Denmark. 11-ER-2356.

The jury acquitted Rana on Count 9 (conspiracy to provide material support to terrorism in India) and convicted him on Count 11 (conspiracy to provide material support to terrorism in Denmark). The jury also convicted Rana on Count 12 (providing material support to Lashkar), but it did not find that death resulted from his conduct. 11-ER-2366-68. In light of the verdicts on Counts 9 and 11, the Northern District of Illinois court concluded that the jury found Rana guilty on Count 12 of providing material support to Lashkar in Denmark but *not* in connection with the Mumbai massacre in India. 11-ER-2406 ("THE COURT: They specifically found that Rana did not cause any deaths, which eliminates the Mumbai massacre from the case, it seems to me.").

On January 7, 2013, the Northern District of Illinois court sentenced Rana to 168 months in prison. On June 9, 2020, the court granted Rana's motion for compassionate release and ordered him released immediately. 11-ER-2481.

2. On June 10, 2020, a Magistrate Judge in the Central District of California (where Rana was serving his sentence) signed a provisional arrest warrant with a view to extraditing him to India to face charges there. Doc. 1; 11-ER-2496. The Indian charges consist of conspiracy to commit various offenses, including to wage war, to murder, to commit two forms of forgery, and to commit a terrorist act (Charge 1); waging war (Charge 2); conspiracy to wage war (Charge 3); murder (Charge 4); committing a terrorist act (Charge 5); and conspiracy to commit a terrorist act (Charge 6). 2-ER-233-35, 244-50. As a result of the warrant and ensuing formal extradition request, Rana has remained in custody throughout the extradition process.

Rana opposed extradition on two grounds: that the double jeopardy provision of the United States-India extradition treaty (Article 6(1)) barred his extradition because the Indian charges rested on the same conduct for which Rana had been tried and acquitted in federal court in Chicago, and that India had failed to establish probable cause that Rana had committed the crimes for which India seeks to prosecute him.

On May 16, 2023, the extradition magistrate judge rejected Rana's arguments and certified that he is extraditable. App. 39a. Rana petitioned the United

States District Court for the Central District of California for a writ of habeas corpus. He again argued that extradition was barred under the double jeopardy provision of the extradition treaty. Habeas Doc. 1; 11-ER-2509. The district court denied Rana's habeas petition on August 10, 2023. App. 33a.

Rana appealed the district court's order to the Ninth Circuit. 2-ER-66. Notwithstanding its ruling on Rana's habeas petition, the district court stayed extradition pending appeal. App. 30a. It found that Rana's double jeopardy challenge "raised serious legal questions going to the merits," because "[t]he proper meaning of 'offense' in Article 6(1) of the extradition treaty is not clear and different jurists could come to different conclusions," and "[t]he public has a strong interest in the proper interpretation of extradition treaties, particularly in the interpretation of provisions that provide important individual protections like the one at issue here." App. 31a-32a.

3. On appeal, Rana made four principal arguments based on double jeopardy. *First*, he contended that the text of the treaty favored reading "offense" to refer to conduct. Noting the principle that "identical words used in different parts of the same act are intended to have the same meaning," *Sorensen v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quotation omitted), he argued that because "offense" in Article 2(1) of the treaty – the dual criminality provision – indisputably refers to conduct instead of elements, *see, e.g., Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998), the same word should receive the same meaning in Article 6(1).

Second, Rana argued that the *Blockburger* test, devised in this country's single-sovereign double jeopardy system, fits poorly in an international dual-sovereignty regime. In a domestic single sovereign system, the elements test permits the legislature to construct its penal code accordingly. By contrast, the *Blockburger* elements standard operates on the laws of United States and India not as the result of an integrated legislative scheme, but entirely by chance. If a United States crime and an Indian crime have the same elements, that is the product of coincidence, not legislative intent or considered choice.

Moreover, applying the *Blockburger* standard to the laws of different countries renders the double jeopardy protection almost entirely toothless. That is partly because of the randomness of any overlap between the elements of any pair of United States and foreign crimes. It also results from the prevalence of jurisdictional and other "local" elements peculiar to a particular sovereign's authority.

For example, almost all U.S. federal crimes have as an element either an effect on interstate commerce or a threat to a federal interest. No foreign crime will have such an element. Almost by definition, therefore, the United States crime will "require[] proof of a fact which the [foreign crime] does not." *Blockburger*, 284 U.S. at 304; *see, e.g., Elcock v. United States*, 80 F. Supp. 2d 70, 83-85 (E.D.N.Y. 2000) (finding that United States and German offenses were not the "same" under *Blockburger* in part because of jurisdictional elements in United States offenses). Similarly, foreign crimes may have their own "local" elements for which there will be no

corresponding element in the analogous United States crime. It is no surprise that not a single reported case has held that a foreign crime and a United States crime are the same offense under the *Blockburger* standard.

In the converse context – defining "dual criminality" – the government has benefitted from the construction Rana advances here, as the lack of congruence in criminal statutes of different nations has led courts to interpret the word "offense" in dual criminality provisions such as Article 2(1) to refer to conduct rather than elements. *See, e.g., Clarey*, 138 F.3d at 765. For the reasons outlined above, if "offense" referred to elements in the dual criminality context, few crimes would be extraditable. Only by defining "offense" in terms of conduct can dual criminality provisions be given practical effect.

Thus, harmonizing criminal statutes of distinct sovereigns in the extradition context has led courts to interpret "offense" in dual criminality provisions in terms of conduct should lead to the same interpretation in the double jeopardy provisions that are contained in dozens of the U.S.'s extradition treaties. Otherwise, those provisions are rendered meaningless. *See Sindona*, 619 F.2d at 178-79. *See also Memorial Hermann Accountable Care Organization v. Commissioner of Internal Revenue*, 2024 WL 4586187, at *3 (5th Cir. October 28, 2024) (in interpreting regulations relevant to §501(c)(4) of the Internal Revenue Code, noting that "[i]t makes little sense to treat the same phrase differently in two neighboring paragraphs of the same statute"), *citing United States ex rel. Vavra v. Kellogg Brown & Root,*

Inc., 848 F.3d 366, 381–82 (5th Cir. 2017) (stating that a "word or phrase is presumed to bear the same meaning throughout a text" (quoting Antonin Scalia & Brian A. Garner, *Reading Law* 170 (2012)).

Adopting Rana's position would achieve an appropriate symmetry in which the government and the individual stand on equal footing with respect to the meaning of the same statutory terms appearing in different parts of a treaty, rather than the government enjoying a flexibility of interpretation that always affords it the advantage.

The Department of Justice's "Petite Policy" further demonstrates the conduct standard's natural fit in a dual sovereign regime. That policy requires federal prosecutors to decline prosecution under certain circumstances where a previous state or federal prosecution has occurred. The policy considers whether the prior proceeding involved "substantially the same act(s) or transaction(s)," rather than whether the offenses have the same elements. Justice Manual ¶ 9-2.031 (2020). *Sindona* relied in part on the Petite Policy in rejecting the *Blockburger* standard in the extradition context. *Sindona*, 619 F.2d at 178-79.

Third, Rana argued that the government's interpretation of Article 6(1) in the case of David Headley, Rana's alleged co-conspirator, further demonstrates that "offense" refers to conduct rather than elements.

Headley pleaded guilty and testified against Rana. In a section of Headley's plea agreement titled

"Extradition," the government agreed that "[p]ursuant to Article 6 of [the Treaty], defendant shall not be extradited to the Republic of India . . . for any offenses for which he has been convicted in accordance with this plea." 11-ER-2462. The extradition section continues: "The defendant and the United States Attorney's Office accordingly agree" that if Headley pleads guilty to a series of offenses, "then the defendant shall not be extradited to the Republic of India . . . for the foregoing offenses, *including conduct within the scope of those offenses for which he has been convicted in accordance with this plea*, so long as he fully discloses all material facts concerning his role with respect to these offenses and abides by all other aspects of this agreement." *Id.* (emphasis added).

During Headley's plea colloquy, then-United States Attorney Patrick J. Fitzgerald explained the meaning of the extradition provision of the plea agreement, declaring that the extradition provision "says *if the conduct is conduct within the scope of those offenses* for which he has been convicted in accordance with the plea, then *according to the treaty, he could not be extradited.*" 2-ER-165 (emphasis added). Thus, in the Headley plea proceedings the government interpreted Article 6(1) to bar extradition for Indian charges based on the underlying conduct to which Headley pleaded guilty, and not merely for charges that included the same elements as the statutes to which he pled. As Rana pointed out, ¶ 9-15.800 of the Justice Manual cautions federal prosecutors that any agreement to prevent or delay extradition requires "a written request for authorization" and "express

written approval from the Assistant Attorney General, Criminal Division."[2]

Having taken the position in Headley's plea proceedings that the word "offense" in Article 6(1) refers to conduct (as it does in Article 2(1)), the government reversed course in Rana's case. It did not discover a new principle of interpretation that it had overlooked in the Headley proceedings; nor has there been a change in the law. Rather, the government repudiated its previous position (that "offense" in Article 6(1) refers to the underlying conduct) and adopted an entirely different position (that "offense" refers to the elements of crimes) solely to secure Rana's extradition. As a result of that interpretation, Headley – an admitted mastermind of the Mumbai attack – cannot be extradited, while Rana – who has been acquitted of charges relating to the attack – faces prosecution in India followed by the very genuine specter of conviction and execution.

Rana argued below that the principle of judicial estoppel barred the government from asserting such blatantly inconsistent positions. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.").

[2] At every stage of the extradition proceedings, Rana asked the courts to examine in camera the communications between United States Attorney Fitzgerald and the Department of Justice about the extradition provision in Headley's plea agreement, to determine whether Fitzgerald obtained the approval that ¶ 9-15.800 requires. The courts refused to do so. *See* App. 10a, 20a-23a, 69a, 70a n.26, 36a.

Based on *New Hampshire* and other cases, Rana contended that the government was estopped from taking a different position in this extradition proceeding than it did in the Headley's case. The government's diametric positions also reinforce the virtue and fairness of symmetry in construction of the relevant statutory terms.

Fourth, Rana argued that the lower courts erred in deferring to a so-called "technical analysis" of the treaty's double jeopardy provision from the Departments of Justice and State, which endorsed the "elements" test. 11-ER-2311; *see* 1-ER-5, 41-42. The "analysis" of Article 6(1) consists of two paragraphs, one of which has only a single sentence. 11-ER-2311. Yet the technical analysis does not discuss the text of Article 6(1). Nor does it attempt to reconcile the different meanings the government ascribes to "offense" in Article 2(1) and Article 6(1). It does not address *Sindona*, which applies a conduct-based standard to a double jeopardy provision.

This Court has noted that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999).[3] Rana contended, however, that

[3] Deference to Executive Branch treaty interpretation has not always been the case. During the first 50 years from the origin of the republic in 1789 through 1838, this Court "decided nineteen cases in which the U.S. government was a party, at least one party raised a claim or defense on the basis of a treaty, and the Court decided the merits of that claim or defense." David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. Ann. Surv. Am. L. 497, 498-99 (2007). Analysis of those decisions

a court cannot determine whether the technical analysis interpretation of Article 6(1) is reasonable without any indication of its reasoning. *See, e.g., Hill v. Norton*, 275 F.3d 98, 105 (D.C. Cir. 2001) (declining to defer to Executive's interpretation of treaty and implementing statute when "the terms of the statute (and treaties) appear to be contrary to [the Executive's position] and the agency has failed to justify its position").

Courts have analogized the deference courts give Executive Branch interpretations of treaties to *Chevron* deference,[4] under which courts deferred to federal agencies' reasonable interpretation of ambiguous statutes governing their work. *See, e.g., Hill*, 275 F.3d at 103-06; *More v. Intelcom Support Services, Inc.*, 960 F.2d 466, 471-72 (5th Cir. 1992); *see also* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 U. Va. L. Rev. 649, 701-07 (2000) (discussing relation between the deference due Executive Branch treaty interpretation and *Chevron* deference).

However, this Court recently abolished *Chevron* deference. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). *Loper Bright*'s insistence that courts perform the duty the

"demonstrates that, during this period, courts did not defer at all to the executive branch on most treaty interpretation questions." *Id.* at 499. Rather, "[t]he judicial record from the early nineteenth century suggests, at a minimum, that there is nothing inherent in the constitutional text or structure that requires judicial deference to the executive branch on treaty interpretation issues." *Id.*

[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Constitution assigns them – interpreting the law, which includes treaties[5] – further undercuts any obligation to defer to the technical analysis. *See also Memorial Hermann*, 2024 WL 4586187, at *3 (citing *Loper Bright* in declining to defer to the Treasury Department's interpretation of tax regulations).

This Court's recent treatment of so-called *Auer* deference, under which courts defer to agencies' reasonable interpretation of their ambiguous regulations, also weighs against deference to the technical analysis. Five years ago, the Court came close to abandoning *Auer* deference entirely. *Kisor v. Wilkie*, 588 U.S. 558 (2019). Four Justices would have overruled *Auer*. *See id*. at 592 (Gorsuch, J., joined by Thomas, Kavanaugh, and Alito, JJ., concurring in judgment). The five-Justice majority preserved *Auer* but sharply limited the circumstances under which courts defer.

One of those limits has particular significance here. *Kisor* requires deference only when an agency's interpretation "reflect[s] fair and considered judgment." *Id*. at 579 (quotation omitted). This requirement is fatal to the technical analysis herein. The "analysis" reflects no judgment at all, much less "considered judgment." And that "judgment," such as it is, can hardly be deemed "fair." As shown by Headley's case, the Executive Branch feels free to disregard its own technical analysis when expedient.

[5] *See, e.g., United States v. Trabelsi*, 845 F.3d 1181, 1194 (D.C. Cir. 2017) (Pilard, J., concurring in part) ("[W]e have a constitutional obligation to interpret and apply treaties as the law of the land . . . . It is our duty under the Supremacy Clause to apply treaty law just as we are bound to apply a federal statute or the Constitution itself.").

That is not "fair" judgment, Rana argued below; it is result-oriented manipulation to which a court should not defer.

4. On August 15, 2024, the Ninth Circuit affirmed the judgment of the habeas court. App. 1a. The court rejected each of Rana's arguments and concluded, in direct conflict with *Sindona*, that "offense" in the treaty's double jeopardy provision refers to elements rather than conduct.

The court of appeals first rejected Rana's contention that "offense" in Article 6(1) should receive the same meaning as "offense" in Article 2(1) because, according to the court, Article 2 has "limiting language." The court pointed to other language in the treaty that, in its view, cut against interpreting "offense" to mean conduct. App. 12a-14a.

The court rejected in a footnote Rana's contention that the *Blockburger* elements standard is ill-suited to a dual-sovereign regime and would neuter the double jeopardy protection in Article 6(1). According to the court, "The plain language of the Treaty . . . suggests that this may be the intended result." App. 20a n.7.

Turning to Headley's plea agreement, the court of appeals conceded that United States Attorney Fitzgerald's statements at Headley's plea hearing "do seem to suggest that he interpreted the plea agreement to employ a conduct-based test under the Treaty." App. 22a. But the court declined to give the statements any weight because "Rana provides no case that suggests a singular statement by a U.S.

Attorney interpreting a plea agreement should control over both plain language in the Treaty and the earlier-in-time contemporaneous understanding of the State Department." *Id.* The court did not address ¶ 9-15.800 of the Justice Manual, and it rejected Rana's request for in camera review of the relevant communications between Fitzgerald and the Department of Justice.

As for the "technical analysis," the court of appeals rejected any analogy between *Chevron* and *Auer* deference on one hand and deference to Executive Branch treaty interpretation on the other. App. 14a-17a. It thus found *Loper Bright* and *Kisor* irrelevant in determining whether to defer to the technical analysis. Nor was the court troubled by the lack of actual analysis in the technical analysis. It concluded: "The plain meaning of the Treaty is supported by the Executive's understanding of its terms at the time of its drafting. We defer to that understanding." App. 17a.

Finally, the court of appeals embraced the Fourth Circuit's adoption of the elements test in *Gon*, and it criticized the Second Circuit's reasoning in *Sindona*. The court acknowledged that in *Sindona* "the Second Circuit interpreted 'offense' to mean underlying conduct." App. 19a. But it concluded that "nothing in *Sindona* persuades us that 'offense' does not refer to a crime's elements." App. 20a.

5. The court of appeals denied Rana's petition for rehearing en banc. App. 99a. The court stayed its mandate pending disposition of this petition. App. 28a.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the clear and deepening circuit split between the Second Circuit on one hand and the Fourth and Ninth Circuits on the other. It is intolerable that Rana's fate turns on the happenstance of where he was incarcerated when the extradition court issued its arrest warrant. If he had been in New York, the *Sindona* conduct standard would control and extradition would be barred. But because he was arrested in California, the elements test governs, according to the Ninth Circuit, and Rana can be extradited despite his prior acquittal on charges based on the same conduct. The Court should resolve the circuit split to ensure that geography does not determine whether a person can be shipped abroad following acquittal or conviction in this country to be put on trial based on the same conduct.

I. THERE IS A CLEAR SPLIT IN THE CIRCUITS ON THE MEANING OF "OFFENSE."

The Ninth Circuit's decision deepens a clear split in the circuits on the meaning of "offense" in the double jeopardy provisions of extradition treaties. *Sindona* held that "[a]doption of the *Blockburger* test, which does not even mark the outer bounds of protection of the double jeopardy clause of the Fifth Amendment . . . would . . . be a crabbed and wholly inappropriate reading" of the double jeopardy provision of the United States-Italy extradition treaty. *Sindona*, 619 F.2d at 178. The court adopted a conduct-based standard – "whether the same

conduct or transaction underlies the criminal charges in both transactions." *Id.* (quoting district court opinion).

The Fourth Circuit's decision in *Gon* adopted the very elements test that *Sindona* rejected as "crabbed and wholly inappropriate." After critiquing *Sindona*, the court declared: "For these reasons, we decline to follow *Sindona*'s 'same conduct' framework, and adopt the *Blockburger* 'same elements' test as the proper mode of analysis in this context." 774 F.3d at 217. *Gon* did not address the fundamental concern animating *Sindona*: that in a dual-sovereign double jeopardy regime – especially where the two sovereigns are separate countries – the elements test would fail to provide *any* practical protection to the person facing extradition.

The Ninth Circuit in this case took the Fourth Circuit's side of the circuit split. Like *Gon*, the Ninth Circuit adopted the *Blockburger* elements test. App. 18a. Like *Gon*, the Ninth Circuit criticized and squarely rejected *Sindona* and its conduct-based standard. App. 19a-20a. And like *Gon*, the Ninth Circuit did not come to grips with the central problem of applying the elements test in a dual-sovereignty double jeopardy regime: that it renders the protection against successive prosecutions entirely ephemeral.

This split in the circuits has great practical significance. Dozens of extradition treaties to which the United States is a party have double jeopardy provisions that use the term "offense" to describe the

crimes in the two countries.[6] The interpretation of that term will often determine whether a person who has previously been prosecuted in this country can be extradited. If the term is held to refer to the elements of the crimes involved, as the Fourth and Ninth Circuits hold, the person will be extradited unless, purely by chance, the crime in this country happens to have the same elements as the crime in the requesting country--something that has never occurred, as far as we can determine.

But if "offense" refers to conduct, as the Second Circuit held in *Sindona*, then double jeopardy may bar extradition, depending on whether the conduct the requesting country seeks to prosecute is the same as the conduct for which the person was prosecuted here. In short, whether the person is extradited boils down to the happenstance of where he is arrested.

The importance of resolving the circuit split is amplified by the increasing globalization of criminal law enforcement, prosecution, and cooperation among nations – particularly the United States. In fact, an audit by the Inspector General for the Department of Justice disclosed that data from DOJ's Office of International Affairs (which handles extradition requests both to and from the United States) "reflects that OIA had a nearly 70 percent increase in case openings from FY 2014 to FY 2020." *Audit of the Criminal Division's Process for Incoming Mutual Legal Assistance Requests*, Audit Division, Office of the Inspector General, U.S. Department of Justice,

[6] A table of such treaties is included as an appendix to the petition.

21-097, July 2021, at 11, available at https://aboutblaw.com/bd8q.[7]

That trend shows no sign of abating. It reflects how digital evidence defies borders and jurisdictions, and the mobility that individuals enjoy in today's world. As a result, consistency in application of the proper double jeopardy standard is critical, and it will affect increasing numbers of extradition proceedings moving forward. *See, e.g.,* Ben Penn, "Global Crime Surge Strains Unheralded Justice Department Unit," *Bloomberg News*, May 29, 2024, available at https://news.bloomberglaw.com/us-law-week/global-crime-surge-strains-unheralded-justice-department-unit (the Deputy Assistant Attorney General supervising the OIA "said the volume of requests for extradition and evidence under Mutual Legal Assistance Treaties has continued to rise in the time since the 2021 inspector general report").

In that context, extradition, particularly for a capital offense, should not be subject to a geographic lottery, particularly since the Executive possesses the authority to confine a person such as Rana anywhere in the United States to contrive the circuit location for a challenge to extradition. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004) (declining to depart from the

---

[7] Also, as of 2019, DOJ "stated that foreign requests to the United States for evidence within U.S. territory have increased by sixty percent." Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. Rev. 340, 354 (2019). Indeed, "extradition is the 'foremost' area of law in which the political branches have used the Article II treaty process." *Id.* at 359 (citing Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1261 (2008)).

"immediate custodian" doctrine controlling venue in habeas corpus proceedings because "[t]here is no indication that there was any attempt to manipulate behind Padilla's transfer").

Also, as law enforcement and the prosecution of crime has become transnational in nature, "it is impossible to cleanly distinguish domestic and foreign affairs." Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. Davis L. Rev. 57, 112 (2023). Thus, there can no longer be "a dual regime of constitutional law, in which federal regulation of foreign affairs is subject to a different, and generally more relaxed, set of constitutional restraints than federal regulation of domestic affairs." Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 391 (1998).

Such a regime has created conditions in "criminal cases where the executive acts as both prosecutor and diplomat." Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. Rev. 340, 345 (2019). In that dual role, "the U.S. prosecutor often acts as a proxy for another nation when advocating for the interpretation of a relevant U.S. criminal treaty or statute." *Id.* at 346. "[S]uch cases may undermine defendant interests," and yet "the judiciary . . . confers heightened deference on this executive interpretation." *Id.* Put differently, "the strong executive interest in conviction in criminal cases weakens the rationale for overreliance on executive interpretation of treaties and statutes." *Id.* at 394.

As a result of the executive interest in conviction, "[i]n a transnational setting, the quest for punishment may steer perilously close to double punishment or jeopardy for a single crime, which would plainly offend the principle of *non bis in idem*." *Id*. Professor Koh further cautions that deference to the Executive

> can risk undermining the judicial practice of interpreting treaties as the "shared expectations of the contracting parties" when the executive branch instead advocates for an interpretation that it has been incentivized to make for purposes of domestic political gain. This is especially true in foreign affairs prosecutions, where DOJ has a strong interest in conviction.

Id.

This increase in transnational crime and cooperation among law enforcement authorities around the world exacerbates the problems with interpreting "offense" in an extradition treaty double jeopardy provision to mean elements. The elements test lends itself to manipulation by law enforcement officials bent on conviction. If prosecutors in the United States and another country want to try a person twice for the same conduct, they have only to select crimes that have different elements – a simple matter, given the prevalence of jurisdictional and other local elements. With a modicum of coordination, the double jeopardy protection in

"offense"-based treaties can be rendered not merely toothless, but a dead letter altogether.

Rana's case demonstrates the problem with the elements test. He was prosecuted in federal court in Chicago on charges focusing on his alleged conduct in connection with the Mumbai attack. After a full and fair trial, the jury acquitted him on those charges. He served his sentence on other charges, unrelated to the Mumbai attack, and prepared to return to his family. But on the eve of his release from prison, India obtained an arrest warrant so he could be extradited to that country to stand trial on charges based on the identical conduct for which the Chicago jury had found him not guilty. He has spent more than four years at the Metropolitan Detention Center in Los Angeles awaiting the outcome of his extradition proceedings. Absent action from this Court, he will be shipped to India, where – if he survives pretrial detention – he will face the daunting prospect of trial, conviction, and a death sentence.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVINGTHE CIRCUIT SPLIT OVER THE MEANING OF "OFFENSE."

This case provides an ideal vehicle for resolving the circuit split.

First, the meaning of "offense" was fully briefed in the extradition court, the habeas court, and on appeal. Each court squarely addressed the issue. There is no concern with preservation.

Second, the Ninth Circuit explained its adoption of the elements standard in detail. Similarly, *Gon* and *Sindona* provided carefully reasoned explanations for the starkly different results they reached. There is nothing to suggest that further percolation in the lower courts will resolve the circuit split or definitively settle the meaning of "offense" in the extradition context. Just as the Court granted certiorari in *Dixon* to determine the meaning of "offence" in the Fifth Amendment Double Jeopardy Clause, it should do here to resolve the same question in the dual-sovereignty extradition context.

Third, resolution of the question presented will determine the outcome of this case. No court has disputed that Rana's extradition is barred under the conduct standard and permitted under the elements standard. Because the question is outcome-determinative, it is sure to receive robust adversarial presentation from the parties.

Fourth, in this burgeoning area of law, the formulation of a consistent standard will provide the necessary uniformity to resolve a disputed and important issue courts will confront in the context of dozens of extradition treaties, and which will therefore affect a growing number of individuals and cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSHUA L. DRATEL
Counsel of Record
Law Offices of
Dratel & Lewis
29 Broadway, Suite 1412
New York, NY 10006
(212) 732-0707
Counsel for Petitioner

November 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-1827

D.C. No. 2:23-cv-04223-DSF

OPINION

TAHAWWUR HUSSAIN RANA,

Petitioner – Appellant,

—v.—

W.Z. JENKINS II,

Respondent – Appellee.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted June 5, 2024
Pasadena, California

Filed August 15, 2024

Before: MILAN D. SMITH, JR. and
BRIDGET S. BADE, Circuit Judges, and
SIDNEY A. FITZWATER, District Judge.*

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Habeas Corpus

The panel affirmed the district court's denial of Tahawwur Hussain Rana's 28 U.S.C. § 2241 habeas corpus petition challenging a magistrate judge's certification of Rana as extraditable to India for his alleged participation in terrorist attacks in Mumbai.

Under the limited scope of habeas review of an extradition order, the panel held that Rana's alleged offense fell within the terms of the extradition treaty between the United States and India, which included a Non Bis in Idem (double jeopardy) exception to extraditability "when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested." Relying on the plain text of the treaty, the State Department's technical analysis, and persuasive case law of other circuits, the panel held that the word "offense" refers to a charged crime, rather than

---

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

underlying acts, and requires an analysis of the elements of each crime. The panel concluded that a coconspirator's plea agreement did not compel a different result. The panel held that the Non Bis in Idem exception did not apply because the Indian charges contained distinct elements from the crimes for which Rana was acquitted in the United States.

The panel also held that India provided sufficient competent evidence to support the magistrate judge's finding of probable cause that Rana committed the charged crimes.

COUNSEL

John D. Cline (argued), Law Office of John D. Cline, Seattle, Washington; Jennifer L. Williams, Summa LLP, South Pasadena, California; for Petitioner-Appellant.

Bram M. Alden (argued), Assistant United States Attorney Chief, Criminal Appeals Section; David R. Friedman and John J. Lulejian, Assistant United States Attorneys; E. Martin Estrada, United States Attorney; Department of Justice, Office of the United States Attorney, Los Angeles, California; Kerry A. Monaco, Trial Attorney; Rebecca A. Haciski, Associate Director; Office of International Affairs; Bruce C. Swartz, Deputy Assistant Attorney General; Nicole M. Argentieri, Acting Assistant Attorney General, Criminal Division; United States Department of Justice, Washington, D.C.; for Respondent-Appellee.

OPINION

M. SMITH, Circuit Judge:

Tahawwur Hussain Rana, a Pakistani national, was tried in a United States district court on charges related to his support for a terrorist organization that carried out large-scale terrorist attacks in Mumbai, India. A jury convicted Rana of providing material support to a foreign terrorist organization and conspiring to provide material support to a foiled plot to carry out terrorist attacks in Denmark. However, the jury acquitted Rana of conspiring to provide material support to terrorism related to the attacks in India. After Rana served seven years in prison for those convictions and upon his compassionate release, India issued a request for his extradition to try him for his alleged participation in the Mumbai attacks.

Before the magistrate judge who initially decided Rana's extraditability (the extradition court), Rana argued that the United States' extradition treaty with India protected him from extradition because of its Non Bis in Idem (double jeopardy) provision. He also argued that India did not provide sufficient evidence to demonstrate probable cause that he committed the charged crimes. The extradition court rejected Rana's arguments and certified that he was extraditable. After Rana raised the same arguments in a habeas petition in district court (the habeas court), the habeas court affirmed the extradition court's findings of facts and conclusions of law. This

appeal timely followed, with Rana raising both his Non Bis in Idem and probable cause arguments. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Rana and David Coleman Headley were childhood friends.[1] In adulthood, Rana deserted his post in the Pakistani army and moved to Chicago, where he established an immigration business. For his part, Headley started trafficking heroin, ultimately radicalized, and attended training camps operated by the terrorist organization Lashkar-e-Tayyiba (Lashkar). According to Headley's testimony, the pair met in Chicago multiple times over the course of three years, plotting to assist Lashkar in terrorist attacks that ultimately killed and injured hundreds of people.

In August 2005, the pair met over several days in Chicago, where Headley told Rana about Lashkar's plans for Headley to travel to public places and government facilities in India to conduct surveillance for a possible attack. Headley proposed using Rana's immigration business as a front for Lashkar's surveillance activities, with Headley posing as an "immigration consultant" for Rana in Mumbai. To sweeten the deal for Rana, Headley offered to help resolve Rana's status as a deserter from the Pakistani army.

---

[1] We recount these facts based on testimony and evidence before the extradition court, including testimony and evidence presented in Rana's criminal trial in the Northern District of Illinois. Rana disputes their accuracy, as outlined in Section II below.

In June 2006, Headley again met with Rana in Chicago, elaborating on his involvement with Lashkar. After agreeing to open a Mumbai branch of his immigration business, Rana helped Headley complete a successful application for an Indian business visa, which contained several inaccuracies. Headley used the visa to travel to India under the pretense of operating the Mumbai branch of Rana's business. Although Headley rented an apartment, hired a secretary, and signed a lease for the branch, little to no immigration work occurred there.

In July 2007, Headley stayed at Rana's Chicago home, informed him about the surveillance he had conducted while in India, and showed Rana a video Headley had taken of the Taj Mahal Palace Hotel. Rana helped Headley secure a five-year multi-entry Indian visa. Utilizing that visa, Headley traveled to India multiple times between September 2007 and March 2008, conducting further surveillance of potential targets. In May 2008, Headley informed Rana about the surveillance he conducted in Mumbai, identifying possible attack targets, including the Taj Mahal Palace Hotel.

In the fall of 2008, Headley warned Rana to avoid India, where attacks were imminent, and arranged for Rana to meet with one of their co-conspirators in Dubai. During a later intercepted conversation, Rana told Headley that their co-conspirator in Dubai had confirmed the upcoming attacks. The lease on the Mumbai office expired in November 2008, and neither Rana nor Headley renewed it.

Lashkar carried out massive terrorist attacks throughout Mumbai, including at the Taj Mahal Palace Hotel, between November 26 and 29, 2008. The attacks killed 166 people, injured 239, and

resulted in more than $1.5 billion in property damage. Rana commended the terrorists who carried out the attacks and stated that the people of India "deserved it."

After the terrorist attacks in India were completed, Headley and Lashkar began plotting new, but ultimately unsuccessful, attacks in Denmark and India. Headley once again used the immigration business as a cover to conduct surveillance, this time in Denmark. Headley kept Rana apprised of his surveillance activities, and Rana communicated directly with Headley's Lashkar contacts.

II. Procedural Background

On October 3, 2009, United States law enforcement arrested Headley in Chicago. Headley pled guilty to twelve terrorism-related charges in the Northern District of Illinois, including multiple counts related to the Mumbai attacks and the foiled Denmark plot. Headley agreed to cooperate with the United States, and his plea agreement contained a non-extradition provision.

Law enforcement also arrested and indicted Rana on October 18, 2009. Rana was tried on three counts: conspiracy to provide material support to terrorism in India, 18 U.S.C. § 2339A, conspiracy to provide material support to terrorism in Denmark, *id.*, and providing material support to a foreign terrorist organization, *id.* § 2339B. Headley testified for the prosecution. On June 9, 2011, the jury convicted Rana of the terrorism conspiracy related to Denmark and providing material support to Lashkar but acquitted him of the terrorism conspiracy related to India. On January 17, 2013, the district court sentenced Rana to 14 years in prison. After serving

seven years of prison time, Rana's motion for compassionate release was granted during the COVID-19 pandemic.

While Rana was in United States custody, the Indian government charged Rana, accusing him of conspiring to plan and carry out the Mumbai attacks. On August 28, 2018, an Indian judge issued a warrant for Rana's arrest on charges related to the attacks, including (1) conspiracy to (a) wage war, (b) commit murder, (c) commit forgery for the purpose of cheating, (d) use as genuine a forged document or electronic record, and (e) commit a terrorist attack; (2) waging war; (3) murder; and (4) committing a terrorist act.[2] India subsequently requested Rana's extradition.

One day after Rana was granted compassionate release, the United States filed a complaint for his provisional arrest in response to India's extradition request. On May 16, 2023, the extradition court certified Rana's extradition pursuant to 18 U.S.C. § 3184 and rejected Rana's claims that (1) his extradition to India was barred under the Non Bis in Idem provision of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India (the Treaty) and (2) India's evidence against Rana failed to establish probable cause that Rana committed the offenses for which the certification of extradition was sought.

Rana sought collateral review in the habeas court by filing a petition pursuant to 28 U.S.C. § 2241. The habeas court

---

[2] We have simplified the charges for the purposes of this opinion. Some of the charges, including conspiracy to wage war and conspiracy to commit a terrorist act, were brought as multiple charges under separate provisions of India's Penal Code and Unlawful Activities Prevention Act.

rejected Rana's same arguments, denying his petition on August 10, 2023. The habeas court, however, stayed Rana's extradition pending this timely appeal.

JURISDICTION AND STANDARD OF REVIEW

The extradition court had jurisdiction pursuant to 18 U.S.C. § 3184. The habeas court had jurisdiction pursuant to 28 U.S.C. § 2241(a). We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253(a).

"We review de novo the district court's denial of a habeas petition in extradition proceedings." *United States v. Knotek*, 925 F.3d 1118, 1124 (9th Cir. 2019). We evaluate "factual questions, as determined by the extradition magistrate judge, for clear error." *McKnight v. Torres*, 563 F.3d 890, 892 (9th Cir. 2009).

"The scope of habeas review of an extradition order is severely limited." *Artukovic v. Rison*, 784 F.2d 1354, 1355–56 (9th Cir. 1986). We can review only "whether: (1) the extradition magistrate judge had jurisdiction over the individual sought, (2) the treaty was in force and the accused's alleged offense fell within the treaty's terms, and (3) there is any competent evidence supporting the probable cause determination of the magistrate judge." *Knotek*, 925 F.3d at 1124 (citation, internal quotation marks, and alterations omitted). Rana challenges only the latter two issues, and we address them in turn.

ANALYSIS

I. Rana's alleged offense fell within the Treaty's terms.

Article 1 of the Treaty states that the United States and India "agree to extradite to each other . . .

persons who, by the authorities in the Requesting State are formally accused of, charged with or convicted of an extraditable offense . . . .” One exception is “when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested,” codified at Article 6(1). Rana argues that he cannot be extradited based on conduct for which he was acquitted in the United States because the word “offense” refers to underlying acts. The government argues that “offense” refers to a charged crime and requires an analysis of the elements of each charged crime. Thus, according to the government, the Treaty permits Rana’s extradition because the Indian charges contain distinct elements from the crimes for which he was acquitted in the United States.

Treaty interpretation begins with the Treaty’s plain text, but we also consider its negotiations, drafting history, and post-ratification understanding of the signatory nations. *Medellín v. Texas*, 552 U.S. 491, 506–07 (2008). Here, the Treaty’s plain terms, the post-ratification understanding of the signatories, and persuasive precedent all support the government’s interpretation. Rana argues, however, that, based on the government’s interpretation of the Treaty in Headley’s plea agreement, we should judicially estop the government from advocating for its current interpretation of the Treaty. We decline to do so.

A. The plain text of the Treaty supports a meaning of “offense” that denotes a charged crime defined by its elements.

The parties refer us to several provisions both within and outside the Treaty that assist us in

interpreting Article 6(1): Article 6(2), Article 2, and the United States' other extradition treaties. We address each source in turn.

First, Article 6, when read as a whole, compels a reading of "offense" that requires comparing the elements of each country's crimes. We begin with the text.[3] Article 6 contains two provisions. Paragraph 1, the provision we are tasked with interpreting, states in full: "Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the *offense* for which extradition is requested." (emphasis added). The subsequent provision, Paragraph 2, states: "Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the *acts* for which extradition is requested . . . ." (emphasis added). As is apparent, Paragraph 1 uses the word "offense," while the very next provision uses the word "acts." When treaties use differing language in parallel provisions, it "implies that the drafters of the [Treaty] understood the word[s] [] to mean something different . . . for they otherwise logically would have used the same word in each article." *Air France v. Saks*, 470 U.S. 392, 398 (1985); *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 995 (9th Cir. 2002). Thus, the most natural reading of Paragraph 1 compels a definition of "offense" that is distinct from "acts."

Because "acts" in Paragraph 2 refers to uncharged conduct, "offense" in Paragraph 1 must refer to

---

[3] The government points to Black's Law Dictionary, which defines "offense" as a "violation of the law" or "crime." *Black's Law Dictionary* 1300 (11th ed. 2019). This definition does not aid our inquiry because it begs the question of how we should compare similar crimes.

something other than uncharged conduct. Rana argues that "acts" in Paragraph 2 means the same thing as "offense[s]" as used in Paragraph 1. This argument is unpersuasive. As Rana concedes in his reply brief, "Article 6(2) refers to instances where the requested state has declined to prosecute, meaning that the *acts* at issue may never have coalesced into an *offense* under the laws of that state." We thus read "offense" as a charged crime, with elements, as distinct from uncharged "acts" or conduct.[4]

Second, Rana points to Article 2's dual criminality provision, which uses "offense" to refer to underlying conduct. Article 2 states that "[a]n offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty." Binding Ninth Circuit precedent instructs that, for purposes of the dual criminality provision, "the elements of the analogous offenses need not be identical." *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998). Rana argues that because "offense" is used to refer to conduct in Article 2, it must also refer to conduct in Article 6.

While Rana is correct that typically "identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986), Article 2 contains limiting language. It instructs that

---

[4] Rana's argument that similar treaties' submittal letters refer to "acts" as "offenses" when explaining similar provisions does not cut in his favor. While it is possible (although unlikely) that "acts" and "offenses" are intended as synonyms in Article 6, that reading does not necessarily mean that they both refer to "conduct." It is equally as likely that both words refer to crimes consisting of elements.

"offense" is to be interpreted "[f]or the purposes of this Article" "whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology." In other words, the Treaty explicitly states that for the purposes of the dual criminality provision, whether the offenses in each state use the same terminology (or, in other words, elements) is irrelevant. *See Knotek*, 925 F.3d at 1131 & n.12 (explaining that a similar provision in the extradition treaty with the Czech Republic incorporated the rule that, for the purposes of dual criminality, "[t]he elements of one offense 'need not be identical to the elements of a similar offense in the United States'"). No such limiting language exists in Article 6.

Moreover, despite Rana's argument that "offense" consistently means "acts" in Article 2, multiple provisions seem to reference the elements of a crime when using "offense." For example, Article 2, Paragraph 4 of the Treaty states: "Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed." The Treaty here acknowledges that various acts make up an offense. The contracting states could have drafted language requiring that extradition shall be granted for an extraditable offense "regardless of where the *offense* was committed," but they did not. Further, Paragraph 2 of Article 2 states: "An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offense described in paragraph 1." Here, Article 2, Paragraph 2 refers to

an offense as something that includes elements, such as aiding and abetting or conspiracy.

Third, this interpretation is further supported by comparing treaties that specifically use the word "acts" in their Non Bis in Idem provisions. For example, the U.S. Extradition Treaty with Italy uses the word "acts" in its Non Bis in Idem provision, as did the 1971 Extradition Treaty between the United States and France. When the United States and France rewrote their extradition treaty in 1996, they changed the Non Bis in Idem provision to use the term "offense." These examples demonstrate that, when the United States and its allies want to protect similar *conduct* from being dually prosecuted in each nation, they use language to evince that intent. They did not do so here, and we see no reason to ignore the Treaty's plain terms.

B. The State Department's technical analysis supports an elements approach.

The post-ratification understanding of the signatories confirms this reading. "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). Here, the United States Departments of State and Justice submitted a technical analysis to Congress based on their notes in negotiating the Treaty. The analysis states that Article 6, Paragraph 1 "applies only when the person sought has been convicted or acquitted in the Requested State of *exactly the same crime* that is charged in the Requesting State. *It is not enough that*

the same facts were involved." (emphasis added). We give this interpretation substantial weight.[5]

Prior to the Supreme Court's overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), Rana argued that *Chevron*'s likely impending demise would undermine the precedent requiring us to defer to the Executive Branch's interpretation of the Treaty. But because the logic underpinning *Chevron* deference is entirely distinct from the logic underpinning a deference to the Executive in matters of foreign affairs, *see* U.S. Const. art. II, § 2; *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) ("[T]he generally accepted view [is] that foreign policy was the province and responsibility of the Executive."), *Loper Bright* has no effect on our decision here.

Documents like a technical analysis help us understand the negotiators' intent in creating a binding agreement with another nation. We defer to those documents because they state what the drafters meant when they wrote the treaties at issue. As we explained in *Patterson v. Wagner*, 785 F.3d 1277 (9th Cir. 2015):

> Because the purpose of treaty interpretation is to 'give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties, courts—including our Supreme Court—look to the executive branch's interpretation of

[5] This interpretation is further supported by India's similar reading of the Treaty. The Indian opinion that Rana claims the government overlooks is a dissenting opinion from the Indian Supreme Court and lacks the force of law.

> the issue, the views of other contracting states, and the treaty's negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent.

Id. at 1281–82 (internal citations omitted); *see, e.g.*, *Manrique v. Kolc*, 65 F.4th 1037, 1043 (9th Cir. 2023) (utilizing technical analysis as "strong evidence" of the United States' intent).

On the other hand, *Chevron* deference relied primarily on an agency's policy expertise, rather than its insight into Congress's intent. *See Chevron*, 467 U.S. at 865–66 (explaining that judges, who are not policy experts, should defer to an agency's wise policy expertise). *Loper Bright* held that this long-standing rationale was flawed because the Administrative Procedure Act's (APA) mandate that reviewing courts determine "all relevant questions of law" means that courts must "exercise independent judgment in determining the meaning of statutory provisions." 144 S. Ct. at 2262. This reasoning does not touch, let alone undermine, the principle that we are to give deference to the Executive Branch's understanding of its own treaties.

Rana makes similar arguments based on his view that the Supreme Court is likely to also undermine *Auer* deference, as articulated in *Auer v. Robbins*, 519 U.S. 452 (1997). The Supreme Court rejected the opportunity to do so in *Kisor v. Wilkie*, 588 U.S. 558 (2019), and we have no reason to believe that the possibility of overruling *Auer* would materially affect this case in any way. *Auer* does not apply here because we are not reviewing an agency's interpretation of its own regulation. Based on *Kisor*, however, Rana argues that the State Department's

interpretation must reflect "fair and considered judgment." *Id.* at 579.[6] Even if *Auer* did apply, the State Department's technical analysis need not "be supported with reasoning and analysis," as Rana contends, because it is merely a recounting of the Executive Branch's understanding of the treaty it negotiated.

Rana refers us to *Hill v. Norton*, 275 F.3d 98 (D.C. Cir. 2001), as persuasive authority that we need not defer to the Executive's interpretation of treaties. In that case, the D.C. Circuit held that the failure of the Secretary of the Interior to include a certain bird species on a list of birds protected by the Migratory Bird Treaty Act was arbitrary and capricious under the APA. *Id.* at 99. That case, however, is distinct for two reasons. First, *Hill* involved review of post-ratification implementation of a treaty via regulations, not a technical analysis explaining the intent of the drafters. *Id.* The Secretary of the Interior's regulations did not evince a pre-ratification intent. Second, the Secretary's implementing regulation contradicted the clear, unambiguous terms of the treaty, which is, as stated above, not the case here. *See id.* at 106.

The plain meaning of the Treaty is supported by the Executive's understanding of its terms at the time of drafting. We defer to that understanding.

---

[6] Rana also argues that we could only defer to the State Department's interpretation of an ambiguous treaty. We come to our conclusion primarily based on the unambiguous plain text of the Treaty, so this argument makes no difference.

C. Persuasive case law supports an elements approach.

The Fourth Circuit considered a similar treaty provision in *Zhenli Ye Gon v. Holt* (*Ye Gon*), 774 F.3d 207 (4th Cir. 2014), and required an elements-based analysis. The Non Bis in Idem provision there stated that the requested country shall not extradite a fugitive who "'has been prosecuted or has been tried and convicted or acquitted' in that country, if that prosecution or trial was 'for the offense for which extradition is requested.'" *Id.* at 211. The Fourth Circuit interpreted "offense" to mean "the definition of the crime." *Id.* at 215.

The Fourth Circuit compared the Non Bis in Idem provision to the dual criminality provision of the treaty. *Id.* The dual criminality provision prevented extradition for crimes unless they were "wilful *acts* . . . punishable in accordance with the laws of both Contracting Parties." *Id.* Because the dual criminality provision used the word "acts" and the Non Bis in Idem provision used the word "offense[s]," the Fourth Circuit held that "offenses" "must be something other than the acts underlying those offenses." *Id.* The most natural reading of "offenses," the Fourth Circuit explained, is the definition of the crime, supporting the double jeopardy approach outlined in *Blockburger v. United States*, 284 U.S. 299 (1932). *Ye Gon*, 774 F.3d at 215. Although the dual criminality provision here also uses the word "offense," it explicitly limits "offense" to mean conduct for that provision only. *See Knotek*, 925 F.3d at 1131 n.12. Here, the word "acts" is used in the very next paragraph in Article 6, leading to an even stronger inference that "acts" and "offense[s]" have distinct definitions. *See Air France*, 470 U.S. at 398.

Similarly, the Eleventh Circuit in *United States v. Duarte-Acero*, 208 F.3d 1282 (11th Cir. 2000), read the word "offense" in a Non Bis in Idem provision to refer narrowly to criminal elements, as opposed to "[a] broader formulation[,] [which] would have used the word 'act,' 'action,' or 'conduct.'" *Id.* at 1286; *see also United States v. Trabelsi*, 845 F.3d 1181, 1193 (D.C. Cir. 2017) (Pillard, J., concurring in part and concurring in the judgment) (endorsing a *Blockburger* analysis in interpreting whether the same "offense" was prosecuted in each country).

Rana also refers us to *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), in which the Second Circuit interpreted "offense" to mean underlying conduct. That decision, however, is less persuasive for several reasons. First, the "same conduct" test in *Sindona* was, at least in part, based on a concurrence by Justice Brennan in *Ashe v. Swenson*, 397 U.S. 436 (1970), which the Supreme Court eroded in *United States v. Dixon*, 509 U.S. 688, 704 (1993) (striking down the "same conduct" rule for double jeopardy analysis as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy"). *See Ye Gon*, 774 F.3d at 216–17. Second, *Sindona* relied on the policy of the Department of Justice not to try federal cases where a state has prosecuted "the same act or acts." 619 F.2d at 178 (citing *Petite v. United States*, 361 U.S. 529, 530–31 (1960) (per curiam)). The internal DOJ *Petite* Policy has no bearing on what the word "offense" means in the Treaty, particularly where the policy does not use the word. *See Ye Gon*, 774 F.3d at 216. Finally, *Sindona* relied on the argument that a foreign country "could hardly be expected to be aware of *Blockburger*." 619 F.2d at 178. While that may have been true in 1980, the Treaty was signed nearly

twenty years later in 1997. Even if India were not aware of *Blockburger*, our conclusion that "offense" and "acts" must have different meanings stands. Rana has offered no other non-elements-based definition of "offense" that would distinguish it from Article 6's use of "acts" in Paragraph 2. Thus, nothing in *Sindona* persuades us that "offense" does not refer to a crime's elements.[7]

D. Headley's plea agreement does not compel a different result.

Rana that the government's interpretation of Article 6 in Headley's plea agreement demonstrates that "offense" refers to conduct rather than elements.

---

[7] Along similar lines, Rana suggests that the government's interpretation of "offense" creates absurd results because there may be local or country- specific elements included in a crime, such as an effect on interstate commerce. The plain language of the Treaty, however, suggests that this may be the intended result. In Article 2, Section 3(b), the Treaty states that for purposes of the dual criminality provision, an offense is extraditable "whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court[.]" The inclusion of this provision in Article 2 demonstrates that the drafters were aware of difficulties in comparing United States and Indian law but chose not to include such an exception in Article 6.

In any event, neither of the terrorism conspiracies for which Rana was prosecuted under 18 U.S.C. § 2339A required proof of a local element. If, at an appropriate time, we determine it is necessary to carve out a jurisdictional-element exception to *Blockburger* to apply exclusively in extradition cases, we may do so. *Cf. United States v. Hairston*, 64 F.3d 491, 496 (9th Cir. 1995). At this time, we take no stance on whether such an exception would be appropriate or necessary.

Headley's plea agreement states: "Pursuant to Article 6 of the Extradition Treaty . . . defendant shall not be extradited . . . for any offenses for which he has been convicted in accordance with this plea." The next sentence states:

> The defendant and the United States Attorney's Office accordingly agree that, if defendant pleads guilty to and is convicted of *all offenses set out in the Superseding Indictment*, including Conspiracy to Bomb Places of Public Use in India (in violation of 18 U.S.C. § 2332f(a)(2)) . . . then the defendant shall not be extradited to the Republic of India . . . for the foregoing offenses, *including conduct within the scope of those offenses for which he has been convicted* . . . (emphasis added).

Rana further points to statements made by U.S. Attorney Patrick J. Fitzgerald at Headley's plea colloquy describing the above plea provision:

> Your Honor, I think that is a summary of what is a paragraph that is very specific in Paragraph 9 of the agreement And that says if the conduct is conduct within the scope of those offenses for which he has been convicted in accordance with the plea, then according to the treaty, he would not be extradited.

Taking the plea agreement by itself, the language does not obviously suggest that "offense" means "conduct." The plea agreement specifies that, for purposes of the agreement, offense "include[s] conduct within the scope of those offenses," thus suggesting that "offense" is not co-extensive with "conduct" in every case. Additionally, the "pursuant

to Article 6" language occurs only in the prior sentence, which refers exclusively to offenses. The plea agreement then goes on to list the "offenses" for which Headley had been indicted, all of which refer to specific statutory criminal violations.

The U.S. Attorney's comments are less clear. Although they do seem to suggest that he interpreted the plea agreement to employ a conduct-based test under the Treaty, Rana provides no case that suggests that a singular statement by a U.S. Attorney interpreting a plea agreement should control over both plain language in the Treaty and the earlier-in-time contemporaneous understanding of the State Department.

Instead, Rana asks this court to judicially estop the Justice Department from changing positions between Headley's and Rana's proceedings. He also asks that, in the alternative, we remand to the district court for production and examination of internal Justice Department communications. A party is judicially estopped from making an argument "when 1) its current position is 'clearly inconsistent' with its previous position; 2) 'the party has succeeded in persuading a court to accept that party's earlier position'; and 3) the party, if not estopped, 'would derive an unfair advantage or impose an unfair detriment on the opposing party.'" *Perez v. Discover Bank*, 74 F.4th 1003, 1008 (9th Cir. 2023).

We decline to estop the government here because, even if U.S. Attorney Fitzgerald's statement was "clearly inconsistent" with the interpretation it now advances, it fails to meet the latter two prongs. First, the government did not persuade the district court to adopt its prior interpretation of the Treaty; it merely asked the district court to approve a plea agreement

that contained a provision that may have been broader than the Treaty. The district court did not explicitly accept any interpretation of the Treaty in approving the agreement. Second, Rana does not successfully articulate why the government would derive an unfair advantage from pursuing an interpretation of the Treaty that is supported by its plain language and technical analysis. Thus, we also decline to remand the case to the district court for production and examination of internal Justice Department communications.

We conclude that "offense" in Article 6, Paragraph 1 requires us to compare the elements of the crime for which Rana was acquitted in the United States with the elements of the crimes he is charged with in India. Because the parties do not dispute that the crimes charged in India have elements independent from those under which Rana was prosecuted in the United States, the Treaty permits Rana's extradition.

II. Competent evidence supports probable cause.

Article 9.3(c) of the Treaty provides that a request for extradition must be supported by "such information as would justify the committal for trial of the person if the offense had been committed in the Requested State." The parties agree that this standard requires India to provide information "that would be sufficient to establish probable cause" that Rana committed the alleged crime. *Emami v. U.S. Dist. Court for N. Dist. of Cal.*, 834 F.2d 1444, 1447 (9th Cir. 1987). We must affirm the probable cause finding so long as "there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Manrique*, 65 F.4th at 1044.

Rana attacks the credibility of Headley, who was the government's main witness. Rana argues that the extradition court should have discounted Headley's testimony because he (a) is a serial cooperator who returned to criminal activity, (b) "received training in manipulation and deception by the ISI, Pakistan's intelligence service," (c) initially denied Rana's knowledge of Headley's terrorist activities and then only disclosed Rana's knowledge after Rana's arrest, (d) used Rana for illegal activity without Rana's knowledge, (e) deceived his multiple wives, (f) and told other unrelated falsehoods to his associates and a judge.

Questions concerning Headley's credibility, however, are not properly before us. "An accused in an extradition hearing has no right . . . to pose questions of credibility as in an ordinary trial . . . ." *Santos v. Thomas*, 830 F.3d 987, 992 (9th Cir. 2016) (en banc) (quoting *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir. 1981)). The only evidence an accused can introduce "is evidence that 'explains away or completely obliterates probable cause.'" *Id.* (quoting *Mainero v. Gregg*, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999), *superseded by statute on other grounds as recognized in Manrique*, 65 F.4th at 1044). Attacks on Headley's credibility, while perhaps compelling to a jury, do not rise to the level of "complete[] obliterat[ion]" required to find a lack of probable cause. *Id.* In *Barapind v. Enomoto*, for example, our court sitting en banc rejected the accused's proffer of a "significant" government witness's complete recantation of his identification of the accused. 400 F.3d 744, 749–50 (9th Cir. 2005) (per curiam) (en banc). None of the attacks Rana proffers regarding Headley's credibility comes anywhere close to a direct recantation of his testimony, and all of them would

require evaluations of credibility best left for trial. *See Santos*, 830 F.3d at 992.

The government correctly notes that the cases to which Rana cites largely recite probable cause standards in the criminal context outside of extradition proceedings, *see Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Jensen*, 425 F.3d 698 (9th Cir. 2005); *United States v. Nielsen*, 371 F.3d 574 (9th Cir. 2004), and it is unclear why those cases apply given the clear, recent precedent proscribing the consideration of impeachment evidence in extradition proceedings. Rana points to *Choe v. Torres*, 525 F.3d 733 (9th Cir. 2008), to support his argument that this court can consider a credibility challenge to undermine the extradition court's probable cause finding, but that case did just the opposite. There, we rejected the petitioner's credibility challenge: "Ho's lack of credibility is merely a weakness in Korea's case; it does not 'completely obliterate[]' the evidence of probable cause." *Id.* at 740.[8]

One district court case cited by Rana, *In re Extradition of Ameen*, 2021 WL 1564520, at *13 (E.D. Cal. Apr. 21, 2021), relies on *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986), for the proposition that the extradition magistrate judge may consider credibility evidence. *Quinn* makes clear, however, that our court may not consider credibility attacks on habeas review, even if an extradition magistrate judge may consider them. *See id.* We review Rana's habeas petition here, so we may not consider Headley's credibility. The other out-of-circuit district

[8] We do not consider the likelihood that Rana would die in jail or be unable to obtain legal representation in India. We must assume that Rana will face a fair trial. *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911).

court case Rana cites, *In re Mazur*, 2007 WL 2122401 (N.D. Ill. July 20, 2007), is also clearly distinguishable. There, the court evaluated multiple statements surrounding the same event from an individual witness. *Id.* at *21–22. The court rejected the witness's statements because the story changed so substantially between statements that it was impossible to believe that the story was true and because the witness "admit[ted] that he lied under oath" and "that he essentially made up the connection between" the petitioner and the criminal activity. *Id.* Rana has not presented similar evidence here.[9] Thus, no case Rana cites to supports the proposition that this court may consider credibility attacks in determining whether the extradition judge properly found probable cause.

Rana's arguments that the Pakistan Intelligence Service paid for the Mumbai office, and that Rana would not have checked Headley's false visa application, rely exclusively on an attack on Headley's credibility, so we reject them. The other evidence that Rana offers (apart from his attack on Headley's credibility) does not help him. His arguments that (1) the Mumbai office did business, (2) the Mumbai office closed around the time of the attack for legitimate reasons, and (3) the warning about the impending attacks from Headley's co-conspirator in Dubai disproves Rana's earlier

---

[9] Rana argues that Headley's initial refusal to implicate Rana is similar to *Mazur*, but the extradition court considered Headley's explanation that he initially lied in an attempt to shield his childhood friend but ultimately offered up the evidence once he learned Rana was arrested. It is not in the province of our court, reviewing a habeas petition, to review that credibility determination. *See Quinn*, 783 F.2d at 815.

awareness of the attacks, do not upset the finding of probable cause.

First, Rana presents evidence disproving that the "Mumbai office did no business," but that ignores clear testimony from the business's customers, stating that they never received the visas for which they paid, and its secretary, stating that "there [was] no business." Second, Rana claims that the Mumbai office closing around the time of the attacks does not create an inference that the Mumbai office was a sham. Instead, Rana points to evidence that he was looking for ways to maintain his business presence in Mumbai. Even so, the evidence discussed above is sufficient to demonstrate probable cause that the Mumbai office was a sham. Finally, Rana argues that the fact that Headley sent a third party to warn Rana of the attacks disproves Rana's involvement with the plot. This inference does not "obliterate" probable cause; an equally compelling inference could be drawn that Headley kept Rana informed of the plans. Competent evidence supports the extradition court's finding of probable cause.

CONCLUSION

The judgment of the district court is **AFFIRMED**.

Appendix B

[STAMP]

FILED

SEP 30 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-1827

D.C. No. 2:23-cv-04223-DSF
Central District of California, Los Angeles

ORDER

TAHAWWUR HUSSAIN RANA,

Petitioner – Appellant,

—v.—

W.Z. JENKINS II,

Respondent – Appellee.

Before: M. SMITH and BADE, Circuit Judges, and FITZWATER, District Judge.*

Petitioner-Appellant's Motion to Stay Mandate Pending Appeal (Dkt. 45) is granted.

Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure, the mandate is stayed for forty-five days to permit Petitioner-Appellant to file a petition for a writ of certiorari in the Supreme Court. Petitioner-Appellant must notify the Court in writing that the petition has been filed, in which case the stay will continue until the Supreme Court resolves the petition. *See* Fed. R. App. P. 41(d)(2)(B)(2). Should the Supreme Court grant certiorari, the mandate will be stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this Court immediately upon the Supreme Court's decision.

---

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 23-4223-DSF

Order GRANTING Ex Parte Application for Stay Pending Appeal (Dkt. 21)

TAHAWWUR RANA,

Plaintiff,

—v.—

W.Z. JENKINS II, Warden,

Defendant.

Plaintiff Tahawwur Rana has moved for a stay of extradition pending appeal of this Court's denial of his habeas petition challenging his extradition order.

When deciding a motion for a stay pending appeal, a court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 434 (2009). The Ninth Circuit applies a "sliding scale" where "the required degree of irreparable harm increases as the probability of success decreases." Manrique v. Kolc, 65 F.4th 1037,

1041 (9th Cir. 2023). "Even with a high degree of irreparable injury, the movant must show 'serious legal questions' going to the merits." Id.

Rana has shown that he is likely to suffer significant irreparable harm absent a stay. He will be extradited to India for a trial on serious crimes with no hope for review of his arguments or hope for his return to the United States. The government admits this, but then argues that because "this claimed irreparable harm applies categorically to any fugitive who seeks a stay of extradition pending appeal," it does not count. See Opp'n at 5. In support of this proposition, the government cites Nken and Manrique, as well as a Seventh Circuit case, Venckiene v. United States, 929 F.3d 843, 864 (7th Cir. 2019).[1] These cases do not support the government's extreme position. But there is no need to explore the issue in depth because binding precedent answers the question in Rana's favor: "Irreparable injury is obvious: Once extradited, [the extradited appellant's] appeal will be moot." Manrique, 65 F.4th at 1041.

While the Court does not find that Rana "has made a strong showing that he is likely to succeed on the merits" – otherwise the Court would have ruled in his favor in the first instance – he has certainly raised serious legal questions going to the merits. The proper meaning of "offense" in Article 6(1) the extradition treaty is not clear and different jurists could come to different conclusions. Rana's position is

[1] Venckiene comes the closest, but it neither directly states the categorical holding that the government supports, nor does the opinion provide much reasoning in its terse discussion of irreparable harm.

certainly colorable and could very well be found to be correct on appeal.

The final two factors "merge when the Government is the opposing party." Nken, 556 U.S. at 435. There is value to compliance with India's extradition request, but Rana's extradition proceedings have been going on for more than three years, which suggests that the process has not been rushed so far. Otherwise, the public interest, if anything, favors Rana. The public has a strong interest in the proper interpretation of extradition treaties, particularly in the interpretation of provisions that provide important individual protections like the one at issue here. Further, there is a strong public interest in definitive, binding interpretations of treaties. District courts cannot provide those rulings; courts of appeals can.

The Court finds that the balance of the stay factors favors a stay pending appeal. The ex parte application is GRANTED. The extradition of Rana to India is stayed pending the conclusion of his appeal before the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

Date: August 18, 2023 /s/ Dale S. Fischer
Dale S. Fischer
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 23-4223-DSF

Order DENYING Petition for
Writ of Habeas Corpus

TAHAWWUR RANA,

Petitioner,

—v.—

W.Z. JENKINS II, WARDEN,

Respondent.

Petitioner Tahawwur Rana has petitioned for a writ of habeas corpus challenging Magistrate Judge Jacqueline Chooljian's order finding Rana eligible to be extradited to India pursuant to the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India.

Rana makes only two basic arguments here. First, he claims that, pursuant to the Treaty, he cannot be extradited because India plans to prosecute him for the same acts for which he was charged and acquitted in a United States court. Second, he argues that the government has not established that there is probable cause to believe that Rana committed the

Indian offenses for which he is expected to stand trial.

Meaning of "Offense" in Article 6(1)

The first issue is the interpretation of the term "offense" in Article 6(1). Rana argues that it should be interpreted to refer to the acts – *i.e.*, course of conduct – that were the basis for the charge for which Rana was previously acquitted. The government argues – and the magistrate judge found – that "offense" refers to the specific statutory crime for which he was charged and acquitted. In other words, the question is whether the Treaty bars extradition for the same *acts* that were previously charged or only for the same *crime* previously charged as analyzed under the Blockburger test or a similar standard.[1]

> The Treaty provides that:
>
> 1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
>
> 2. Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested, or to discontinue any criminal proceedings which have been

[1] In his petition, separate from his "acts" based reading of the Treaty, Rana does not challenge the magistrate judge's use of the Blockburger test or the conclusion that application of the Blockburger test would allow subsequent prosecution for the relevant Indian crimes.

> instituted against the person sought for those acts.

Treaty, Article 6.

An initial analysis of Article 6(1) supports the government's position, if for no other reason, because Article 6(2) uses the phrase "the acts for which extradition is requested" rather than "offense." This strongly suggests that "offense" in Article 6(1) is not intended to refer to "acts," but rather to the particular crime(s) charged.

Rana correctly points out that words in a treaty, like a statute, are assumed to have consistent meanings throughout. However, the Court rejects his argument that the Treaty uses "offense" consistently to mean "acts." Rana focuses on the dual criminality portion of the Treaty, Article 2, and argues that "offense" clearly refers to acts in that Article. But it is arguable that "offense" is used inconsistently – or at least ambiguously – even within Article 2. Article 2(1) and 2(2) arguably use "offense" to mean a set of acts, but Article 2(3) arguably uses it to mean a particular crime or crimes and Article 2(4) almost certainly uses "offense" to mean a particular crime, as that section uses the phrase "act or acts constituting the offense." Similarly, Article 17(1)(a) uses the phrase "offense based on the same facts on which extradition was granted," which logically suggests that "offense" in that section refers to a crime, not a set of facts – *i.e.*, acts. The Treaty simply does not use the term "offense" consistently to refer either to crimes or to acts, and, therefore, Rana's reliance on other sections of the Treaty does not help him.

As noted above, the internal logic of Article 6 strongly suggests that "offense" in Article 6(1) is intended to mean the same crime as analyzed under

something akin to the Blockburger test. This conclusion is further supported by the analysis provided to the Senate by the United States State Department and Justice Department at the time of the Treaty's ratification. That analysis is entitled to "great weight." Abbott v. Abbott, 560 U.S. 1, 15 (2010). In this case, the analysis directly states that Article 6(1)'s bar on extradition after a previous acquittal

> applies only when the person sought has been convicted or acquitted in the Requested State of exactly the same crime that is charged in the Requesting State. It is not enough that the same facts were involved. [Article 6] will not preclude extradition in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic transaction.

Extradition Treaty with India, S. Exec. Rep. No. 105-23, 105 Cong., 2d Sess. (1998) at 108. Given that Article 6(1) is, at best for Rana, ambiguous regarding whether "offense" means the same crime or the same set of acts, this analysis provided by the negotiators of the Treaty is especially worthy of "great weight."

Therefore, the Court agrees with the magistrate judge's conclusion that Article 6(1)'s use of "offense" refers to the particular crime charged, not the set of acts or course of conduct that led to the previously charged crime.

Probable Cause

Rana also challenges the magistrate judge's conclusion that the government had established probable cause to believe that Rana had committed the Indian offenses for which he is being extradited.

On habeas review of an extradition order, the probable cause determination must be upheld if "there is any competent evidence supporting the probable cause determination of the magistrate." Santos v. Thomas, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc).

This standard is easily met here. Rana does not even contest that there is evidence in the record that, if credited, would establish probable cause. He instead focuses on the testimony of alleged co-conspirator David Headley and provides numerous reasons Headley should be disbelieved. But Rana fails to consider the magistrate judge's reliance on other evidence, see extradition order at 43-44, and this alone is sufficient to reject Rana's attack on the magistrate judge's finding of probable cause. As for Headley's testimony, the magistrate judge correctly held that she was not entitled to weigh evidence or decide the credibility of witnesses.[2] Quinn v.

---

[2] Rana attempts to categorize Headley's credibility issues as so severe as to "obliterate" probable cause. No Ninth Circuit precedent suggests that a witness's testimony can have so many credibility problems as to "obliterate" probable cause. The concept of "obliteration" of probable cause arises only in the context of what evidence can be considered by an extradition court. Contrary evidence that goes to the *competence* of testimony can be considered because a complete lack of competent evidence can "obliterate" probable cause. See Santos, 830 F.3d at 1002-06 (evidence that testimony was coerced by torture admissible because it goes to the competence of the testimony). Additional evidence that attacks only the *credibility* of testimony, such as a later recantation, cannot even be considered in the probable cause determination. Id. at 1003. And even if the competence of some evidence is successfully challenged, if other evidence exists that is competent and supports probable cause, probable cause would not be "obliterated." See id. at 1008. As noted, other evidence exists here – a fact Rana ignores.

Robinson, 783 F.2d 776, 815 (9th Cir. 1986). Given that, even if Headley's testimony were the entire basis for the probable cause finding, it would be sufficient for the purposes of habeas review because it constitutes some competent evidence supporting the finding.

For the reasons stated above, Rana's petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Date: August 10, 2023 /s/ Dale S. Fischer
Dale S. Fischer
United States District Judge

Appendix E

[STAMP]

FILED
CLERK, U.S. DISTRICT COURT

May 16, 2023

CENTRAL DISTRICT OF CALIFORNIA

BY: KH DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:20-cv-7309-DSF-JC

CERTIFICATION OF EXTRADITABILITY
AND ORDER OF COMMITMENT

IN RE THE MATTER OF THE EXTRADITION
OF TAHAWWUR HUSSAIN RANA,

I. INTRODUCTION

This is a proceeding under 18 U.S.C. § 3184 pursuant to a request by the Republic of India ("India"), through the United States Government (the "United States" or "Government"), for the extradition of Tahawwur Hussain Rana ("Rana") under the provisions of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, signed on June

25, 1997, S. Treaty Doc. No. 105-30 (1997), entered into force on July 21, 1999 ("Treaty").

On June 10, 2020, the Government filed a Complaint seeking the provisional arrest of Rana with a view towards extradition. (Dkt. Nos. 1, 4). According to the Complaint, on August 28, 2018, a District and Sessions Judge for the Special Court of National Investigation Agency in New Dehli, India issued a warrant for Rana, who is being prosecuted in India for a number of offenses related to the November 2008 terrorist attacks in Mumbai, India. (Dkt. No. 4). On the same date, the Court issued a warrant for Rana's arrest. (Dkt. No. 2). Rana was subsequently arrested, and on July 21, 2020, the Court granted the Government's Request for Detention Pending Extradition. (Dkt. Nos. 6, 44).

On August 13, 2020, the Government filed a Request for Extradition ("Request") pursuant to 18 U.S.C. § 3184 with accompanying exhibits/ attachments, including the Declaration of Tom Heinemann ("Heinemann Decl."), an Affidavit of Superintendent of Police Sanjukta Parasor ("Parasor Aff.") and excerpts of reporter's transcripts ("RT") from United States v. Kashmiri, United States District Court for the Northern District of Illinois, Case No. 1:09-00830 ("NDIL Case"). (Dkt. Nos. 56, 66). On September 28, 2020, the Government filed an Extradition Memorandum ("Govt. Mem."). (Dkt. No. 67). Between February 1, 2021 and February 4, 2021, Rana filed an Opposition to the Request with an accompanying Memorandum of Points and Authorities ("Opposition") with exhibits. (Dkt. Nos. 77, 78). On March 22, 2021, the Government filed a Reply with the Declaration of John J. Lulejian and exhibits. (Dkt. No. 79). On April 5, 2021, Rana filed a Surreply, and on April 12, 2021, the Government filed a Surrebuttal

with the Second Declaration of John J. Lulejian. (Dkt. Nos. 87-88). On June 21 and 23, 2021, the Government lodged supplemental exhibits in support of the Extradition Request. (Dkt. Nos. 89-92).

On June 24, 2021, the Court conducted a hearing pursuant to U.S.C. § 3184, at which Government counsel, Rana, and Rana's counsel appeared. (See Dkt. No. 98 (Extradition Hearing Transcript ("EHT"))).

On June 25, 2021, the Government filed a Notice of Supplemental Authority supporting its Extradition Request. (Dkt. No. 93).

On July 15, 2021, the Government and Rana each submitted Proposed Findings of Fact and Conclusions of Law, and on July 21, 2021, the Government filed a Response to Rana's Proposed Findings on July 21, 2021. (Dkt. Nos. 100-102).

The Court has reviewed and considered all of the documents submitted in support of and in opposition to the Request, and has considered the arguments presented at the hearing. Based on such review and consideration and for the reasons discussed herein, the Court makes the findings set forth below, and CERTIFIES to the Secretary of State of the United States the extraditability of Rana on the charged offenses that are the subject of the Request.

II. FACTS

Between November 26 and 29, 2008, ten Lashkar-e-Tayyiba ("Lashkar")[1] members carried out

[1] The United States has designated Lashkar as a foreign terrorist organization, and Lashkar is banned in India as a designated terrorist group. (See Parasor Aff. ¶ 25). There appear to be various spellings of Lashkar. (See id.).

coordinated attacks at various locations throughout Mumbai, India, including the Taj Mahal Palace Hotel. (Parasor Aff. ¶¶ 3, 24, 37). These attacks killed 166 people, injured 239 people, and resulted in excess of $1.5 billion dollars in property damage. (Parasor Aff. ¶¶ 24, 37). The Indian government has charged multiple individuals, including Rana, with crimes related to the attacks, accusing Rana of conspiring with his childhood friend David Coleman Headley, also known as "Daood Gilani," and others to help plan and carry out the Lashkar terrorist attacks in Mumbai. (Parasor Aff. ¶¶ 3, 28-29, 38).

In particular, on August 28, 2018, Poonam A. Bamba, District and Sessions Judge, Special Court of National Investigation Agency, issued a warrant for Rana's arrest on charges related to the Mumbai attacks, including: (1) conspiracy to (a) wage war (Object 1), (b) commit murder (Object 3), (c) commit forgery for the purpose of cheating (Object 4), (d) use as genuine a forged document or electronic record (Object 5), and (e) commit a terrorist act (Object 6), in violation of Indian Penal Code ("IPC") § 120B[2] read

---

[2] Under the IPC, a criminal conspiracy occurs: "When two or more persons agree to do, or cause to be done, – (1) an illegal act, or (2) an act which is not illegal by illegal means[,] . . . [p]rovided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof." IPC § 120A. A "party to a criminal conspiracy to commit an offence punishable with death, [] [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in [the IPC] for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence." IPC § 120B. (Dkt. No. 42-2 at 4-5 (as paginated on the Court's electronic docket)).

with IPC §§ 121,[3] 302,[4] 468,[5] 471,[6] and Unlawful Activities Prevention Act ("UAPA") § 16;[7] (2) waging

[3] Under the IPC: "Whoever wages war against the [] [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [] [imprisonment for life] [] [and shall also be liable to fine]." IPC § 121. (Dkt. No. 42-2 at 5).

[4] Under the IPC, a person is guilty of murder if he performs an act that causes death and "if the act by which the death is caused is done with the intention of causing death, or – [] [i]f it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or – . . . [i]f it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or – . . . [i]f the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid." IPC § 300. "Whoever commits murder shall be punished with death or [][imprisonment for life], and shall also be liable to fine." IPC § 302. (Dkt. No. 42-2 at 6-8).

[5] Under the IPC: "[Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery." IPC § 463. "Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." IPC § 465. (Dkt. No. 42-2 at 11-13). Further: "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'." IPC § 415. "Whoever commits

war, in violation of IPC § 121; (3) conspiracy to wage war, in violation of IPC § 121A;[8] (4) murder, in violation of IPC § 302; (5) committing a terrorist act, in violation of UAPA § 16; and (6) conspiracy to commit a terrorist act, in violation of UAPA § 18.[9]

---

forgery, intending that the [][document or electronic record forged] shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." IPC § 468. (Dkt. No. 42-2 at 9, 13).

[6] Under the IPC: "Whoever fraudulently or dishonestly uses as genuine any [][document or electronic record] which he knows or has reason to believe to be a forged [][document or electronic record] shall be punished in the same manner as if he had forged such [][document or electronic record]. IPC § 471. (Dkt. No. 42-2 at 13).

[7] Under UAPA § 16: "(1) Whoever commits a terrorist act shall, – [¶] (a) if such act has resulted in the death of any person, be punishable with death or imprisonment for life, and shall also be liable to fine; [¶] (b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine." (Dkt. No. 66-15 at 10).

[8] Under the IPC: "Whoever within or without [] [India] conspires to commit any of the offences punishable by section 121, [] . . . or conspires to overawe, by means of criminal force or the show of criminal force, [] [the Central Government or any [] [State] Government [] . . .], shall be punished with [] [imprisonment for life], or with imprisonment of either description which may extend to ten years, [] [and shall also be liable to fine]. IPC § 121A. (Dkt. No. 42-2 at 5).

[9] Under the UAPA: "Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directs or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine." UAPA § 18. (Dkt. No. 66-15 at 10). The UAPA defines "terrorist act" as:

(Dkt. Nos. 4-1, 42-2, 66-2, 66-6, 66-15; Parasor Aff. ¶¶ 1-5, 12-13).[10] The Indian Government has

---

> Whosoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, – (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause – [¶] (i) death of, or injuries to, any person or persons; or [¶] (ii) loss of, or damage to, or destruction of, property; or [¶] (iii) disruption of any supplies or services essential to the life of the community in 1ndia or in any foreign country; or [¶] (iii-a) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or [¶] (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or [¶] (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or [¶] (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; or [¶] commits a terrorist act.

UAPA § 15. (Dkt. No. 66-15 at 8-9).

[10] The United States is not proceeding on several other charges identified in the warrant and related documents, and the Court will not further address such charges. (See Dkt. No. 67 at 26).

provided the following evidence in support of its request to extradite Rana on the aforementioned charges, including transcripts of Headley's testimony in the NDIL Case.

Rana and Headley met when they attended a military boarding high school together in Pakistan, became close friends, and remained so for many years. (Parasor Aff. ¶ 29; RT 59-60, 115, 643-46). After high school, Rana served as a doctor with the rank of Captain in the Pakistan army; however, he later deserted from the army and became a Canadian citizen before moving to Chicago, Illinois and opening several businesses, including the Immigration Law Center, which had offices in Chicago, New York and Toronto. (Parasor Aff. ¶¶ 29, 38; RT 177, 653-55). Meanwhile, Headley became involved with heroin trafficking and was twice convicted of drug offenses.[11] (RT 61-62). Following Headley's 1997 arrest for importing heroin into the United States, Rana posted his house as collateral for Headley's bond. (RT 63). Moreover, during their friendship, Rana held money for Headley and sent it to him as needed. (RT 63-64, 657-58).

Headley's involvement with Lashkar predates the Mumbai attacks. (Parasor Aff. ¶¶ 38; RT 66-67). In 2000, Headley went to his first Lashkar meeting, listened to speeches about jihad, donated money, and volunteered. (RT 67-71, 660). Headley moved from the United States to Pakistan in December 2001, and between 2002 and 2005, he attended numerous

---

[11] Headley was convicted of offenses related to importing heroin in 1988 and 1997 and received a four-year sentence for the first conviction and a 15-month sentence for the second conviction. (RT 61-62). In both instances he received leniency for cooperating with investigators. (RT 62).

training courses with Lashkar, including receiving military, intelligence and anti-terrorist training regarding subjects such as weapons, hand-to-hand combat, surveillance, and setting up safe houses in enemy territory. (RT 71-87, 662, 673-75; Dkt. No. 16-6 at 4-5). Headley moved back to the United States in August 2005, met with Rana, and told Rana about the training he had received from Lashkar, including that he had received, among other things, "weapons training, ambush, raids, [and] military training." (RT 87-88; Dkt. No. 16-6 at 5). Headley also informed Rana that Lashkar wanted him (Headley) to go to India for surveillance or an attack, and he was changing his name for that purpose so that "nobody would be able to tell that [Headley] was a Muslim or a Pakistani." (RT 88-89, 1148; Dkt. No. 16-6 at 5; Parasor Aff. ¶ 39). Headley legally changed his name to David Coleman Headley in February 2006 and obtained a new passport in that name. (RT 109-10).

In late 2005 or early 2006, Headley met with Lashkar members who ordered him to travel to India to conduct surveillance of places of public use and state and government facilities within that country. (RT 90, 96, 98, 107, 110-12). In the spring or early summer of 2006, Headley met with Lashkar members and discussed opening an immigration office in Mumbai, India as cover for his surveillance activities. (RT 112-16). Headley had told Lashkar about his friendship with Rana and Rana's ownership and operation of the Immigration Law Center. (Parasor Aff. ¶ 29; RT 115-17). Headley and his contacts agreed that Rana's business would be an ideal front for their activities because it would allow Headley to travel freely in and out of India and to establish connections with powerful individuals in India. (RT 115-16, 127, 129).

In or about June 2006, Headley traveled to Chicago and met with Rana. (RT 119-20; Dkt. No. 16-6 at 5). Headley told Rana about his association with Lashkar and his orders to conduct surveillance around Mumbai. (RT 120, 126-28; Parasor Aff. ¶ 42). Headley explained that opening an office for Immigration Law Center would provide a cover story for his activities. (RT 128; Dkt. No. 16-6 at 5-6). Headley also told Rana that one of the co-conspirator's could help with Rana's status as a deserter from the Pakistani army. (RT 128-29). After hearing Headley's explanation, Rana agreed to open a Mumbai Branch office of his business to assist Headley.[12] (RT 128-29, 1149; Dkt. No. 16-6 at 6; Parasor Aff. ¶¶ 39, 71(b)). Although Headley had no immigration experience, Rana also helped Headley secure a business visa from Indian authorities as the "Regional Manager" of the Mumbai Office of the Immigration Law Center, with Headley purportedly responsible for supervising and coordinating the company's operations in Asia. (RT 129-30, 135; Parasor Aff. ¶ 62; Dkt. No. 66-9 at 65-71, 130-32). Headley prepared the relevant Indian visa application forms, which contained false information about his identity and purpose for travel to India. (RT 130-32; Dkt. No. 16-6 at 6). Rana reviewed these forms and knew that the information Headley had provided was false, but did not correct the forms before submission to the Indian authorities. (RT 132). Rana deceived his business partner – the immigration attorney at Immigration Law Center – to approve the forms. (RT 133-38). Headley presented

[12] One of Headley's co-conspirators who helped plan the Mumbai attacks provided money for the Mumbai branch of the Immigration Law Center, which Headley used for living expenses. (RT 141, 146-47, 159-60; Parasor Aff. ¶ 41).

the forms to the Indian Consulate in Chicago and was granted a business visa. (RT 138-41). Having the office in India and business visa was important for Headley's plans because it allowed him to stay in India long term and perform surveillance. (RT 1149).

Through his unsuspecting business partner, Rana also helped Headley complete an application with the Reserve Bank of India to open the Mumbai branch office of Immigration Law Center. (RT 178-81; Parasor Aff. ¶¶ 40, 63; Dkt. No. 66-9 at 93-110, 135-37). The application stated that Headley would serve as the Immigration Law Center's "South Asian Regional Director" and "Office Head." (RT 180; Dkt. No. 66-9 at 97, 109, 136). The bank ultimately rejected the application. (RT 180; Parasor Aff. ¶¶ 40, 63; Dkt. No. 66-9 at 107).

After Headley obtained the visa, he went to Pakistan and met with Lashkar members and other co-conspirators, informing them that Rana had permitted them to use the Immigration Law Center and showing them the visa he had obtained with Rana's assistance. (RT 141-43; Dkt. No. 16-6 at 6). Headley was instructed to take general videos of Mumbai, including of the Taj Mahal hotel. (RT 143-46). Headley traveled to Mumbai in September 2006 and conducted many hours of video surveillance, including the requested recordings of the Taj Mahal Hotel. (RT 147-51, 164-65; Dkt. No. 16-6 at 6; Parasor Aff. ¶ 39). At that time, Headley "was received by an individual close to Rana" who "is a protected witness who has stated that at the telephonic request of Rana, he arranged accommodations and other logistics for [Headley]." (Parasor Aff. ¶ 67; Dkt. No. 66-9 at 138-42). In early December, Headley traveled to Pakistan, met with Lashkar members and others, provided them with the video recordings he had

made, discussed the video and surveillance he had conducted in India, and received instructions to again go to the Taj Mahal Hotel and visit the second floor to obtain video of the hotel's conference halls since it was believed that some defense contractors or scientists held meetings in those halls. (RT 163-68).

While in Mumbai in the fall of 2006, Headley also rented an apartment, signed a lease for office space for Rana's immigration business, hired a secretary for the business, put advertisements in newspapers and printed fliers for the business. (RT 150-52, 157-58; Parasor Aff. ¶ 60; Dkt. No. 66-9 at 76-85). In signing the lease for office space, Headley used a letter from Rana's business partner claiming that Headley served as the company's South Asian Regional Director, represented the Immigration Law Center's interests in India, Bangladesh, and Pakistan, and had the authority to negotiate contracts, sign an office lease, and open bank accounts on behalf of the business. (RT 153-57). During its period of alleged operation, the Mumbai Office of the Immigration Law Center generated little to no business. (Parasor Aff. ¶¶ 64, 71(c); RT 158-59, 175, 181-82, 194-95, 701, 830-31; Dkt. No. 66-9 at 111-12, 120-29).[13]

---

[13] According to Headley, people sometimes responded to the advertisements he placed, and he would sometimes refer them to Rana for a consultation. (RT 158-59). Headley stated there were some very small payments made by clients and that they obtained no visas for any clients in India between October 2006 and September 2007, but they did "servic[e]" some of Rana's clients from Chicago. (RT 175, 181-82, 194-95). Headley also stated that if a client paid money and did not receive a visa, the money was returned. (RT 830-31; see also Dkt. No. 66-9 at 111-12, 120-21 (statements of individuals who paid money to obtain visa from Immigration Law Center's Mumbai office and were refunded money when no visa was obtained)). The

At the direction of co-conspirators in Pakistan, Headley returned to Mumbai on multiple other occasions between February 2007 and September 2007, conducted more surveillance of various locations there, including the second floor of the Taj Mahal Palace Hotel, and thereafter traveled to Pakistan, met with Lashkar members and other co-conspirators, provided them with the video recordings he made, and discussed the video and surveillance he conducted in Mumbai. (RT 158-59, 176-78, 182-86, 191-93; Dkt. No. 16-6 at 7).

In July 2007, Headley traveled to Chicago and stayed with Rana. (RT 185). Headley told Rana about the surveillance he conducted and would continue to conduct in India, including the videos he had taken of the Taj Mahal Palace Hotel. (RT 185-87, 195-96; Dkt. No. 16-6 at 7). Headley also told Rana about meeting co-conspirators in Pakistan and their reactions regarding the surveillance he conducted. (RT 186-87, 190; Dkt. No. 16-6 at 7). Since Headley's Indian visa had expired, Rana helped Headley obtain a new visa by processing the forms through the Immigration

---

Superintendent of Police in charge of the investigation in India stated that:

> No immigration work whatsoever was actually carried out by [the] office [Headley established for Rana in Mumbai]. Even when the business was visited by interested persons following an advertisement they h0.17ad made, and the persons paid some money for immigration services, no such service was provided and in fact it was Rana who repaid the amount taken from them. To maintain the facade of the office Rana had agreed to hire a secretary. Consequently, Mahrukh Bharucha was appointed as an employee at the Mumbai office. She has stated that no immigration work had ever taken place from this office.

(Parasor Aff. ¶ 64).

Law Center. (RT 188-90). The visa application included the same false information previously submitted to the Indian government. (RT 188-90; Parasor Aff. ¶ 62; Dkt. No. 66-9 at 72-75, 133-34). As a result of Rana's assistance, Headley secured a five-year multi-entry visa from Indian authorities on July 18, 2007. (RT 189-90).

In December 2007, at Lashkar's Pakistan headquarters office, Headley met with co-conspirators who told him about portions of their attack plans and showed him a styrofoam mock-up of the Taj Mahal Palace Hotel. (RT 199-202, 208).

In March 2008, Headley met with other co-conspirators in Pakistan to discuss potential landing sites in Mumbai where a team of attackers could arrive by sea. (RT 209-13; Dkt. No. 16-6 at 8). At their direction, Headley returned to Mumbai the following month and conducted additional surveillance, took boat trips in and around the harbor to locate possible landing sites, and used a GPS device to record such locations. (RT 213-27; Dkt. No. 16-6 at 8). He returned to Pakistan and advised his co-conspirators of his recommendations for potential landing sites, but learned that the attack plans would be delayed, in part to await calmer seas. (RT 230-34; Dkt. No. 16-6 at 8).

In May 2008, Headley met with Rana in Chicago over a period of several days and told Rana about his extensive surveillance in Mumbai, his meetings with co-conspirators in Pakistan, the styrofoam mock-up he had been shown, the landing ideas (including specifically where a team of attackers would land in front of the Taj Mahal Palace Hotel), his boat trips in and around the harbor and use of the GPS device, and the delay of the attack plans, in part to await

calmer waters. (RT 236-40, 245-48, 755-58, 767-72, 774-75, 1151; Dkt. No. 16-6 at 8; Parasor Aff. ¶ 43). Rana smiled and laughed when Headley told him about the landing site in front of the Taj Mahal Palace Hotel and when Headley said he thought the mock-up was "terrible." (RT 238-40). Additionally, during May 2008, Headley included Rana with other co-conspirators in email discussions regarding how one of Headley's contacts in India could be used to benefit Lashkar. (RT 248-79; Dkt. No. 66-9 at 161-66, 168-88, 203-05).

In June 2008, Headley returned to Pakistan and met with his co-conspirators, who gave him a list of targets in Mumbai for surveillance, provided him with a GPS device, and requested that Headley recheck the landing site. (RT 279-88; Dkt. No. 16-6 at 9). One of the co-conspirators also told Headley to close the office and take out a newspaper advertisement pretending to be an employment agency looking for people to work as security personnel in Canada since it was felt that this would attract retired military personnel. (RT 285-86). A day or two later, after Rana had a discussion with the co-conspirator who had told Headley to close the office, Rana also told Headley to close the office. (RT 803, 1168, 1180-81).

Headley returned to Mumbai at the end of June or the beginning of July 2008 and began taking steps to close the office and complete the surveillance tasks he had been given, and Rana gave Headley instructions on how he wanted the office closed. (RT 288-95). However, Headley was unable to close the office because the landlord did not want to refund the deposit. (RT 295). Thereafter, Headley consulted Rana, and it was decided to keep the office open until the deposit ran out. (RT 296). During this time,

another business began sharing the office and paying half of the rent. (RT 295-96). After Headley negotiated a short extension, the Mumbai lease expired approximately two weeks before the Mumbai attacks. (Parasor Aff. ¶¶ 65, 71(c); Dkt. No. 66-9 at 76-85, 90, 118).

After leaving India, Headley returned to Pakistan and met with his co-conspirators and gave them the videos he had taken, the GPS device, and some bracelets he had purchased to help disguise the attackers. (RT 296-98).

In the fall of 2008, Headley learned that Rana was planning to go to China, Dubai and India. (RT 313). Headley arranged for Rana to meet a co-conspirator in Dubai, where, at Headley's request, the co-conspirator advised Rana not to go to India because the attacks were imminent. (RT 313-14; Parasor Aff. ¶¶ 44, 60, 65). On September 7, 2009, Rana and Headley discussed this incident during a long conversation that, unbeknownst to them, the FBI recorded ("September 7, 2009 conversation"), with Rana confirming the co-conspirator "had mentioned that in Dubai[.]" (RT 536-37, 560-61; Parasor Aff. ¶¶ 44, 60).

As noted above, the Mumbai terrorist attacks occurred between November 26 and 29, 2008, killing 166 people, injuring 239 people, and causing significant property damage.[14] (Parasor Aff. ¶¶ 24, 37).

---

[14] A stipulation during the trial in the NDIL Case indicated the Mumbai attacks occurred between November 26 and 28, 2008, and that 164 people were killed, including six United States nationals. (RT 1201-04).

Headley returned to the United States in December 2008, and discussed the attacks with Rana, sharing the details Headley learned from the co-conspirators about the attacks and reminding Rana that he (Headley) had made videos of the locations that had been attacked. (RT 316, 325, 334, 348-50). Referring to a 1971 attack on his school in Pakistan, Headley told Rana that he believed he was "even with the Indians now." (RT 350). In response, Rana said the Indian people "deserved it." (RT 350).

On December 25, 2008, the co-conspirator who met Rana in Dubai sent Headley an email asking "'How's . . . [Rana's] reaction on what all is happening, is he terrified or relaxed?'" (RT 346-48). Headley responded the next day that Rana "'is very relaxed'" and was trying to calm Headley down. (RT 350-52).

In the September 7, 2009 conversation, Rana told Headley that the nine Lashkar terrorists who had been killed in the Mumbai attacks "'should be given Nishan-e-Haider,'" which is Pakistan's highest military honor. (RT 552-53; Parasor Aff. ¶ 44). Rana also asked Headley to tell one of the co-conspirator's responsible for planning the Mumbai attacks that he should get "a medal for top class." (RT 553-55). Rana was pleased to learn Headley had already conveyed the compliment based on prior statements Rana had made equating the co-conspirator to a famous general. (Parasor Aff. ¶ 71(g); RT 490-92, 495, 553-55).

In 2009, Headley conducted surveillance activities for potential future terrorist attacks in other parts of India as well as for an intended, but ultimately foiled, terrorist plot in Denmark that was meant to retaliate against a Danish newspaper for publishing a cartoon Headley and his co-conspirators found offensive. (See,

e.g., RT 317-19, 325, 334, 362-81, 389-91, 396-400, 407-11, 417-18, 422-24, 433, 474-86, 1149-50, 1220-25; Dkt. No. 16-6 at 10, 12-17). In India, Headley conducted surveillance on Chabad Houses in Delhi, Goa, and Pushkar as well as the National Defence College ("NDC"), which "teaches courses for high-level Indian Army officers, colonels and up."[15] (RT 330, 405-07, 417-23, 1079). He kept Rana apprised of the surveillance activities. (RT 334, 362-68, 382-86, 392-93, 436-40, 484-86, 555-59, 815-16, 926, 1149-50; Dkt. No. 16-6 at 13-14, 16). For example, in the September 7, 2009 conversation, Headley and Rana discussed targeting the NDC, Rana told Headley that he was already aware that the NDC was a target, and they talked about how such an attack would kill more high-ranking Indian military officials than previous wars between India and Pakistan. (RT 555-59). Moreover, Rana set up an email account for Headley so that Headley could communicate securely with Rana,[16] and Headley transferred a list of Chabad houses in India – including the ones he was supposed to conduct surveillance on – into the email account for security purposes.[17] (RT 410-16; Dkt. No. 66-9 at 153-59, 207-10, 289-95). Rana also occasionally communicated directly with some of Headley's contacts in Pakistan. (RT 470-73, 704; Parasor Aff.

---

[15] On cross-examination in the NDIL Case, Headley also stated that he had made a video of a fourth Chabad House in Pune. (RT 1079-80).

[16] Rana set up this email address and informed Headley of it in a coded email; however, Headley did not understand the code and Rana had to explain it to him in a phone call. (RT 412- 14).

[17] Headley explained he put the list in an email rather than keeping a handwritten list because "if I was stopped and somebody found a list in my pocket, it would not seem right." (RT 415-16).

¶¶ 41, 61; Dkt. No. 66-9 at 198-02; see also Parasor Aff. ¶ 42 ("Rana was also in direct touch with the . . . handlers for [Headley] and passed on information as and when required.").

Headley was arrested in Chicago on October 3, 2009, and Rana was arrested on October 18, 2009. (RT 57, 638, 1020, 1039, 1381; Dkt. No. 16-6 at 16-17). On January 14, 2010, in the NDIL Case, a First Superseding Indictment was filed against Rana, Headley, and two other co-conspirators, and on April 21, 2011, the operative twelve-count Second Superseding Indictment ("Indictment") was filed in the NDIL Case charging Rana and six co-conspirators with multiple federal offenses relating to the Mumbai attacks and the Denmark plot.[18] (Dkt. No. 16-2; NDIL Case Dkt. ("NDIL Dkt.") Nos. 32, 213). The Indictment charged Rana with three counts: (1) Count 9 – Conspiracy to Provide Material Support to Terrorism in India in violation of 18 U.S.C. § 2339A – which essentially alleged that Rana conspired to provide material support to Lashkar in

[18] On March 18, 2010, in the NDIL Case, Headley pled guilty to, and was convicted of, twelve charges relating to his activities in India and Denmark: (1) conspiracy to bomb places of public use in India in violation of 18 U.S.C. § 2332f(a)(2); (2) conspiracy to murder and maim persons in India in violation of 18 U.S.C. § 956(a)(1); (3-8) aiding and abetting the murders of six United States nationals in Mumbai, India in violation of 18 U.S.C. § 2332(a)(1); (9) conspiracy to provide material support to terrorism in India in violation of 18 U.S.C. § 2339A; (10) conspiracy to murder and maim persons in Denmark in violation of 18 U.S.C. § 956(a)(1); (11) conspiracy to provide material support to terrorism in Denmark in violation of 18 U.S.C. § 2339A; and (12) providing material support to Lashkar in violation 18 U.S.C. § 2339B. (Dkt. No. 16-6 at ¶¶ 2, 5; Dkt. No. 79-2). Headley was ultimately sentenced to 35 years in prison. (NDIL Case, Defendant #3, Dkt. No. 365).

connection with such entity's conspiracies to commit the Mumbai attacks as charged against others in Counts 1 and 2, and, as pertinent to sentencing, that death resulted to approximately 164 persons;[19] (2) Count 11 – Conspiracy to Provide Material Support to Terrorism in Denmark in violation of 18 U.S.C. § 2339A – which essentially alleged that Rana

---

[19] 18 U.S.C. § 2339A provides in pertinent part: "Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [sections 956 or 2332f] of this title . . . or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life." 18 U.S.C. § 2339A(a).

The District Judge in the NDIL Case instructed the jury that "[t]o sustain the charge of conspiracy as alleged in Count [9], the government must prove two elements: [¶] First, that a conspiracy to provide material support or resources or to conceal or disguise the nature, location, source and ownership of such material support or resources existed, as charged in Count [9]; and [¶] Second, that the defendant became a member of the conspiracy, knowing or intending that the material support or resources provided, or concealed or disguised, were to be used in preparation for, or in carrying out, one of the two conspiracies charged in Counts [1] and [2] of the [] Indictment [*i.e.*, conspiracies to bomb places of public use in India and to murder and maim in India]." (NDIL Dkt. No. 284 at 19). He further advised the jury that "[a] conspiracy is an agreement between two or more persons to accomplish an unlawful objective[,]" that "[a] conspiracy may be established even if its purpose is not accomplished," and that "[t]o be a member of a conspiracy, the defendant need not joint at the beginning, or know all the other members or the means by which its purpose was to be accomplished[,]" but that "[t]he government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant." (NDIL Dkt. No. 284 at 20).

conspired to provide material support for a planned attack (which ultimately did not take place) against a private newspaper in Denmark as charged against others in Count 10;[20] and (3) Count 12 – Providing Material Support to Lashkar in violation of 18 U.S.C. § 2339B, which alleged that Rana provided material support to Lashkar, and, as pertinent to sentencing, that death resulted to approximately 164 persons.[21] (Dkt. No. 16-2; NDIL Dkt. No. 213).

---

[20] The District Judge in the NDIL Case instructed the jury that "[t]o sustain the charge of conspiracy as alleged in Count [11], the government must prove two elements: [¶] First, that a conspiracy to provide material support or resources or to conceal or disguise the nature, location, source and ownership of such material support or resources existed, as charged in Count [11]; and [¶] Second, that the defendant became a member of the conspiracy, knowing or intending that the material support or resources provided, or concealed or disguised, were to be used in preparation for, or in carrying out, the conspiracy charged in Count [10] of the [] Indictment." (NDIL Dkt. No. 284 at 26).

[21] Title 18, United States Code section 2339B provides in pertinent part: "Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than [15] years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . ." 18 U.S.C. § 2339B(a)(1). In 2015, Section 2339B(a)(1) was amended to replace 15 years with 20 years.

The District Judge in the NDIL Case instructed the jury that "[t]o sustain the charge as alleged in Count [12], the government must prove: [¶] First, that the defendant knowingly provided material support or resources to *Lashkar e Tayyiba*; and [¶] Second, that the defendant knew that *Lashkar e Tayyiba* was a designated terrorist organization, or knew that *Lashkar e Tayyiba* had engaged in or was engaging in terrorist or

On July 16, 2010 and April 29, 2011, the Government filed two Bills of Particulars supporting its allegations relating to Counts 9, 11 and 12. (Dkt. No. 16-3; NDIL Dkt. Nos. 109, 223).

As to Count 9 – which charged Rana with conspiring to provide material support and resources, namely personnel, tangible property, expert advice and assistance, money, and false documentation and identification that were used in connection with the conspiracies to bomb, murder and maim individuals in India as charged in Counts 1 and 2 – the Government identified (1) the personnel to include Headley and Rana; (2) the tangible property to include (a) memory cards containing videos and photographs of various locations in India provided to co-conspirators for the purpose of planning attacks in India; (b) maps and books relating to locations in India provided to co-conspirators for the purpose of planning attacks in India; and (c) red string bracelets obtained by Headley at or near the Siddi Vinayak temple and provided to a co-conspirator for the purpose of disguising the ten attackers described elsewhere in Count 1; (3) the expert advice and assistance to include (a) Rana providing his

---

terrorism activity; and [¶] Third, that one of the [specified] jurisdictional requirements . . . is satisfied." (NDIL Dkt. No. 284 at 34). He further instructed that if the jury found Rana guilty of Count 12, it "must then determine whether the government ha[d] proved that at least one individual died as a result of the conduct charged in Count [12]" and that "[i]n order to find that at least one individual died as a result of the conduct charged in Count [12], the government must prove that the defendant's conduct contributed to an individual's death in the attacks committed by *Lashkar e Tayyiba* in Mumbai, India, in November 2008, even if that conduct by itself would not have caused the death." (NDIL Dkt. No. 284 at 38).

immigration expertise to assist in obtaining a business visa for Headley to travel to, and work in, India; (b) Rana providing his immigration business expertise to establish and seek the necessary approval to operate an immigration business in Mumbai, India, for the purpose of providing a cover to Headley; and (c) Rana providing his immigration business expertise to maintain and run an immigration business in Mumbai, India, for the purpose of effectuating the cover; (4) the money to include (a) the wiring of money to Headley while in India, including on four specified dates in late 2006; (b) the payment of expenses associated with the Immigrant Law Center in Mumbai, India, which acted as a cover for the surveillance activities of Headley; and (c) the payment of living expenses for Headley in Chicago, Illinois; and (5) the false documentation and identification to include Headley's application for an Indian visa, containing false information. (Dkt. No. 16-3 at 2-4; NDIL Dkt. Nos. 109 at 1-3 & 223 at 2-3).

As to Count 11 – which charged Rana with conspiring to provide material support and resources, namely personnel, tangible property, expert advice and assistance, and money that were used in connection with the conspiracy to murder and maim individuals in Denmark as charged in Count 10 – the Government identified (1) the personnel to include Headley and Rana; (2) the tangible property to include memory cards containing videos and photographs of various locations in Denmark provided to co-conspirators for the purpose of planning attacks in Denmark; (3) the expert advice and assistance to include: (a) Rana providing his immigration business expertise to assist in establishing a cover for Headley in Denmark; and

(b) Rana providing his immigration business expertise for the purpose of effectuating the cover for surveillance in Denmark; and (4) the money to include the payment of travel expenses associated with Headley's trips to Pakistan, Denmark and other locations in Europe, as well as living expenses for Headley in Chicago, Illinois. (Dkt. No. 16-3 at 4; NDIL Dkt. Nos. 109 at 4 & Dkt. No. 223 at 3-4).

As to Count 12 – which charged Rana with providing material support and resources, namely personnel, currency, expert advice and assistance, tangible property, and false documentation and identification to a foreign terrorist organization, namely *Lashkar e Tayyiba*, the Government incorporated its identification of personnel, currency, expert advice and assistance, tangible property, and false documentation and identification, as stated above in reference to Counts 9 and 11. (Dkt. No. 16-3 at 4-5; NDIL Dkt. Nos. 109 at 4-5 & 223 at 4).

Rana's trial commenced on May 23, 2011. (NDIL Dkt. No. 270). Headley testified as the main prosecution witness. (RT 56-1189). On June 9, 2011, the jury returned its verdicts, acquitting Rana of Count 9 (conspiracy to provide material support to terrorism in India) and convicting Rana of Count 11 (conspiracy to provide material support to terrorism in Denmark) and Count 12 (providing material support to Lashkar), but finding, as to Count 12, that death had not resulted from the conduct charged. (Dkt. No. 16-4; NDIL Dkt. No. 283).

On September 19, 2011, Rana filed motions for a new trial and for a judgment of acquittal (NDIL Dkt. Nos. 305-07), which were denied. (NDIL Dkt. Nos. 331-32, 342-43). In denying such motions, the District Judge in the NDIL Case addressed Rana's contention

that "nearly all of the Government's evidence was from or interpreted by David Headley, and because the jury found Headley not credible, the evidence was insufficient to convict Rana, stating:

> The jury was presented with two very different pictures of Rana: the man who knowingly supported his lifelong friend as Headley traveled the world plotting and preparing for terrorist attacks, and the ambitious businessman manipulated by a friend into unwittingly providing cover for terrorist plots. Each side presented evidence to support its account and identified apparent inconsistencies or gaps in the other party's argument. Ultimately, the Court cannot conclude that no rational jury would accept the Government's version of events and find Rana guilty, and therefore affirms the verdicts.

(NDIL Dkt. No. 343 at 9).

On January 17, 2013, the District Judge in the NDIL Case sentenced Rana to 168 months (14 years) imprisonment on Counts 11 and 12. (Dkt. No. 16-5; NDIL Dkt. No. 361). Rana apparently did not appeal his conviction or sentence. (NDIL Dkt.).

On June 9, 2020, the District Judge in the NDIL Case found that Rana qualified for compassionate release, reduced Rana's sentence to time served and ordered his immediate release while leaving intact all other aspects of his criminal convictions. (Dkt. No. 16-7; NDIL Dkt. No. 416). However, as set forth above, Rana was subsequently arrested and detained pending resolution of the extradition request. (Dkt. Nos. 1-2, 4, 6, 44).

III. GOVERNING LEGAL STANDARDS

Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902). "Authority over the extradition process is shared between the executive and judicial branches." Santos v. Thomas, 830 F.3d 987, 991 (9th Cir. 2016) (en banc). An extradition statute, 18 U.S.C. § 3184, confers jurisdiction on "any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States"[22] to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting nation, and to issue a certification of extraditability to the Secretary of State. 18 U.S.C. § 3184;[23] Santos,

---

[22] The Central District's General Order 05-07 delegates to magistrate judges the authority to hear extradition matters.

[23] Specifically, 18 U.S.C. § 3184 provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, . . . any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, . . . he shall certify the same, together with a copy of all the testimony taken before him,

830 F.3d at 1000-01; see also Vo v. Benov, 447 F.3d 1235, 1237 (9th Cir.) (An "extradition court . . . exercises very limited authority in the overall process of extradition[,]" which "'is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function.'" (citation omitted)), cert. denied, 549 U.S. 935 (2006).

Under Section 3184, "the country seeking extradition must first file a request with the State Department." Patterson v. Wagner, 785 F.3d 1277, 1279 (9th Cir. 2015); Santos, 830 F.3d at 990. "If the State Department determines that the request falls within the governing extradition treaty, a U.S. Attorney files a complaint in federal district court indicating an intent to extradite and seeking a provisional warrant for the person sought." Santos, 830 F.3d at 991; Vo, 447 F.3d at 1237. "Upon the filing of a complaint, a judicial officer (typically a magistrate judge) issues a warrant for an individual sought for extradition, provided that an extradition treaty exists between the United States and the country seeking extradition and the crime charged is covered by the treaty." Vo, 447 F.3d at 1237; 18 U.S.C. § 3184. "After the warrant issues, the judicial officer conducts a hearing to determine whether there is 'evidence sufficient to sustain the charge under the provisions of the proper treaty or convention,' or, in other words, whether there is probable cause." Vo,

---

to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

447 F.3d at 1237 (quoting 18 U.S.C. § 3184); see also Santos, 830 F.3d at 991 ("[T]he extradition court's review is limited to determining, first, whether the crime of which the person is accused is extraditable, that is, whether it falls within the terms of the extradition treaty between the United States and the requesting state, and second, whether there is probable cause to believe the person committed the crime charged."). "If the judge or magistrate judge concludes that 'the crime is extraditable,' and that 'there is probable cause to sustain the charge,' the judge or magistrate judge must certify the extradition." Manta v. Chertoff, 518 F.3d 1134, 1140 (9th Cir. 2008) (quoting 18 U.S.C. § 3184); see also Santos, 830 F.3d at 993 ("If the extradition court determines that there is probable cause to extradite, it enters an order certifying extradition to the Secretary of State, who ultimately decides whether to surrender the individual to the requesting state."). "After an extradition magistrate certifies that an individual can be extradited, it is the Secretary of State, representing the executive branch, who ultimately decides whether to surrender the fugitive to the requesting country." Vo, 447 F.3d at 1237.

IV. DISCUSSION

For the Court to certify Rana as extraditable, the Government must establish that "(1) the extradition judge ha[s] jurisdiction to conduct proceedings; (2) the extradition court ha[s] jurisdiction over the fugitive; (3) the extradition treaty [is] in full force and effect; (4) the crime [falls] within the terms of the treaty; and (5) there [is] competent legal evidence to support a finding of extraditability." Manta, 518 F.3d at 1140; Zanazanian v. United States, 729 F.2d 624, 625-26 (9th Cir. 1984). "The fifth factor, stated

another way, requires [the Court] to consider whether competent legal evidence 'demonstrate[s] probable cause to believe that the accused committed the crime charged' by the foreign nation." Manta, 518 F.3d at 1140 (citation omitted); Zanazanian, 729 F.2d at 626. "In addition to its probable cause determination, the [Court] must also assess whether any of the applicable treaty provisions bar extradition of the alien for any of the charged offenses." Barapind v. Reno, 225 F.3d 1100, 1105 (9th Cir. 2000); Patterson, 785 F.3d at 1280.

Based on the parties' submissions and extradition hearing arguments, the first four factors are undisputed (see EHT 5-8), and, as set out in Part V, infra, the Court finds the Government has established them.[24] The Court focuses its discussion on two disputed issues: (1) whether, as Rana contends, the extradition to India is barred under Article 6 of the Treaty, the non bis in idem provision; and (2) whether, as Rana also argues, the Government has failed to establish probable cause to believe that Rana committed the offenses in issue because the Government's showing almost entirely rests on the uncorroborated and incredible trial testimony of Headley in the NDIL Case. (Opposition at 3-22).

---

[24] Rana does not dispute that he has been charged with extraditable offenses that fall within the dual criminality provision (Article 2) of the Treaty. (See EHT 6). Rather, as discussed below, Rana argues the Treaty's non bis in idem provision, Article 6, precludes his extradition.

A. Non Bis in Idem

"Prior Prosecution," also known as prior jeopardy or non bis in idem,[25] "is a concept incorporated in many bilateral extradition treaties . . . which precludes extradition in certain cases where the subject of the extradition request has previously been placed in 'jeopardy' on the same or similar charges." United States v. Demirtas, 204 F. Supp. 3d 158, 167 (D.D.C. 2016); see also Zhenli Ye Gon v. Holt, 774 F.3d 207, 211 (4th Cir. 2014) (A Treaty's prior prosecution provision "is analogous to our constitutional prohibition on double jeopardy. In essence, it prevents a fugitive from being tried for the same offense in two different countries."), cert. denied, 576 U.S. 1035 (2015). Prior prosecution provisions "have become 'common to most extradition treaties.'" Sindona v. Grant, 619 F.2d 167, 177 (2d Cir. 1980) (citation omitted); see also Elcock v. United States, 80 F. Supp. 2d 70, 75 (E.D.N.Y. 2000) ("[M]any extradition treaties – including virtually all of the United States' extradition treaties negotiated since World War II – contain provisions on double jeopardy.").

Article 6 of the Treaty contains a "Prior Prosecution" provision, which states:

> 1. Extradition shall not be granted when the person sought has been convicted or

[25] Non bis in idem "means 'not twice for the same thing.'" Zhenli Ye Gon v. Holt, 774 F.3d 207, 211 (4th Cir. 2014) (citation omitted), cert. denied, 576 U.S. 1035 (2015); see also McKnight v. Torres, 2008 WL 11441887, *6 n.7 (C.D. Cal. 2008) ("*Non bis in idem* means 'not twice for the same thing' and refers to the law forbidding more than one trial for the same offense." (citations omitted)).

acquitted in the Requested State for the offense for which extradition is requested.

2. Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested, or to discontinue any criminal proceedings which have been instituted against the person sought for those acts.

Rana contends Article 6 bars his extradition since the term "offense" in Article 6(1) refers to the conduct underlying the charged offense and he has been tried and found not guilty of the same conduct in the NDIL Case. (Opposition at 3-15). Rana bases his argument on "the Treaty's language, the government's interpretation of Article 6 in Headley's plea agreement, and contemporary practice under international and Indian law[.]" (Opposition at 10).

The Government disagrees, arguing the fact that Article 6(1) uses the term "offense" – rather than "acts" or "conduct" – demonstrates that Article 6(1) was only intended to bar extradition when a Requesting State seeks extradition of a person "for the exact same crime" that the person has been convicted or acquitted of in the Requested State. (Govt. Mem. at 38-40). The Government asserts that the "same elements" test articulated in Blockburger v. United States, 284 U.S. 299 (1932), provides the appropriate standard for determining whether the exact same crime is involved, and since the charged Indian offenses contain different elements from the crimes adjudicated in the Northern District of Illinois, Article 6 does not preclude Rana's

extradition.[26] (Govt. Mem. at 39-40); Blockburger, 284 U.S. at 304. Accordingly, the Court must consider the meaning of the term "offense" in Article 6(1).

---

[26] Among other arguments, Rana asserts, in essence, that the Government should be judicially estopped from contending that Article 6(1) mandates an elements-based test since "[i]n Headley's plea agreement, the government interpreted 'offense' in Article 6 to refer to conduct." (Opposition at 12-14). The portion of the plea agreement in question provides:

> Pursuant to Article 6 of the Extradition Treaty Between the United States and the Republic of India, . . . [Headley] shall not be extradited to the Republic of India . . . for any offenses for which he has been convicted in accordance with this plea. [Headley] and the United States Attorney's Office accordingly agree that, if [Headley] pleads guilty to and is convicted of all offenses set out in the Superseding Indictment, . . . then [Headley] shall not be extradited to the Republic of India . . . for the foregoing offenses, including conduct within the scope of those offenses for which he has been convicted in accordance with this plea, so long as he fully discloses all material facts concerning his role with respect to these offenses and abides by all other aspects of this agreement.

(Dkt. No. 16-6 at 20). The Government disagrees. (See Reply at 25-28). Judicial estoppel, which "only applies when the positions at issue are clearly contradictory, and the estopped party's conduct involves 'more than mistake or inadvertence,'" is "construed even more narrowly when requested against the government." Audio Technica U.S., Inc. v. United States, 963 F.3d 569, 575-76 (6th Cir. 2020) (citations omitted); see also Heckler v. Cmty. Health Serv. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."). Here, since Headley is not a party before this Court and Rana cites no case law applying judicial estoppel in extradition proceedings, the Court declines Rana's request to interpret Headley's plea agreement to bar Rana's extradition. See Matter of Knotek, 2016 WL 4726537, *4 n.3 (C.D. Cal. 2016) (rejecting attempt to apply

"'The interpretation of a treaty . . . begins with its text.'" Abbott v. Abbott, 560 U.S. 1, 10 (2010) (quoting Medellin v. Texas, 552 U.S. 491, 506 (2008)); see also Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1508-09 (2017) ("In interpreting treaties, "we begin with the text of the treaty and the context in which the written words are used.'" (citation omitted)). The Court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 400 (1985); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999). The Court is required "to construe extradition treaties liberally." Manta, 518 F.3d at 1144; Factor v. Laubenheimer, 290 U.S. 276, 293 (1933); United States ex rel. Sakaguchi v. Kaulukukui, 520 F.2d 726, 731 (9th Cir. 1975); see also Elcock, 80 F. Supp. 2d at 79 ("[C]onstruction of an extradition treaty is . . . guided by the familiar rule that the obligations of treaty should be liberally construed to effect their purpose, namely, the surrender of fugitives to be tried for their alleged offenses." (citations and internal quotation marks omitted)).

Article 6 does not bar extradition unless "the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested." "The use of 'offenses' is common in extradition treaties to which the United States is a party, but its meaning is not always clear." United States v. Trabelsi, 845 F.3d 1181, 1189 (D.C. Cir.), cert. denied, 138 S. Ct. 194 (2017) (citation omitted); see also In re Gambino, 421 F. Supp. 2d 283, 300 (D. Mass. 2006) ("the term 'same offense' can yield a

---

judicial estoppel in an extradition proceeding), denial of habeas corpus aff'd, 925 F.3d 1118 (9th Cir. 2019).

range of obvious or ordinary meanings" (citing Sindona, 619 F.2d at 177)); Elcock, 80 F. Supp. 2d at 80 (noting "the absence of any generally recognized meaning for the term 'offense' in international law"). Rana asserts that the "text of the Treaty shows that the term 'offense' refers to conduct rather than elements." (Opposition at 10-12). In particular, Rana notes that the term "offense" is also used in Article 2(1), the "dual criminality" provision, and in that provision "offense" refers to the conduct charged, not the elements of the crimes being compared. (Opposition at 10-11); see also Manta, 518 F.3d at 1141 ("Dual criminality exists if the 'essential character' of the acts criminalized by the laws of each country are the same and the laws are 'substantially analogous.' The name by which the crime is described in each country and the scope of liability need not be the same. The elements of the crime allegedly committed in a foreign country also need not be identical to the elements of the substantially analogous crime." (citations omitted); Clarey v. Gregg, 138 F.3d 764, 766 (9th Cir.) ("The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical."), cert. denied, 525 U.S. 853 (1998). Therefore, Rana contends that since "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning[,]" Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) (citation and internal quotation marks omitted), "offense" in Article 6(1) must mean "the conduct underlying the previous charge and the charge for which extradition is sought, not . . . the elements of the crimes involved in the two prosecutions." (Opposition at 11). This Court declines

to so conclude. See In re Gambino, 421 F. Supp. 2d at 306-09 (rejecting similar argument and stating "While this court agrees that the treaty should be read in context and as a whole, it cannot overlook the starkly different reasons for the clauses and the principles of dual criminality and extraditable offenses as distinct from the principle of *non bis in idem*.").

The presumption Rana relies on "is not absolute. It yields readily to indications that the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion." Barber v. Thomas, 560 U.S. 474, 484 (2010); see also Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." (citation omitted)). In other words, it "is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory

construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance." Atlantic Cleaners & Dyers, 286 U.S. at 433; see also Yates v. United States, 574 U.S. 528, 537 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."); Vanscoter v. Sullivan, 920 F.2d 1441, 1448 (9th Cir. 1990) ("Identical words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent.").

The Treaty's language favors the Government's interpretation of the term "offense" in Article 6(1). In particular, while Article 6(1) precludes extradition of someone who has been convicted or acquitted of the "offense" for which extradition is requested, Article 6(2) provides that extradition is not barred when "the authorities of the Requested State have decided not to prosecute the person sought ***for the acts for which extradition is requested***. . . ." (emphasis added). The use of both "offense" and "acts" in Article 6 suggests the term "offense" must encompass more than simply the acts or conduct underlying the offense.[27] See

---

[27] During the extradition hearing, Rana disagreed, suggesting the term "acts" in Article 6(2) had the same meaning as the term "offense" in Article 6(1) and that the use of such different terms in the same Article was "sort of clumsy draftsmanship." (EHT 29). This Court declines to so conclude, particularly as the same offense/acts distinction has been used in other treaties. See, e.g., Ramanauskus v. United States, 526 F.3d 1111, 1113-14 (8th Cir. 2008) (discussing the "Prior Prosecution" provision of the Extradition Treaty Between the Government of the United

Saks, 470 U.S. at 398 (use of different terms in related parts of a treaty "implies that the drafters . . . understood the word[s] . . . to mean something different. . . , for they otherwise logically would have used the same word"); Hosaka v. United Airlines, Inc., 305 F.3d 989, 995 (9th Cir. 2002) (describing this implication as "a sound principle of treaty construction"), cert. denied, 537 U.S. 1227 (2003). "The most natural reading of 'offense,' as distinct from 'acts,' is that 'offense' refers to the definition of the crime itself. This weighs heavily in favor of the government's elements-based *Blockburger* approach."[28] Zhenli Ye Gon, 774 F.3d at 215.[29]

States of America and the Government of the Republic of Lithuania, which states in Article 5(1) that "Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State ***for the offense for which extradition is requested***" and in Article 5(2)(a) that "Extradition shall not be precluded by the fact that the competent authorities of the Requested State have decided . . . not to prosecute the person sought for ***the acts for which extradition is requested***" (emphasis added)); Extradition Treaty Between the Government of the United States of America and the Republic of Columbia, Article 5(1) ("Extradition shall not be granted when the person sought has been tried and convicted or acquitted by the Requested State ***for the offense for which extradition is requested***." (emphasis added)), Article 5(2) ("The fact that the competent authorities of the Requested State have decided not to prosecute the person sought for ***the acts for which extradition is requested*** or decided to discontinue any criminal proceedings which have been initiated shall not preclude extradition." (emphasis added)).

[28] Other extradition treaties have non bis in idem provisions that specifically mention underlying acts or conduct. For instance, Article 6 of the Extradition Treaty between the United States and Italy provides that "Extradition shall not be granted when the person sought has been convicted, acquitted or

"While '[t]he interpretation of a treaty . . . begins with its text,' it does not end there." Patterson, 785 F.3d at 1281 (quoting Medellin, 552 U.S. at 506). Rather, "[b]ecause a treaty ratified by the United States is 'an agreement among sovereign powers,' [the Supreme Court has] also considered as 'aids to its interpretation' the negotiation and drafting

---

pardoned, or has served the sentence imposed, by the Requested Party ***for the same acts*** for which extradition is requested." (Dkt. No. 79-3 (emphasis added)). This demonstrates that the United States and its treaty partners know how to draft broader non bis in idem provisions that specifically refer to acts or conduct when they intend to do so, see Elcock, 80 F. Supp. 2d at 79 ("[I]t appears relatively clear that use of the term 'same acts' in a *non bis in idem* clause confers broader protection against extradition than a clause that uses the term 'same offense[.]'" (citations omitted)), and suggests that such intent was lacking here.

[29] In Sindona, the Second Circuit declined to apply a same elements analysis to a non bis in idem provision that stated that extradition shall not be granted "(w)hen the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested." Sindona, 619 F.2d at 176-79. Instead, the Sindona Court approved a test asking "'whether the same conduct or transaction underlies the criminal charges in both transactions.'" Id. at 178. The Court declines to apply Sindona for the reasons set forth in Zhenli Ye Gon. See Zhenli Ye Gon, 774 F.3d at 216-17; see also McKnight, 2008 WL 11441887 at *6, *9 n.9 (rejecting application of Sindona to a non bis in idem provision stating that "'[e]xtradition shall not be granted when the person sought has been finally convicted or acquitted in the Requested State for the offense for which extradition is requested'" and concluding that "[t]o the extent that the parties contemplated principles of double jeopardy as applied in the United States in using the word 'offense' in [the non bis in idem] provision, it appears . . . that the parties intended for this word to refer to crimes having the same elements, rather than to crimes arising from the same conduct.").

history of the treaty as well as 'the postratification understanding' of signatory nations." Medellin, 552 U.S. at 507 (citations omitted); see also United States v. Stuart, 489 U.S. 353, 366 (1989) ("Nontextual sources . . . often assist us in 'giving effect to the intent of the Treaty parties,' such as a treaty's ratification history and its subsequent operation[.]" (citation omitted)); Patterson, 785 F.3d at 1281-82 ("Because the purpose of treaty interpretation is to 'give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties,' courts – including our Supreme Court – look to the executive branch's interpretation of the issue, the views of other contracting states, and the treaty's negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent."). Here, such evidence provides further support for the Government's interpretation of Article 6. Id.

In particular, in connection with the Treaty's ratification, the Departments of State and Justice provided the Senate Committee on Foreign Relations with a section-by-section technical analysis of the Treaty ("Analysis"). Extradition Treaty With India, S. Exec. Rep. No. 105-23, 105th Cong., 2d Sess. (1998); (see Dkt. 26-5). With regard to Article 6, the Analysis states, in pertinent part:

> This article permits extradition when the person sought is charged by each Contracting State with different offenses arising out of the same basic transaction. [¶] Paragraph 1, which prohibits extradition if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested, is similar to language present in many U.S.

> extradition treaties. ***This provision applies only when the person sought has been convicted or acquitted in the Requested State of exactly the same crime that is charged in the Requesting State. It is not enough that the same facts were involved. This article will not preclude extradition in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic transaction***. Thus, if the person sought is accused by one Contracting State of illegally smuggling narcotics into that country, and is charged by the other Contracting State with conspiring to illegally export the same shipment of drugs, an acquittal or conviction in one Contracting State does not insulate that person from extradition because different crimes are involved.

(Dkt. 26-5 at 16 (emphasis added; footnote omitted) (as paginated on the Court's electronic docket)). The Analysis, which is entitled to "great weight" and "substantial deference," see Abbott, 560 U.S. at 15 ("[T]he Executive Branch's interpretation of a treaty 'is entitled to great weight.'" (citation omitted)); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); Zhenli Ye Gon, 774 F.3d at 215 ("State Department treaty interpretations are entitled to 'substantial deference' from the courts." (citation omitted)), supports

application of an elements-based test.[30] See Trabelsi, 845 F.3d at 1190 ("The legislative history surrounding the Extradition Treaty's ratification . . . supports interpreting the Treaty to apply to offenses, not conduct" since the Senate Committee on Foreign Relations Executive Report "explains that '[t]his paragraph permits extradition . . . if the person sought is charged in each Contracting State *with different offenses arising out of the same basic transaction*.'" (citation omitted; italics in original)); Zhenli Ye Gon, 774 F.3d at 215 ("[T]he State Department has interpreted . . . 'offense'-based Non Bis In Idem provisions in other treaties to call for a *Blockburger* analysis."); Elcock, 80 F. Supp. 2d at 83 ("[T]he Department of State has clearly expressed its view that 'offense'–based double jeopardy provisions . . . apply only where the elements of the crimes charged in the domestic prosecution and the extradition request are the same, regardless of whether the underlying facts are the same[.]").

Finally, as noted above, the Court is required to construe extradition treaties liberally. Factor, 290 U.S. at 293; Manta, 518 F.3d at 1144. "The more liberal interpretation typically favors . . . extradition inasmuch as the purpose of an extradition treaty is to facilitate extradition." In re Gambino, 421 F. Supp. 2d at 310; Factor, 290 U.S. at 293-94; see also Cornejo v. Cnty. of San Diego, 504 F.3d 853, 860 n.12 (9th Cir. 2007) ("[T]he terms of a treaty are by canon and international convention construed in light of the

[30] Rana asserts that the Analysis is "merely ipse dixit from unidentified DOJ and DOS employees" that "deserves no deference from this Court." (Surreply at 7-8; see also EHT at 24-25). Rana cites no authority for this assertion, which is contrary to the cases discussed herein.

treaty's object and purpose[.]"); Hosaka, 305 F.3d at 996 ("Where the text of a treaty is ambiguous, we may look to the purposes of the treaty to aid our interpretation."); Martinez v. United States, 828 F.3d 451, 463 (6th Cir.) (en banc) ("[A]mbiguity in an extradition treaty must be construed in favor of the 'rights' the 'parties' may claim under it. The parties to the treaty are countries, and the right the treaty creates is the right of one country to demand the extradition of fugitives in the other country – 'to facilitate extradition between the parties to the treaty.'. . . *Factor* requires courts to 'interpret extradition treaties to produce reciprocity between, and expanded rights on behalf of, the signatories.' The point of an extradition treaty after all is to facilitate extradition, as any country surely would agree at the time of signing." (citations omitted)), cert. denied, 137 S. Ct. 243 (2016). In this case, "because *Blockburger* affords a narrower protection. . . , it will permit extradition more readily than any other viable interpretation of Article [6], and, as such, is to be preferred under the 'familiar rule' of liberal treaty construction[.]"[31] Elcock, 80 F. Supp. 2d at 83.

---

[31] Rana argues that international law and Indian law support the conclusion that "Article 6 intends 'offense' to be defined in terms of conduct rather than elements." (Opposition at 14). Rana bases this argument on a document entitled Expert Report by Paul Garlick, QC. (Id. at 14 & Exh. B). Rana notes that:

> Mr. Garlick opines that "in accordance with the rules applicable to the interpretation of extradition treaties, Article 6 should be interpreted as meaning prosecuted by the requested state for the same conduct." Turning to Indian law, Mr. Garlick declares that "the intention of the Government of India when negotiating the terms of The Treaty must have been that the word 'offense' in Article 6 of The Treaty should be interpreted as referring to the underlying conduct, rather than the elements of the

For these reasons, the Court agrees with the Government that application of an elements-based test is appropriate here, and that Blockburger supplies the appropriate standard. Zhenli Ye Gon, 774 F.3d at 217; Elcock, 80 F. Supp. 2d at 83.

> alleged extradition offense." Mr. Garlick concludes: "For all the reasons stated above, it is my opinion that as a matter of international extradition law, the word 'offense' in Article 6 of The Treaty refers to the conduct underlying the alleged extradition crimes in the request for extradition and not to the elements of the alleged extradition crimes."

(Id. at 14 quoting Exh. B, ¶¶ 5, 73-74). Rana concludes that Garlick's opinion "further undermines the government's reliance on *Blockburger*." (Id. at 14). The Court is not persuaded. Among other things, Garlick attacks the Government's interpretation of Article 6(1) in this matter, contending it is "not tenable" given the interpretation of offense in Article 2. (Id., Exh. B, ¶¶ 6-11). In so doing, Garlick does not address, among other things, the use of the term "acts" in Article 6(2) or the different purposes behind Articles 2 and 6. In any event, the Court has rejected this argument above and need not repeat the analysis here. Additionally, Garlick asserts that it is improper for the Court to rely on the Senate Executive Report (including the Analysis of the Treaty) despite the various authorities the Court cited indicating that the Report and Analysis are entitled to great weight and substantial deference. (Id., Exh. B, ¶ 26). Ironically, Garlick makes this argument shortly after citing a separate portion of the Senate Executive Report to "affirm[] that the test for dual criminality is the conduct test. . . ." (Id., Exh. B, ¶¶ 24-25). Moreover, Garlick's analysis of Indian law relies heavily on a dissenting opinion (Id., Exh. B, ¶¶ 58, 66), and is disputed by the analyses of Dayan Krishnan, Senior Advocate Special Public Prosecutor, National Investigation Agency, who identifies multiple Indian authorities contradicting Garlick's analysis and concludes that "[t]he fundamental premise of Mr. Garlick's opinion, that Indian law accepts the 'conduct test' is factually . . . incorrect" and that "it has been the consistent view of the courts in India that the 'elements test' should be adopted and not the 'conduct test' as suggested by Mr. Garlick." (Dkt. Nos. 79-1, 66-7).

Nevertheless, Rana claims the Court should ignore Blockburger because under United States double jeopardy law, Blockburger is inapplicable in determining whether two conspiracies charged in successive prosecutions constitute the same offense for double jeopardy purposes. (Opposition at 4-10). Instead, Rana asserts that the Court should apply a multi-factor test, known in the Ninth Circuit as the Arnold[32] test, that "focuses on the underlying conduct." (Opposition at 4-10). "[U]nder the Arnold test, '[the Court] consider[s] five factors: (1) the differences in the periods of time covered by the alleged conspiracies; (2) the places where the conspiracies were alleged to occur; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed; and (5) the statutes alleged to have been violated.'" United States v. Ziskin, 360 F.3d 934, 944 (9th cir. 2003) (citation omitted); United States v. Smith, 424 F.3d 992, 1000 (9th Cir. 2005), cert. denied, 547 U.S. 1008 (2006) & 547 U.S. 1073 (2006). The Court disagrees. As discussed herein, the Court's decision to apply an elements-based test is based on its analysis of the Treaty's text and purpose as well as the executive branch's analysis of the Treaty – not United States double jeopardy law, see Elcock, 80 F. Supp. 2d at 83 ("The *Blockburger* test is not adopted here because it is the current domestic law of the United States, nor under any claim that it represented the full extent of double jeopardy law at the time the Treaty was signed. Rather, in the absence of any precise objective meaning of *non bis in idem* in international law or any relevant *travaux preparatoires*, *Blockburger* is

---

[32] See Arnold v. United States, 336 F.2d 347, 350 (9th Cir. 1964), cert. denied, 380 U.S. 982 (1965).

adopted out of deference to the Executive Branch's interpretation of like provisions in other extradition treaties and its consistency with the principle of liberal construction in favor of extradition."), which if applied *in toto* would not benefit Rana in any event. See Commonwealth of Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016) ("[T]wo prosecutions, this Court has long held, are not for the same offense if brought by different sovereigns – even when those actions target the identical criminal conduct through equivalent criminal laws. As we have put the point: '[W]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences.' The Double Jeopardy Clause thus drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns.'" (citations omitted)); Elcock, 80 F. Supp. 2d at 75 ("The Fifth Amendment's protection against double jeopardy extends only to successive prosecutions brought by the same sovereign. As a result, the Double Jeopardy Clause of the Constitution does not prevent extradition from the United States for the purpose of a foreign prosecution following prosecution in the United States for the same offense." (citations omitted)). Moreover, the Ninth Circuit applies the Arnold test "in cases where multiple conspiracies were charged, either consecutively or simultaneously, under the same conspiracy statute[,]" United States v. Montgomery, 150 F.3d 983, 990 (9th Cir.), cert. denied, 525 U.S. 917 (1998) & 525 U.S. 989 (1998); United States v. Luong, 393 F.3d 913, 916 (9th Cir. 2004), cert. denied, 544 U.S. 1006 (2005) & 544 U.S. 1009 (2005); see also Albernaz v. United States, 450

U.S. 333, 344 n.3 (1981) (rejecting contention of petitioners, who were convicted of conspiracy to import marijuana in violation of 21 U.S.C. § 963 and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846, that a single conspiracy which violates both § 846 and § 963 constitutes the "same offense" for double jeopardy purposes, stating "the established test for determining whether two offenses are the 'same offense' is the rule set forth in *Blockburger*. As has been previously discussed, conspiracy to import [marijuana] in violation of § 963 and conspiracy to distribute [marijuana] in violation of § 846 clearly meet the *Blockburger* standard. It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. This is true even though the 'single transaction' is an agreement or conspiracy."), which is clearly not the case here.

Application of the Blockburger test yields the conclusion that Article 6 of the Treaty does not bar Rana's extradition to India. Indeed, since Rana "does not contest that under a *Blockburge*r analysis, the [Indian] offenses . . . do not constitute the same 'offense' as the American [conspiracy] charge[s,]" the Court holds that Article 6 of the Treaty does not bar [Rana's] extradition." Zhenli Ye Gon, 774 F.3d at 217; Blockburger, 284 U.S. at 304; Elcock, 80 F. Supp. 2d at 84-85; (see also EHT at 8) (Rana's counsel agreeing that if court adopts elements approach, Article 6 does not bar prosecution).

B. Probable Cause

The Court cannot certify Rana's extradition unless there is probable cause to believe he committed the offenses for which extradition is sought. Santos, 830

F.3d at 991; see also Treaty, Article 9(3)(c) (An extradition request must be supported by "such information as would justify the committal for trial of the person if the offense has been committed in the Requested State."); Santos, 830 F.3d at 1006 (The Court's "'function in an extradition hearing is . . . to ensure that our judicial standard of probable cause is met by the Requesting Nation.'" (citation omitted)); Barapind v. Enomoto, 400 F.3d 744, 747 (9th Cir. 2005) (en banc) (per curiam) ("Certification of extradition is lawful only when the requesting nation has demonstrated probable cause to believe the accused person is guilty of committing the charged crimes."); Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir.) ("In addition, there must be evidence that would justify committing the accused for trial under the law of the nation from whom extradition is requested if the offense had been committed within the territory of that nation. United States courts have interpreted this provision in similar treaties as requiring a showing by the requesting party that there is probable cause to believe that the accused has committed the charged offense." (citations omitted)), cert. denied, 479

U.S. 882 (1986). The probable cause standard requires the Court to determine "'whether there [is] any evidence warranting the finding that there [is] a reasonable ground to believe the accused guilty.'" Mirchandani v. United States, 836 F.2d 1223, 1226 (9th Cir. 1988) (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925)); see also Emami v. U.S. Dist. Court for N. Dist. of Cal., 834 F.2d 1444, 1452 (9th Cir. 1987) ("An extradition proceeding is not a trial; the relevant determination is confined to whether a prima facie case of guilt exists that is sufficient to make it proper to hold the extraditee for trial."). In

making this determination, the Court "does not weigh conflicting evidence and make factual determinations but, rather, determines only whether there is competent evidence to support the belief that the accused has committed the charged offense." Quinn, 783 F.2d at 815; see also Santos, 830 F.3d at 991-92 (The "'function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction.'" (quoting Collins v. Loisel, 259 U.S. 309, 316 (1922)); Barapind, 400 F.3d at 750 ("[E]xtradition courts 'do[] not weigh conflicting evidence' in making their probable cause determinations[.]" (citation omitted)).

"Given the limited nature of extradition proceedings, neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure apply." Santos, 830 F.3d at 992; Fed. R. Evid. 1103(d)(3) ("These rules – except for those on privilege – do not apply to the following . . . extradition or rendition[.]"); Fed. R. Crim. P. 1(a)(5)(A) (Federal Rules of Criminal Procedure do not govern extradition proceedings); Matter of Requested Extradition of Smyth, 61 F.3d 711, 720-21 (9th Cir. 1995) ("[T]he rules of evidence and civil procedure that govern federal court proceedings heard under the authority of Article III of the United States Constitution do not apply in extradition hearings that are conducted under the authority of a treaty enacted pursuant to Article II."), amended by, 73 F.3d 887 (9th Cir. 1995), cert. denied, 518 U.S. 1022 (1996). "Instead, 18 U.S.C. § 3190 provides that evidence may be admitted as long as the evidence is authenticated and would 'be received for similar purposes by the tribunals of the foreign country from which the accused party shall have

escaped.'" Santos, 830 F.3d at 992 (quoting 18 U.S.C. § 3190);[33] see also Manta, 518 F.3d at 1146 ("The usual rules of evidence do not apply in extradition hearings and, unless the relevant treaty provides otherwise, the only requirement for evidence is that it has been authenticated."); Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1406 (9th Cir. 1988) ("[A]uthentication is the only requirement for admissibility of evidence under general United States extradition law."), cert. denied, 490 U.S. 1106 (1989). This means, among other things, that "unsworn hearsay statements contained in properly authenticated documents can constitute competent evidence to support a certificate of extradition." Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986); see also Then v. Melendez, 92 F.3d 851, 855 (9th Cir. 1996) ("[H]earsay evidence is admissible to support a probable cause determination in an extradition hearing[.]"); Emami, 834 F.2d at 1451 ("[I]t has been repeatedly held that hearsay evidence that would be inadmissible for other purposes is admissible in extradition proceedings."); Quinn, 783 F.2d at 815-16 ("Barring hearsay from extradition proceedings would thwart one of the objectives of bilateral extradition treaties by

---

[33] In its entirety, Section 3190 states that:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190.

requiring the requesting nation to send its citizens to the extraditing country to confront the accused."); Zanazanian, 729 F.2d at 627 (multiple hearsay can be competent evidence in an extradition matter).

Rana argues that the Government has failed to establish probable cause to believe that Rana committed the offenses in issue because the Government's showing almost entirely rests on the uncorroborated and incredible trial testimony of Headley in the NDIL Case. Rana does not otherwise argue that the Government's probable cause showing is deficient. (See EHT at 7). He asserts that the government's probable cause theory is supported by "two essential pillars" – first, "Headley told Rana he was working with Lashkar, including in preparation for the Mumbai attack"; and second "Rana furthered Headley's efforts on Lashkar's behalf by, for example, opening the Mumbai office of Immigration Law Center to provide cover for Headley's surveillance of potential attack sites and helping Headley obtain a business visa for India through the submission of false documents" – and probable cause is lacking because both pillars rely on "Headley's uncorroborated and at times demonstrably false testimony."[34] (Objections at 15-22; EHT at 7).

---

[34] Rana also argues that several aspects of the government's second pillar are demonstrably incorrect. (Objections at 17-21). But these contentions primarily involve alternate interpretations of the evidence – such as Rana's contention that the Dubai warning suggests that Rana was unaware of Headley's plans (id. at 20) – that do not negate probable cause. For instance, Rana challenges the assertion that the Mumbai office did no business. (Id. at 17-18). However, there is evidence to support this statement. (See Parasor Aff. ¶¶ 64, 71(c) (noting that the individual hired as the Mumbai office's secretary "has stated that no immigration work had ever taken place from [the

The Government counters that this Court cannot consider Headley's credibility because "credibility determinations are outside the scope of an extradition proceeding." (Govt. Mem. at 19-20; Reply at 36-41; see also EHT 79-80). To support this argument, the Government quotes Santos for the proposition that "an individual contesting extradition may not . . . call into question the credibility of the government's offer of proof." (Govt. Mem. at 19-20; EHT at 79). However, the Government's citation omits an important portion of this quotation. The complete citation states "an individual contesting extradition may not, for example, present alibi evidence, facts contradicting the government's proof, or evidence of defenses like insanity, as this tends to call into question the credibility of the government's offer of proof." Santos, 830 F.3d at 993. This line is part of the Santos Court's broader discussion of "explanatory" and "contradictory" evidence, which notes that "[t]he Supreme Court has drawn a distinction between evidence 'properly admitted in behalf of the [accused] and that improperly admitted.' Evidence that may be admitted is evidence that 'explain[s] matters referred to by the witnesses for the government,' while 'evidence in defense' that merely 'contradict[s] the testimony for the prosecution' may be excluded[.]" Id. at 992 (citations omitted); see also Barapind, 400 F.3d at 750 ("[E]xtradition courts "do[ ] not weigh conflicting evidence" in making their probable cause determinations[.]" (quoting Quinn, 783 F.2d at 815)).

Mumbai] office"). Moreover, the Mumbai office could have served as a front for Headley's activities regardless of whether some, minimal or no work was performed in the Mumbai office. Accordingly, these arguments do not demonstrate a lack of probable cause.

Here, however, the distinction has limited relevance since Rana did not submit the evidence in issue. Instead, the Government provided the entirety of Headley's testimony in the NDIL Case in support of the extradition request. Accordingly, the Court rejects the contention that it cannot consider this evidence in determining whether there is probable cause to support the extradition request. See Quinn, 783 F.2d at 815 ("The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate."); United States v. Kin-Hong, 110 F.3d 103, 120 (1st. Cir. 1997) ("Inherent in the probable cause standard is the necessity of a determination that the evidence is both sufficiently reliable and of sufficient weight to warrant the conclusion."); Matter of Extradition of Santos, 228 F. Supp. 3d 1034, 1054 (C.D. Cal. 2017) ("Although an extradition court is not authorized to conduct a mini-trial, it still must determine the competency of evidence – a determination which involves assessing the credibility of the government's evidence."); In re Extradition of Singh, 124 F.R.D. 571, 577 (D. N.J. 1987) ("[W]hen a court in an extradition proceeding is presented with evidence through affidavits, the court may conclude, on review of the affidavits submitted, that there are insufficient indicia of reliability or credibility to establish probable cause."); Matter of Extradition of Ameen, 2021 WL 1564520, *12 (E.D. Cal. 2021) ("[I]mplicit in the purpose of [extradition] probable cause proceedings is the court's ability to reject witness testimony for want of reliability. The court does not determine guilt or innocence, true, but it must assure itself that the standards for probable cause under United States law are satisfied.").

There is no doubt that Headley lied to investigators when first arrested. He testified that he initially lied in an attempt to shield the people he cares about – his wife, his uncle, his brother, and Rana, who was his best friend – from the consequences of his actions. (RT 641-43, 1053-54, 1067, 1070). Indeed, Headley only implicated Rana after he learned Rana had been arrested. (RT 1074). Headley also lied about the extent of his connections with one of the named co-conspirators, an individual who was "very influential . . . in al Qaeda."[35] (RT 400-01, 1053). Nevertheless, Headley's testimony is not the only evidence the Government presented to support its case.[36] As

---

[35] Rana highlights other purported Headley falsehoods (see Opposition at 16 n.8), such as Headley lying to his first wife about his second wife (see RT 1126-30), but they do not alter the Court's analysis.

[36] As noted above, Rana was partially acquitted in the NDIL Case. He does not assert that the partial acquittal means there is a lack of probable cause to support his extradition. (EHT at 75). Nevertheless, he does repeatedly assert that the jury rejected Headley's testimony. (See, e.g., Objections at 16, 21). But this is not necessarily so. Headley testified against Rana on all three charges against him in the NDIL Case, and the jury, which was instructed to view Headley's testimony "with caution and great care[,]" convicted Rana of two of the three charges. (NDIL Dkt. No. 284 at 15). In any event, an "'acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.'" United States v. Watts, 519 U.S. 148, 155 (1997) (per curiam) (citation omitted); Santamaria v. Horsley, 133 F.3d 1242, 1246 (9th Cir.) (en banc), concurrence amend by, 138 F.3d 1242 (9th Cir.), cert. denied, 525 U.S. 823 (1998) & 525 U.S. 824 (1998); see also Gomez v. Cnty. of Los Angeles, 2011 WL 13269747, *4 (C.D. Cal. 2017) ("An acquittal on a criminal charge may merely reflect the failure of the prosecution to sustain its burden of proving the charges true beyond a reasonable doubt. Obviously, this is a higher standard than probable cause. . . ."). At Rana's sentencing hearing, the

detailed in Part II, in addition to Headley's trial testimony, the Government supported its probable cause presentation with, among other things: an affidavit from the Superintendent of Police in charge of the investigation in India summarizing the evidence supporting India's extradition request;[37]

---

district judge who presided over the NDIL Case recognized as much, commenting:

> Now, there's sort of an unsaid feeling here that the evidence was questionable as to Mr. Rana's conduct, whether he was guilty, because Headley was shown to be a very manipulative person who would certainly use the ability to lie in order to carry out any activity he wanted and that perhaps the jury was wrong in finding Mr. Rana guilty. [¶] I think the jury, certainly you can show that they bent over backwards to be fair because there was certainly evidence . . . to certainly support . . . Count 9, which was the Mumbai []count. And they very clearly determined that, by listening to all the evidence and viewing Mr. Headley – who testified for I think seven days, I think five of which were involved in the Mumbai matter – that they were very able to distinguish between what was perhaps preponderance of the evidence as opposed to beyond a reasonable doubt.

(Dkt. No. 16-5 at 65).

[37] "[I]f the evidence submitted in the extradition papers is certified and authenticated in accordance with the admissibility requirements of . . . the Treaty and 18 U.S.C. § 3190 — which is not disputed here — the magistrate judge is authorized to consider it." Man-Seok Choe v. Torres, 525 F.3d 733, 740 (9th Cir. 2008) (footnotes omitted), cert. denied, 555 U.S. 1139 (2009); see also Collins, 259 U.S. at 317 ("[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the state on a preliminary examination."); Zanazanian, 729 F.2d at 627 (police reports summarizing witness statements are competent evidence); Emami, 834 F.3d at 1450-52 (hearsay evidence summarized in prosecutor's affidavit was competent evidence).

documentary evidence, including witness statements, copies of leases and related documents, and emails between Rana, Headley and other co-conspirators; and recordings of discussions between Rana and Headley.[38]

The Ninth Circuit addressed a similar issue in Man-Seok Choe v. Torres, 525 F.3d 733 (9th Cir. 2008), cert. denied, 555 U.S. 1139 (2009). In that case, the evidence supporting probable cause included "the Korean prosecutor's summary of testimony from Choe's accomplice, Ki Choon Ho, who implicate[d] Choe" in the charged offense. Man-Seok Choe, 525 F.3d at 739. Choe asserted there was no probable cause supporting his extradition for the charged offense and, in so doing, attacked Ho's credibility, arguing that "Ho had every reason to shift blame to

---

[38] Rana argues, among other things, that "[n]o documents or witness corroborates Headley's claim to have told Rana about his activities on Lashkar's behalf." (Objections at 22). The Court disagrees. Among other things, the September 7, 2009 conversation demonstrates Rana was aware of Headley's surveillance activities. (RT 555-59). The Court also notes that in an interview with the FBI, Rana apparently "admitted knowing that Headley had trained with Lashkar." (RT 1559; see also EHT at 114 (Rana's counsel acknowledged Rana's post-arrest statement that Headley told Rana that Headley was involved with Lashkar); NDIL Case Dkt. No. 254-3)). While this admission is not part of the evidence presented to support the extradition request, it seems reasonable to conclude that Superintendent of Police Parasor – who wrote a detailed affidavit supporting the extradition request that makes clear the NDIL Case was one of the sources of evidence relied upon in developing the Indian charges against Rana – was aware of this admission when he stated that "Rana knew that [Headley] was a member of [Lashkar], that [Headley] was carrying out surveillance for [Lashkar] in India, [and] that [Headley] was going to Pakistan after every trip to India to hand over the videos to [Lashkar.]" (Parasor Aff. ¶ 42).

him to reduce her own culpability, and that her statements aren't supported by any other witness." Id. at 740. However, the Ninth Circuit, after briefly highlighting other evidence supporting the probable cause determination, rejected Choe's contention, stating "Ho's lack of credibility is merely a weakness in Korea's case; it does not 'completely obliterate[]' the evidence of probable cause." Id. at 739-40 (quoting Barapind, 400 F.3d at 749).

Applying Man-Seok Choe, the Court reaches the same result here. Given the evidence presented in support of India's extradition request, as detailed above, the issues regarding Headley's credibility do not "completely obliterate the evidence of probable cause" and, therefore, are "merely a weakness" to be considered at trial in India. Id. at 739-40; Barapind, 400 F.3d at 749-50; see also Matter of Yordanov, 2017 WL 216693, *13 (C.D. Cal.) ("The credibility of the witnesses against Yordanov presents a matter for trial in Bulgaria because the reasons suggested by Yordanov to doubt the credibility of these witnesses do not 'completely obliterate the evidence of probable cause.'" (citation omitted)), habeas corpus denied, 250 F. Supp. 3d 540 (C.D. Cal. 2017), appeal dismissed, 2018 WL 1989645 (9th Cir. 2018).

Accordingly, the Court finds there is probable cause to believe Rana committed the charged offenses as to which extradition has been sought and should be extradited to India under the extradition Treaty between the United States and India.[39]

---

[39] Since Rana does not challenge the Government's showing of probable cause except to the extent predicated on Headley's testimony as discussed above (see, e.g., EHT at 7), and since the Court finds that the competent evidence detailed herein is sufficient to establish probable cause to support each element of

V. CERTIFICATION AND ORDER

Based upon the foregoing and the Court's consideration of the entire record in this matter:

1. The undersigned judicial officer is authorized to conduct extradition proceedings and this Court has subject matter jurisdiction over the case. See 18 U.S.C. § 3184, Local Rule 72-1; General Order No. 05-07.

2. The undersigned judicial officer and this Court have personal jurisdiction over Rana who was found and arrested and is presently in custody in the Central District of California. See 18 U.S.C. § 3184.

3. The Treaty is currently in full force and effect was in force and effect at all times relevant to this matter. See Heinemann Decl. ¶ 2 & Attachment (Treaty).

4. India has issued an arrest warrant and charged Rana with the following offenses on which the United States is proceeding: (a) conspiracy to wage war, to commit murder, to commit forgery for the purpose of cheating, to use as genuine a forged document or electronic record, and to commit a terrorist act in violation of IPC § 120B, read with IPC §§ 121, 302, 468, 471 and UAPA § 16; (b) waging war, in violation of IPC § 121; (c) conspiracy to wage war, in violation of IPC § 121A; (d) murder, in violation of IPC § 302; (e) committing a terrorist act, in violation of UAPA § 16; and (f) conspiracy to commit a terrorist act, in violation of UAPA § 18. See Heinemann Decl. ¶ 5; Parasor Aff. ¶¶ 12-13 & Attachments. The foregoing

---

each such charge, the Court need not and does not individually discuss each charge/element and detail the corresponding specific supporting evidence.

charged offenses constitute extraditable offenses within the meaning and scope of the Treaty and over which India has jurisdiction. See Treaty, Art. 2.[40]

5. The United States and India have submitted documents that were properly authenticated and certified in accordance with Title 18, United States

---

[40] Article 2 of the Treaty provides:

l. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offense described in paragraph 1.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;

(b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; or

(c) whether or not it relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request, even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met.

Code, section 3190, including the pertinent text of the crimes with which Rana has been charged. See Dkt. No. 66.

6. Sufficient competent evidence – detailed above – has been presented to establish probable cause that Rana – the individual appearing before the undersigned judicial officer – is the individual who has been charged in India and whose extradition has been sought by India in this action, and that Rana committed the aforementioned offenses for which extradition has been sought.

7. The requested extradition is not barred under Article 6 of the Treaty (the non bis in idem provision) or otherwise.

8. Based on the foregoing, the Court concludes that Rana is extraditable for the offenses for which extradition has been requested and on which the United States is proceeding and hereby CERTIFIES this finding to the United States Secretary of State as required under Title 18, United States Code, section 3184.

IT IS THEREFORE ORDERED that Tahawwur Hussain Rana be and remain committed to the custody of the United States Marshal pending a final decision on extradition and surrender by the Secretary of State to India for trial of the offenses as to which extradition has been granted pursuant to Title 18, United States Code, section 3186 and the Treaty.

IT IS FURTHER ORDERED that the Clerk of the Court forthwith deliver to the assigned Assistant United States Attorney a certified copy of this Certification of Extraditability and Order of Commitment and forward without delay certified

copies of the same to the Secretary of the State, Department of State, to the attention of the Office of the Legal Adviser and the Director, Office of International Affairs, Criminal Division, U.S. Department of Justice, Washington, D.C., for appropriate disposition.

DATED: May 16, 2023

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

Appendix F

[STAMP]

FILED

SEP 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPPEALS
FOR THE NINTH CIRCUIT

No. 23-1827

D.C. No. 2:23-cv-04223-DSF
Central District of California,
Los Angeles

ORDER

TAHAWWUR HUSSAIN RANA,

Petitioner – Appellant,

—v.—

W.Z. JENKINS II,

Respondent – Appellee.

Before: M. SMITH and BADE, Circuit Judges, and FITZWATER, District Judge.*

---

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Judge M. Smith and Judge Bade vote to deny the petition for rehearing en banc, and Judge Fitzwater so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. 35. The petition for rehearing en banc is DENIED.

Appendix G

EXTRADITION TREATY BETWEEN THE UNITED STATES AND INDIA

Signed at Washington June 25, 1997

with

Exchange of Letters

[SEAL]

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89–497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

". . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

INDIA

Extradition

Treaty signed at Washington June 25, 1997;
Transmitted by the President of the United States of America to the Senate September 23, 1997 (Treaty Doc. 105-30, 105th Cong., 1st Sess.);
Reported favorably by the Senate Committee on Foreign Relations October 14, 1998 (S. Ex. Rept. 105-23, 105th Cong., 2d Sess.);
Advice and consent to ratification by the Senate October 21, 1998;
Ratified by the President January 20, 1999;
Ratified by India April 16, 1999;
Ratifications exchanged at New Delhi July 21, 1999;
Entered into force July 21, 1999.
With exchange of letters.

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA

The Government of the United States of America and the Government of the Republic of India;

Recalling the Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain, signed at London December 22, 1931;[1]

Noting that both the Government of the United States of America and the Government of the Republic of India currently apply the terms of that Treaty; and

Desiring to provide for more effective cooperation between the two States in the suppression of crime, recognizing that concrete steps are necessary to combat terrorism, including narcoterrorism, and drug trafficking, and, for that purpose, to conclude a new treaty for the extradition of fugitive offenders;

Have agreed as follows:

Article 1
Obligation to Extradite

The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons who, by the authorities in the Requesting State are formally accused of, charged with or convicted of an extraditable offense, whether such offense was committed before or after the entry into force of the Treaty.

---

[1] TS 849; 12 Bevans 482.

Article 2
Extraditable Offenses

1. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offense described in paragraph 1.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;

(b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; or

(c) whether or not it relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request, even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met.

Article 3
Nationality

Extradition shall not be refused on the ground that the person sought is a national of the Requested State.

Article 4
Political Offenses

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses:

(a) a murder or other willful crime against the person of a Head of State or Head of Government of one of the Contracting States, or of a member of the Head of State's or Head of Government's family;

(b) aircraft hijacking offenses, as described in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on December 16, 1970;[1]

[1] TIAS 7192; 22 UST 1641.

(c) acts of aviation sabotage, as described in the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on September 23, 1971;[2]

(d) crimes against internationally protected persons, including diplomats, as described in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, done at New York on December 14, 1973;[3]

(e) hostage taking, as described in the International Convention against the Taking of Hostages, done at New York on December 17, 1979;[4]

(f) offenses related to illegal drugs, as described in the Single Convention on Narcotic Drugs, 1961, done at New York on March 30, 1961,[5] the Protocol Amending the Single Convention on Narcotic Drugs, 1961, done at Geneva on March 25, 1972,[6] and the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, done at Vienna on December 20, 1988;[7]

---

[2] TIAS 7570; 24 UST 564.

[3] TIAS 8532; 28 UST 1975.

[4] TIAS 11081.

[5] TIAS 6298; 18 UST 1407.

[6] TIAS 8118; 26 UST 1439.

[7] *International Legal Materials*, vol. XXVIII, No. 2, Mar. 1989, p. 493.

(g) any other offense for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; and

(h) a conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses.

Article 5
Military Offenses and Other Bases
for Denial of Extradition

1. The executive authority of the Requested State may refuse extradition for offenses under military law which are not offenses under ordinary criminal law.

2. Extradition shall not be granted if the executive authority of the Requested State determines that the request was politically motivated.

Article 6
Prior Prosecution

1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

2. Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested, or to discontinue any criminal proceedings which have

been instituted against the person sought for those acts.

Article 7
Lapse of Time

Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting State.

Article 8
Capital Punishment

1. When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless:

(a) the offense constitutes murder under the laws in the Requested State; or

(b) the Requesting State provides assurances that the death penalty, if imposed, will not be carried out.

2. In instances in which a Requesting State provides an assurance in accordance with paragraph (1)(b) of this Article, the death penalty, if imposed by the courts of the Requesting State, shall not be carried out.

Article 9
Extradition Procedures and Required Documents

1. All requests for extradition shall be submitted through the diplomatic channel.

2. All requests for extradition shall be supported by:

(a) documents, statements, or other types of information which describe the identity and probable location of the person sought;

(b) information describing the facts of the offense and the procedural history of the case;

(c) a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested;

(d) a statement of the provisions of the law describing the punishment for the offense; and

(e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.

3. A request for extradition of a person who is sought for prosecution shall also be supported by:

(a) a copy of the warrant or order of arrest, issued by a judge or other competent authority;

(b) a copy of the charging document, if any; and

(c) such information as would justify the committal for trial of the person if the offense had been committed in the Requested State.

4. A request for extradition relating to a person who has been convicted of the offense for which extradition is sought shall also be supported by:

(a) a copy of the judgment of conviction or, if such copy is not available, a statement by a

judicial authority that the person has been convicted;

(b) information establishing that the person sought is the person to whom the conviction refers;

(c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and

(d) in the case of a person who has been convicted in absentia, the documents required in paragraph 3.

Article 10
Admissibility of Documents

The documents which accompany an extradition request shall be received and admitted as evidence in extradition proceedings if:

(a) in the case of a request from the United States, they are certified by the principal diplomatic or principal consular officer of the Republic of India resident in the United States;

(b) in the case of a request from the Republic of India, they are certified by the principal diplomatic or principal consular officer of the United States resident in the Republic of India, as provided by the extradition laws of the United States; or

(c) they are certified or authenticated in any other manner accepted by the laws in the Requested State.

Article 11
Translation

All documents submitted by the Requesting State shall be in English.

Article 12
Provisional Arrest

1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offense;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought; and

(f) a statement that a request for extradition for the person sought will follow.

3. The Requesting State shall be notified without delay of the disposition of its application and the reasons for any denial.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 9.

5. The fact that the person sought has been discharged from custody pursuant to paragraph (4) of this Article shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

Article 13
Decision and Surrender

1. The Requested State shall promptly notify the Requesting State through the diplomatic channel of its decision on the request for extradition.

2. If the request is denied in whole or in part, the Requested State shall provide the reasons for the denial. The Requested State shall provide copies of pertinent judicial decisions upon request.

3. If the request for extradition is granted, the authorities of the Contracting States shall agree on the time and place for the surrender of the person sought.

4. If the person sought is not removed from the territory of the Requested State within the time prescribed by the laws in that State, that person may be discharged from custody, and the Requested State may subsequently refuse extradition for the same offense.

Article 14
Temporary and Deferred Surrender

1. If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the Requested State, the Requested State, subject to its laws, may temporarily surrender the person sought to the Requesting State for the purpose of prosecution. The person so surrendered shall be kept in custody in the Requesting State and shall be returned to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by agreement of the Contracting States.

2. The Requested State may postpone the extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded or until such person has served any sentence imposed.

Article 15
Requests for Extradition Made by More than One State

If the Requested State receives requests from the other Contracting State and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State it will surrender the person. In making its decision, the Requested State shall consider all relevant factors, including but not limited to:

(a) whether the requests were made pursuant to treaty;

(b) the place where each offense was committed;

(c) the respective interests of the Requesting States;

(d) the gravity of the offenses;

(e) the nationality of the victim;

(f) the possibility of further extradition between the Requesting States; and

(g) the chronological order in which the requests were received from the Requesting States.

Article 16
Seizure and Surrender of Property

1. To the extent permitted under its laws, the Requested State may seize and surrender to the Requesting State all articles, documents, and evidence connected with the offense in respect of which extradition is granted. The items mentioned in this Article may be surrendered even when the extradition cannot be effected due to the death, disappearance, or escape of the person sought.

2. The Requested State may condition the surrender of the property upon satisfactory assurances from the Requesting State that the property will be returned to the Requested State as soon as practicable. The Requested State may also defer the surrender of such property if it is needed as evidence in the Requested State.

3. The rights of third parties in such property shall be duly respected.

Article 17
Rule of Speciality

1. A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for:

(a) the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted, provided such offense is extraditable or is a lesser included offense;

(b) an offense committed after the extradition of the person; or

(c) an offense for which the executive authority of the Requested State consents to the person's detention, trial, or punishment. For the purpose of this subparagraph:

(i) the Requested State may require the submission of the documents called for in Article 9; and

(ii) the person extradited may be detained by the Requesting State for 90 days, or for such longer period of time as the Requested State may authorize, while the request is being processed.

2. A person extradited under this Treaty may not be extradited to a third State for an offense committed prior to his surrender unless the surrendering State consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of that person to a third State, if:

(a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or

(b) that person does not leave the territory of the Requesting State within 15 days of the day on which that person is free to leave.

Article 18
Waiver of Extradition

If the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without further proceedings.

Article 19
Transit

1. Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be made through the diplomatic channel. The facilities of Interpol may be used to transmit such a request. It shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be detained in custody during the period of transit.

2. No authorization is required where air transportation is used and no landing is scheduled on the territory of the Contracting State. If an unscheduled landing occurs on the territory of the

other Contracting State, the other Contracting State may require the request for transit as provided in paragraph 1. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

Article 20
Representation and Expenses

1. The Requested State shall advise, assist, appear in court on behalf of the Requesting State, and represent the interests of the Requesting State, in any proceeding arising out of a request for extradition.

2. The Requesting State shall bear the expenses related to the translation of documents and the transportation of the person surrendered. The Requested State shall pay all other expenses incurred in that State by reason of the extradition proceedings.

3. Neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons sought under this Treaty.

Article 21
Consultation

The competent authorities of the United States and the Republic of India may consult with each other directly or through the facilities of Interpol in connection with the processing of individual cases and in furtherance of maintaining and improving procedures for the implementation of this Treaty.

Article 22
Mutual Legal Assistance in Extradition

Each Contracting State shall, to the extent permitted by its law, afford the other the widest measure of mutual assistance in criminal matters in connection with an offense for which extradition has been requested.

Article 23
Ratification and Entry into Force

1. This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged as soon as possible.

2. This Treaty shall enter into force upon the exchange of the instruments of ratification.[1]

3. Upon the entry into force of this Treaty, the Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain, signed at London December 22, 1931, shall cease to have any effect between the Government of the United States of America and the Government of the Republic of India. Nevertheless, the prior Treaty shall apply to any extradition proceedings in which the extradition documents have already been submitted to the courts of the Requested State at the time this Treaty enters into force, except that Article 17 of this Treaty shall be applicable to such proceedings.

---

[1] July 21, 1999.

Article 24
Termination

Either Contracting State may terminate this Treaty at any time by giving written notice to the other Contracting State, and the termination shall be effective six months after the date of such notice.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments have signed this Treaty.

DONE at Washington, in duplicate, this Twenty-fifth day of June, 1997, in the English and Hindi languages, both texts being equally authentic.

FOR THE GOVERNMENT OF UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF THE REPUBLIC OF INDIA:
Strobe Talbott	Saleem I. Shervani

[EXCHANGE OF LETTERS]

DEPARTMENT of STATE
WASHINGTON

June 25, 1997

Dear Mr. Minister:

I refer to the extradition treaty between the Government of the United States of America and the Government of the Republic of India signed today. It is the understanding of the Government of the United States of America that, as a general matter, upon extradition, a person shall be proceeded against or punished under the ordinary criminal laws of the Requesting State, and shall be subject to prosecution or punishment in accordance with the Requesting State's ordinary rules of criminal procedure. If either party is considering prosecution or punishment upon extradition under other laws or other rules of criminal procedure, the Requesting State shall request consultations and shall make such a request only upon the agreement of the Requested State.

I would appreciate receiving confirmation that your Government shares this understanding.

Sincerely,

Strobe Talbott
Acting Secretary

His Excellency
Saleem Iqbal Shervani,
Minister of State for External Affairs of India.

Saleem I. Shervani — MINISTER OF STATE FOR EXTERNAL AFFAIRS INDIA

Dear Mr. Talbott, June 25, 1997

I am writing with respect to your letter of June 25, 1997, which reads as follows

[For text of the U.S. letter, see p. 13.]

I am pleased to confirm that the Government of the Republic of India shares the understanding expressed in your letter.

Yours sincerely,

(Saleem I. Shervani)

The Honorable Strobe Talbott,
Acting Secretary of State.

Appendix H

SENATE

105TH CONGRESS, *2d Session*

Exec. Rept. 105–23

EXTRADITION TREATIES WITH ARGENTINA, AUSTRIA, BARBADOS, CYPRUS, FRANCE, INDIA, LUXEMBOURG, MEXICO, POLAND, SPAIN, TRINIDAD & TOBAGO, ZIMBABWE, ANTIGUA & BARBUDA, DOMINICA, GRENADA, ST. KITTS & NEVIS, ST. LUCIA, AND ST. VINCENT & THE GRENADINES

OCTOBER 14 (legislation day, OCTOBER 2), 1998.—
Ordered to be printed

Document pages 1 through 9

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

REPORT

[To accompany Treaty Docs. 105–10; 105–13; 105–14; 105–15; 105–16; 105–18; 105–19; 105–20; 105–21; 105–30; 105–33; 105–46; and 105–50.]

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 Grand Duchy of Luxembourg,

signed at Washington on October 1, 1996 (Treaty Doc. 105–10); the Extradition Treaty between the United States of America and France, which includes an Agreed Minute, signed at Paris on April 23, 1996 (Treaty Doc. 105–13); the Extradition Treaty Between the United States of America and the Republic of Poland, signed at Washington on July 10, 1996 (Treaty Doc. 105–14); the Third Supplementary Extradition Treaty Between the United States of America and the Kingdom of Spain, signed at Madrid on March 12, 1996 (Treaty Doc. 105–15); the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Cyprus, signed at Washington on June 17, 1996 (Treaty Doc. 105–16); the Extradition Treaty Between the United States of America and the Argentine Republic, signed at Buenos Aires on June 10, 1997 (Treaty Doc. 105–18); the Extradition Treaties Between the Government of the United States of America and the Governments of Six Countries Comprising the Organization of Eastern Caribbean States (Collectively, the "Treaties"). The Treaties are with: Antigua and Barbuda, signed at St. John's on June 3, 1996; Dominica, signed at Roseau on October 10, 1996; Grenada, signed at St. George's on May 30, 1996; St. Lucia, signed at Castries on April 18, 1996; St. Kitts and Nevis, signed at Basseterre on September 18, 1996; and St. Vincent and the Grenadines, signed at Kingstown on August 15, 1996 (Treaty Doc. 105–19); Extradition Treaty Between the Government of the United States of America and the Government of Barbados, signed at Bridgetown on February 28, 1996 (Treaty Doc. 105–20); the Extradition Treaty Between the Government of the United States of America and the Government of Trinidad and Tobago, signed at Port of Spain on

March 4, 1996 (Treaty Doc. 105–21); the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, signed at Washington on June 25, 1997 (Treaty Doc. 105–30); the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Zimbabwe, signed at Harare on July 25, 1997 (Treaty Doc. 105–33); the Protocol to the Extradition Treaty Between the United States of America and the United Mexican States of May 4, 1978, signed at Washington on November 13, 1997 (Treaty Doc. 105–46); and the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Austria, signed at Washington on January 8, 1998 (Treaty Doc. 105–50), having considered the same, reports favorably thereon, each with one understanding, one declaration and one proviso, (except two Protocols with one declaration and 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 resolutions of ratification.

CONTENTS

I. PURPOSE

These Treaties obligate the Parties to extradite fugitives at the request of a Party subject to conditions set forth in the treaties.

II. BACKGROUND

The United States is a party to more than 100 bilateral extradition treaties. Of the 13 extradition treaties considered in this report, only the treaty with Zimbabwe represents a new treaty relationship. Ten of the treaties with the Caribbean countries, India, and Cyprus replace 1931 or 1972 Treaties between the United States and the United Kingdom, which continued to apply to these countries even after their independence. The other treaties modernize older treaties to ensure that all criminal acts punishable in both countries by more than one year in prison are covered by the treaties. Two of the treaties—those with Spain and Mexico—are Protocols to existing treaties.

Extradition relationships have long been a basis of bilateral relationships, and represent a recognition by the United States of the legitimacy of a country's judicial system. Respect for a treaty partner's judicial system is essential since the treaties permit the transfer of individuals to another country in order to stand trial for alleged crimes. The treaty with Zimbabwe, therefore, signals an important advancement in the U.S. relationship with that country.

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 certain crimes against, or are fugitives from, the Requesting State.

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. 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.

The importance of extradition treaties as a tool for law enforcement is reflected in the increase in the number of extraditions of individuals under treaties. Since September l997, 185 persons were extradited to the United States for prosecution for crimes committed in the United States, and the United States extradited 73 individuals to other countries for prosecution.

In the United States, the legal procedures for extradition are governed by both federal statute and self-executing treaties. Federal statute controls the judicial process for making a determination to the Secretary of State that she may extradite an

individual under an existing treaty. Courts have held that the following elements must exist in order for a court to find that the Secretary of State may extradite: (1) the existence of a treaty enumerating crimes with which a defendant is charged; (2) charges for which extradition is sought are actually pending against the defendant in the requesting nation and are extraditable under the treaty; (3) the defendant is the same individual sought for trial in the requesting nation; (4) probable cause exists to believe that the defendant is guilty of charges pending against him in the requesting nation; and (5) the acts alleged to have been committed by the defendant are punishable as criminal conduct in the requesting nation and under the criminal law of the United States.

Once a court has made a determination that an individual may be extradited under U.S. law, and so certifies to the Secretary of State, she may still refrain from extraditing an individual on foreign policy grounds, as defined in the treaties themselves (or even absent express treaty provisions).

B. KEY PROVISIONS

1. Extraditable Offenses: The Dual Criminality Clause

Each of the extradition treaties 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 more than (or at least) one year. Attempts and conspiracies to commit such offenses, and participation in the commission of such offenses, are also extraditable. In many of the treaties, if the extradition request involves a fugitive, it shall be granted only if the

remaining sentence to be served is more than six months.

With minor variations, this definition of an extraditable offense appears in each of the treaties under consideration. 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

A separate question arises as to whether offenses committed outside the territory of the Requesting State are extraditable under the treaties. To be able to extradite individuals for extraterritorial crimes can be an important weapon in the fight against international drug traffickers and terrorists. Only three of the pending treaties (Austria, India, and Luxembourg) permit extradition regardless of where the offense is committed. However the rest permit extradition for extraterritorial crimes if extradition would be permitted in both the Requesting and

Receiving State. Even if both States do not permit extradition in those instances, extradition for crimes committed outside both territories remains a matter of discretion in most of the treaties.

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. Though some of the treaties under consideration take a narrower view than others of the political offense exception, all of them give it a more limited scope than earlier U.S. extradition treaties.

The exclusion of certain violent crimes, (i.e. murder, kidnaping, and others) from the political offense exception reflects 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 each of the treaties under consideration.

The multilateral international agreement exception clause serves to incorporate by reference certain multilateral agreements to which the United States is a party and which deal with international law enforcement in drug dealing, terrorism, airplane hijacking and smuggling of nuclear material. These agreements require that the offenses with which they deal shall be extraditable under any extradition treaty between countries that are parties to the multilateral agreements. 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.

It should perhaps be noted that the incorporation by reference of multilateral international agreements that deal with international law enforcement can have significance only if the parties to an extradition treaty are also parties to such multilateral agreements.

4. The Death Penalty Exception

The United States and other countries often have different views on capital punishment, though some countries do impose the death penalty for certain crimes, such as drug trafficking. Most of the treaties under consideration permit the countries to 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. The treaties under consideration take varying positions on the nationality issue.

6. Retroactivity

Each of the treaties states that it shall apply to offenses committed before as well as after it enters into force. 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. The treaties include language reflecting the basic prohibition as well as clauses setting forth certain exceptions. With minor variations, the treaties express the basic prohibition and also include the following exceptions: an extradited individual may be tried by the Requesting State for an offense other than the one for which he was extradited if the Requested State (which may request the submission of additional supporting documents) waives the prohibition; the extradited individual leaves the territory of the Requesting State and voluntarily returns to it; the extradited individual does not leave the territory of the Requesting State within a limited period of time on which he or she is free to leave; or, the extradited individual voluntarily consents to being tried for an offense other than the one for which he was extradited. These exceptions to the speciality rule are designed to allow a Requesting State some latitude in

prosecuting offenders for crimes other than those for which they had been specifically extradited.

8. Lapse of Time

Some of the treaties include rules that preclude extradition of offenses barred by an applicable statute of limitations.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

The Treaties generally provide for the entry into force of the treaty either on the date of, or a short time after, the exchange of instruments of ratification.

B. TERMINATION

The Treaties generally provide for the Parties to withdraw from the Treaty by means of written notice to the other Party. Termination would take place six months after the date of notification.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed Treaties on September 15, 1998. The Committee considered the proposed Treaties on October 14, 1998, and ordered the proposed Treaties favorably reported, with the recommendation that the Senate give its advice and consent to the ratification of each of the proposed Treaties subject to one understanding, one declaration, and two provisos (except two Protocols with one declaration and one proviso).

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommends favorably the proposed Treaties. On balance, the Committee believes that the proposed Treaties are in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. Several issues did arise in the course of the Committee's consideration of the Treaties, and the Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Treaties and to the State Department.

A. RESTRICTION ON TRANSFER OF EXTRADITEES TO INTERNATIONAL CRIMINAL COURT

On July 17, 1998 a majority of nations at the U.N. Diplomatic Conference in Rome, Italy, on the Establishment of an International Criminal Court voted 120–7, with 21 abstentions, in favor of a treaty that would establish an international criminal court. The court is empowered to investigate and prosecute war crimes, crimes against humanity, genocide and aggression. The United States voted against the treaty.

Each of the Resolutions of Ratification accompanying the Extradition Treaties contains an understanding relative to the international court. Specifically, regarding the "Rule of Specialty" the United States shall restate in its instrument of ratification its understanding of the provision, which requires that the United States consent to any retransfer of persons extradited to the Treaty Partner to a third jurisdiction. The understanding further states that future United States policy shall be to refuse such consent to the transfer of individuals to

the International Criminal Court. This restriction is binding on the President, and would be vitiated only in the event that the United States ratifies the treaty establishing the court, pursuant to the Constitutional procedures as contained in Article II, section 2 of the United States Constitution.

This provision makes clear that both Parties understand that individuals extradited to the other Party may not be transferred to the international court. Members of the Committee are concerned that these treaties could become conduits for transferring suspects located in the United States to the international criminal court, even though the United States has rejected the court.

B. USE OF TREATIES TO AGGRESSIVELY PURSUE INTERNATIONAL PARENTAL KIDNAPING

On October 1, 1998, the Committee on Foreign Relations convened a hearing to consider U.S. Responses to International Parental Kidnaping. The Attorney General, Janet Reno, testified before the Committee, as did four parents whose children were abducted or wrongfully detained in international jurisdictions. The parents recounted their frustration with the current level of U.S. Government assistance in seeking the return of their children.

Although the Attorney General pointed to limitations in the ability of the U.S. Government to resolve many cases of international parental abduction, she also recognized that the United States could do better in assisting in the return of abducted children and pledged to take steps to improve coordination between the Departments of State and Justice. She also indicated that an interagency working group, which has been studying this issue

during the past year, will produce a report in January with recommendations for improvements in U.S. policy regarding international parental kidnaping.

As this working group completes its work, the Committee expects that one area related to these treaties that the working group should comment upon is the current practice of extradition of parental kidnappers. Under current practice the United States does not seek extradition if they do not think that a country will extradite—whether because a country does not have an extradition treaty with the United States, does not extradite its nationals, or would simply be unlikely to extradite under the circumstances. The Committee believes that failure to even request extradition may create the misperception that the United States is not interested in pursuing such individuals.

The State and Justice Departments have testified that these treaties are essential in order to ensure that no individual is able to evade the justice system by travel to a foreign country. This same principle should be true of parents who take their children from the United States in violation of the 1993 International Parental Kidnaping Act. The Committee expects, therefore, that State and Justice Department officials will seek extradition unless it will hinder U.S. law enforcement efforts. The Committee also expects that State and Justice Department officials will raise this issue in the course of negotiation of all bilateral law enforcement treaties and in other bilateral diplomatic exchanges. The Committee anticipates, also, that this issue will be given great scrutiny in the issuance of passports, with a special eye towards passport or visa fraud.

C. EXTRADITION OF NATIONALS

The treaties with Antigua and Barbuda, Argentina, Barbados, Dominica, Grenada, India, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe require the extradition of their nationals. Such provisions reflect an important trend in extradition relationships, particularly with countries in the Western Hemisphere. The Committee applauds this progress by State and Justice Department negotiators.

Unfortunately, such progress has been much more difficult for the United States to achieve in agreements with European allies. Although the treaties with Austria, Cyprus, Luxembourg, and Poland give each party the discretion to extradite its nationals, each of these countries is prohibited by statute or constitution from doing so. The treaty with France prohibits extradition of nationals outright.

The Committee supports the extradition of U.S. nationals in most instances. Criminal suspects should not be given safe haven in this country. The alternative—trying them in this country—is often not a realistic option, for two reasons. First, U.S. courts often lack jurisdiction over the crime, because not many crimes are subject to extraterritorial jurisdiction under U.S. law. Second, prosecuting such cases in the United States is often extremely difficult, particularly when the evidence and many of the witnesses are not located in this country, as would often be the case.

The Committee is deeply concerned that many nations around the world, particularly those in Europe, do not agree to extradite their own nationals to the United States. The Committee expects that

U.S. negotiators will continue to press other nations to agree to extradite their nationals, including in existing treaty relationships. The Committee urges the Executive Branch to emphasize, in discussing new extradition relationships with foreign states, that a reciprocal duty to extradite nationals is a key U.S. negotiating objective.

In addition, the United States could request extradition of nationals in some circumstances. In response to a question for the record, the State Department indicated that it might request extradition of nationals in an effort to encourage the country to exercise discretion available under its domestic law. The Committee anticipates that the United States will err on the side of making requests, unless U.S. law enforcement efforts would be compromised, in order to continue to force treaty partners to respond to U.S. requests for extradition of nationals.

D. EXTRADITION TREATY WITH INDIA

The Committee believes that special concerns are raised in the Extradition Treaty with India, as evidenced by an exchange of letters accompanying the Treaty (See Treaty Doc. 105–30, at pages 18–19). The concern arises because when the treaty was under negotiation, India had in effect a special law, the Terrorist and Disruptive (Prevention) Act, which, according to the Department of State, "limited the rights of a defendant accorded under ordinary Indian criminal law in a number of important respects." The limits on a defendant's rights included permitting detention for a year without charge, trial proceedings *in camera,* permitting the court to keep secret the identity of witnesses, reversing the burden of proof in

certain situations, and limiting the right to appeal. The Act lapsed on May 23, 1995, and has not been replaced, but it continues to have effect with respect to cases under investigation and trial as of that date.

In an exchange of letters signed the same day as the Extradition Treaty, the United States and India agreed to an understanding that, as a general matter, persons extradited under the treaty will be prosecuted or punished under the ordinary criminal laws of the Requesting State. The Parties further agreed that if either party is considering prosecution or punishment under other laws, the "Requesting State shall request consultations and shall make such a request only upon the agreement of the Requested State."

During the hearing before the Committee, Deputy Legal Adviser Jamison Borek testified that there would be a "presumption" against extraditing a criminal suspect in the event that a request is made by India under this act or any similar law. In response to a question for the record, the Executive Branch indicated that while it could not "rule out the possibility that a [such a request] might merit serious consideration" it did not anticipate being presented with such a case, at least based on information currently available.

It is evident from a brief review of the limitations set forth in Terrorist and Disruptive (Prevention) Act that many of its provisions do not accord with basic due process rights that are central to American notions of justice and fundamental fairness. It is difficult to envision a case that would warrant extradition under such circumstances. Accordingly, the Committee expects that it will be the rare case—a matter of the gravest consequence—in which ex-

ing and technical assistance to better educate and equip prosecutors and legal officials in Grenada to implement this treaty.

During the negotiations, the Grenada delegation also expressed concern than the United States might invoke the Treaty much more often than Grenada, resulting in an imbalance in the financial obligations occasioned by extradition proceedings. While no specific Treaty language was adopted, the United States agreed that consultations between the Parties under Article 18 could address extraordinary expenses arising from the execution of individual extradition requests or requests in general.

ARTICLE 19—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 entered into force, provided that they were offenses under the laws of both States at the time that they were committed.

ARTICLE 20—RATIFICATION AND ENTRY INTO FORCE

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

Paragraph 3 provides that the 1931 Treaty will cease to have any effect upon the entry into force of the Treaty, but extradition requests pending when the Treaty enters into force will nevertheless be processed to conclusion under the 1931 Treaty.

Nonetheless, Article 15 (waiver of extradition) of this Treaty will apply in such proceedings, and Article 14 (rule of speciality) also applies to persons found extraditable under the prior Treaty.

ARTICLE 21—TERMINATION

This Article contains standard treaty language describing the procedure for termination of the Treaty by either State, and the termination shall become effective six months after notice of termination is received.

Technical Analysis of The Extradition Treaty Between The Government of the United States of America and the Government of the Republic of India Signed June 25, 1997

On June 25, 1997, the United States signed a treaty on extradition with the Republic of India (hereinafter "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. In addition, the Treaty will be an important catalyst in providing more effective cooperation against terrorism, including narco-terrorism, and drug trafficking. The Treaty is intended to replace the current extradition treaty in force with respect to both countries. That treaty, the Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain, signed at London December 22, 1931 (hereinafter "the 1931 Treaty"), became applicable to India at the time it gained independence by virtue of the Schedule to the Indian Independence (International Arrangements) Orders, 1947.[299] On the same day, there was an exchange of letters reflecting an understanding concerning the use of the Treaty

for prosecution or punishment only with respect to the ordinary criminal laws of the Requested State.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 18 U.S. Code, Section 3184 et seq; implementing legislation will not be needed. India has extradition legislation[300] that will apply to U.S. requests under the Treaty. According to the Indian delegation which negotiated the Treaty, Indian constitutional law provides that pre-existing domestic law takes precedence over a treaty; however it was not anticipated that any provision of India's domestic law was inconsistent with the provisions of the Treaty.[301]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—OBLIGATION TO EXTRADITE

This article, like the first article in every recent United States extradition treaty, formally obligates both parties to the Treaty, referred to therein as the Contracting States, to extradite to the other, persons formally accused of, charged with, or convicted of extraditable offenses, subject to the provisions of the Treaty. The reference to "formally accused of" was included to recognize that in Indian criminal law practice a person is accused of certain offenses in the document known as a First Information Report and that reaching such a stage would be the equivalent, for purposes of this article, of charging an individual in an indictment under U.S. practice.

Article 1 refers to persons formally accused of, charged with, or convicted of an offense by the authorities "in" the Requesting State rather than "of" the Requesting State, thereby obligating each Contracting State to extradite a fugitive to the other with respect to a prosecution or conviction in any political subdivision as well as in national cases. The term "convicted" includes instances in which the person has been found guilty but the sentence has not yet been imposed.[302] The Treaty applies to persons adjudged guilty who flee the jurisdiction prior to sentencing.

ARTICLE 2—EXTRADITABLE OFFENSES

This article contains the basic guidelines for determining what offenses are extraditable. The Treaty, like most recent U.S. extradition treaties, including those with Jamaica, Jordan, Italy, Ireland, Thailand, Sweden (Supplementary Convention), and Costa Rica, does not list the offenses for which

extradition may be granted. Instead, paragraph 1 of Article 2 permits extradition for any offense punishable under the laws of both Contracting States by deprivation of liberty (i.e., imprisonment, or other form of detention) for a period exceeding one year, or by a more severe penalty. Defining extraditable offenses in terms of "dual criminality" rather than attempting to list each extraditable crime obviates the need to renegotiate the Treaty or supplement it if both Contracting Parties pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover a criminal activity punishable by both Contracting Parties.

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition should also be granted for an attempt or a conspiracy to commit, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to, any extraditable offense. This is significant because conspiracy charges are frequently used in U.S. criminal prosecutions, particularly those involving complex transnational criminal activity. An offense which falls within one of these categories under American law is extraditable even if India does not have such a provision, so long as the underlying offense is extraditable. Therefore, paragraph 2 creates a basis for extradition, in addition to the "dual criminality" rule of paragraph 1, by making conspiracy and the other enumerated similar actions an extraditable crime if the offense, which was the object of the conspiracy or other action, an extraditable offense.

Paragraph 3 reflects the intention of the Contracting States to interpret the principles of this article broadly. Similar provisions to those in

subparagraphs (a) and (b) are contained in all recent U.S. extradition treaties.

Paragraph 3(a) 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.

Paragraph 3(b) addresses the concerns sometimes raised by foreign authorities regarding jurisdictional elements, such as use of the mails or interstate transportation, of certain federal offenses, which are used solely to establish jurisdiction in federal courts. Because foreign authorities 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 be disregarded in applying the dual criminality principle. For example, Indian authorities must treat United States mail fraud charges (18 U.S.C. §1341) in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property (18 U.S.C. §2314) in the same manner as unlawful possession of stolen property.

Paragraph 3(c) was included in the treaty to make it unambiguous that criminal tax offenses are extraditable if they meet the test of dual criminality.

Paragraph 4 recognizes that extraditable crimes can involve acts committed wholly outside the territory of the Requesting State. United States jurisprudence recognizes jurisdiction in our courts to prosecute 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.[303] In India, an Indian national can be prosecuted for any crime he commits abroad as if he had committed the crime in India.[304] If the dual criminality and other requirements of the Treaty are satisfied, extradition shall be granted for a crime or offense, regardless of where the act or acts constituting the offense occurred.

Paragraph 5 provides that when extradition has been granted for an extraditable offense, it shall also be granted for any other offense for which all of the requirements for extradition have been met except for the requirement that the offense be punishable by more than one year of imprisonment. For example, if India 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 that have been charged, so long as those misdemeanors would also be recognized as criminal offenses in India. Thus, the Treaty incorporates recent U.S. extradition practice by permitting extradition for misdemeanors committed by a fugitive when the fugitive's extradition is granted for a more serious extraditable offense. This practice is generally desirable from the standpoint of both the fugitive and the 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.

Some U.S. extradition treaties provide that persons who have been convicted and sentenced for an extraditable offense may be extradited only if at least a certain specified portion of the sentence (often six months) remains to be served.[305] This Treaty, like

most U.S. extradition treaties in the past two decades, contains no such requirement. Thus, any concerns about whether a particular case justifies the time and expense of invoking the machinery of international extradition should be resolved between the Parties through the exercise of wisdom and restraint rather than through arbitrary limits imposed in the Treaty itself.

ARTICLE 3—NATIONALITY

Authorities in some countries, because of statutory or constitutional prohibitions or as a matter of policy, will not extradite a national to another country. Neither the United States[306] nor India[307] denies extradition on the basis of the fugitive's nationality. Therefore, Article 3 of the Treaty provides that extradition is not to be refused based on the nationality of the person sought.

ARTICLE 4—POLITICAL AND MILITARY OFFENSES

Paragraph 1 of this article prohibits extradition for a political offense. This is a standard provision in U.S. extradition treaties and is incorporated in the Indian Extradition Act.[308]

Paragraph 2, in its eight subparagraphs, describe certain categories of offenses which, for purposes of the Treaty, shall not be considered to be political offenses. These categories include offenses that are the subject of multilateral treaties to which the Contracting States are parties, pursuant to which there is an obligation to extradite. By specifically excluding such offenses from the definition of political offense, the Contracting States have established a binding bilateral extradition commitment with respect to such crimes. The categories are as follows:

Murder or other willful crime against the person of a Head of State or Government of a Contracting State, or a member of the family of such Head of State or Government;

Aircraft hijacking offenses, as described in the Convention on the Suppression of Unlawful Seizures of Aircraft;[309]

Aviation sabotage, as described in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;[310]

Any crime against an internationally protected person, as described in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents;[311]

Hostage taking, as described in the International Convention against the Taking of Hostages;[312]

Offenses related to illegal drugs, as described in the Single Convention on Narcotic Drugs,[313] the Amending Protocol to the Single Convention,[314] and the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances;[315]

Offenses which obligate the Contracting States to extradite the person sought or submit the matter for prosecution, pursuant to any multilateral treaty, convention, or international agreement to which they are parties; or

Conspiring or attempting to commit, or for aiding and abetting the commission or attempted commission of any of the foregoing offenses.

ARTICLE 5—MILITARY OFFENSES AND OTHER BASES FOR DENIAL OF EXTRADITION

Paragraph 1 provides that the extradition may be denied by the Requested State if the request relates to a matter that constitutes an offense only under military, and not criminal, law.[316] The paragraph would not bar extradition to stand trial in a military tribunal for an ordinary criminal offense.

Paragraph 2 of the article provides that extradition shall not be granted if the executive authority of the Requested State finds that the request was politically motivated.[317] This is consistent with the long-standing law and practice of the United States, under which the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.[318] Indian law currently provides for the denial of extradition either if the offense is of a political character (see Article 4) or if the fugitive proves, to the satisfaction of the court or the government, that the request was, in fact, made "with a view to try or punish him for an offense of a political character."[319]

ARTICLE 6—PRIOR PROSECUTION

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

Paragraph 1, which prohibits extradition if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested, is similar to language present in many U.S. extradition treaties.[320] This provision applies only when the person sought has been convicted or

acquitted in the Requested State of exactly the same crime that is charged in the Requesting State. It is not enough that the same facts were involved. This article will not preclude extradition in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic transaction. Thus, if the person sought is accused by one Contracting State of illegally smuggling narcotics into that country, and is charged by the other Contracting State with conspiring to illegally export the same shipment of drugs, an acquittal or conviction in one Contracting State does not insulate that person from extradition because different crimes are involved.

Paragraph 2 makes it clear that neither Contracting State can refuse to extradite an offender on the ground that the Requested State's authorities formally declined to prosecute the offender, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings. This provision was included because, for example, the Requested State might have decided to forego prosecution or to dismiss charges because of a failure to obtain sufficient evidence for trial. Such declination or discontinuance should not be a bar to prosecution in the Requesting State, where substantial evidence might be available. This provision should enhance the ability of the Contracting States to extradite to the jurisdiction with the better chance of a successful prosecution.

ARTICLE 7—LAPSE OF TIME

Article 7 states that extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting

State.[321] Thus, if the Requesting State has a lapse of time provision which has run for the offense for which extradition is being requested, the Requested State shall not extradite the fugitive.[322]

ARTICLE 8—CAPITAL PUNISHMENT

Paragraph 1 permits the Requested State to refuse to extradite a fugitive 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. This paragraph provides two exceptions to this general rule, if:

Under subparagraph (a), the extraditable offense constitutes murder under the laws of the Requested State; or

Under subparagraph (b), the Requesting State provides assurances that the death penalty, if imposed, will not be carried out.

Similar provisions are found in many recent U.S. extradition treaties.[323]

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

ARTICLE 9—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

This article sets out the procedural, documentary and evidentiary requirements to support an extradition request, and is generally similar to corresponding articles in recently concluded U.S. extradition treaties.

Paragraph 1 requires that each formal request for extradition be submitted through the diplomatic channel. A formal extradition request may be preceded by a request for provisional arrest under Article 12, which need not be initiated through diplomatic channels.

Paragraph 2 delineates the information that should accompany a request for extradition. Most of the items listed in Article 9(2) enable the Requested State to determine quickly whether extradition is appropriate. For example, Article 9(2)(c) calls for "a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested," such information should enable the Requested State to determine easily whether the request satisfies the requirement for dual criminality under Article 2. Moreover, Article 9(2)(d) specifies that the extradition request must be accompanied by "a statement of the provisions of the law describing the punishment for the offense," enabling the Requested State to determine whether there is a basis for denying extradition for insufficient punishment under Article 2. Other requirements listed in Article 9(2), are needed for informational purposes. These include information describing the identity and probable location of the person sought, the facts of the offense and procedural history of the offense, and other documents, statements and information.

Paragraph 3 requires that, if the fugitive is being sought for prosecution, the Requesting State must provide a copy of the warrant or arrest order,[324] any charging document, and "such information as would justify the committal for trial of the person if the offense had been committed in the Requested State." This provision is meant to satisfy the standard of

"probable cause," under which our courts permit extradition if there is probable cause to believe that an extraditable offense was committed and that the fugitive committed it.[325] The delegation of India advised the U.S. delegation that under current Indian law the somewhat higher prima facie standard of evidence would need to be met for India to extradite under the Treaty.[326]

Paragraph 4 lists the additional information required to support a judicial finding of extraditability of a person convicted of an offense in the Requesting State. This paragraph makes it clear that once a conviction has been obtained, no showing of the relevant burden of proof as described in paragraph 3 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.[327]

Subsection (d) of paragraph 4 states that if the person sought was found guilty *in absentia,* the documentation and information required under paragraph 3 must be submitted with the extradition request. This provision is consistent with the long-standing United States policy of requiring such documentation in the extradition of persons convicted *in absentia.*

ARTICLE 10—ADMISSIBILITY OF DOCUMENTS

Article 10 sets forth the authentication procedures for receiving and admitting into evidence extradition documents.

Subparagraph (a) states that evidence intended for use in extradition proceedings in India shall be admissible if certified by the principal diplomatic or

consular officer of India resident in the United States.[328]

Subparagraph (b) states that evidence intended for use in extradition proceedings in the United States shall be admissible if certified by the principal diplomatic or consular officer of the United States resident in India, in accordance with U.S. extradition laws.[329]

Subparagraph (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 acceptable by the law of the Requested State. For example, there may be information in the Requested State itself which is relevant and probative to extradition. The Requested State is free under subsection (c) to utilize that information if it is admissible under the ordinary rules of evidence in the Requested State. Moreover, subparagraph (c) should ensure that relevant evidence, which 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.

ARTICLE 11—TRANSLATION

All documents submitted by either Requesting State in support of an extradition request shall be in the English language. If any document in support of a request is written in another language, it must be accompanied by an English translation.

ARTICLE 12—PROVISIONAL ARREST

This article describes the process, known as provisional arrest, by which a fugitive in one country may be arrested and detained before a formal extradition request is completed and submitted by the Requesting State.[330]

Paragraph 1 provides that, "in a case of urgency," a request for provisional arrest may be made. It provides that such a request may be made through the diplomatic channel. INTERPOL facilities may also be used to transmit such a request.

Paragraph 2 lists the information that the Requesting State must provide in its request for provisional arrest. The application needs to set forth identification and location information, the facts of the case, and a description of the laws violated and, in addition, include statements that an arrest warrant and a finding of guilt or judgment of conviction exists and that the formal extradition request will follow.

Paragraph 3 states that the Requesting State must be advised promptly of the outcome of its application and the reason for any denial.

Paragraph 4 provides that the fugitive may be discharged from custody if the executive authority of the Requested State does not receive a fully documented extradition request within sixty days of the provisional arrest. When the United States is the Requested State, the "executive authority" for purposes of paragraph 4 would include the Secretary of State or the U.S. Embassy in New Delhi, India.[331]

Although the person arrested may be released from custody if the documents are not received within the

sixty-day period, the proceedings against the fugitive need not be dismissed. Paragraph 5 makes it clear that the fugitive may be rearrested and the extradition proceedings may commence if the formal, documented request is presented at a later date.

ARTICLE 13—DECISION AND SURRENDER

This article requires that the Requested State promptly notify the Requesting State through the diplomatic channel of its decision on the extradition request. If extradition is denied in whole or in part, the Requested State must provide the reasons for the denial. The Requested State shall also provide any pertinent judicial opinions if the Requesting State so requests. If the extradition request is granted, the article provides that the Contracting States shall agree on a time and place for the surrender of the fugitive.

According to Paragraph 4, if the fugitive is not removed from the territory of the Requested State within the time prescribed by the law of the Requested State, the person may be discharged from custody and the Requested State may subsequently refuse to extradite for the same offense. U.S. law requires that surrender occur within two calendar months of the finding that the offender is extraditable,[332] or of the conclusion of any litigation challenging that finding,[333] whichever is later. India has a similar law, which provides that a fugitive, in custody for more than two months following a determination of extraditability, may be discharged by the High Court, unless sufficient cause is shown to the contrary.[334]

ARTICLE 14—TEMPORARY AND DEFERRED SURRENDER

Occasionally, a person sought for extradition may already 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 and the full execution of any punishment imposed.[335]

Paragraph 1 provides for the temporary surrender of a person wanted for prosecution in the Requesting State who is being prosecuted or is serving a sentence in the Requested State. A person temporarily transferred pursuant to the Treaty shall be kept in custody and returned to the Requested State at the conclusion of the proceedings in the Requesting State. The Contracting States shall determine the conditions of the fugitive's return to the Requested State. Such temporary surrender furthers the interests of justice in that it permits a trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of a successful prosecution. Such a transfer may also be advantageous to the person sought in that: (1) it permits resolution of the charges sooner; (2) it makes it possible for any sentence to be served in the Requesting State concurrently with the sentence in the Requested State; and (3) it permits defense against the charges while favorable evidence is fresh and more likely to be available.

Paragraph 2 provides that 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 execution of the punishment that has been imposed.[336] The wording of this

provision also makes clear that the Requested State may postpone the surrender of the person facing prosecution or serving a sentence even if all necessary extradition proceedings have been completed.

ARTICLE 15—REQUESTS FOR EXTRADITION MADE BY SEVERAL STATES

This article, which is also included in many recent U.S. 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. This article is invoked when multiple extradition requests are made for a person either for the same offense or for different extraditable offenses. For the United States, the Secretary of State makes this decision;[337] for India, the decision is made by the Central Government.[338]

ARTICLE 16—SEIZURE AND SURRENDER OF PROPERTY

This article provides for the seizure by the Requested State, and surrender to the Requesting State, of all property—articles, instruments, objects of value, documents, or other evidence—relating to the offense for which extradition is requested.[339] Such actions are subject to the laws of the Requested State. The article also provides that these objects shall be so surrendered upon the granting of the 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 upon satisfactory

assurances that the objects will be returned as soon as practicable. The Requested State may defer surrender altogether if the property is needed as evidence in the Requested State. Pursuant to paragraph 3, 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 SPECIALITY

This article incorporates the principle known as the rule of speciality, which is a standard component of U.S. and international extradition practice. Designed to ensure that a fugitive surrendered for one offense is not tried for other crimes, the rule of speciality prevents an extradition request from being used as a subterfuge to obtain custody of a person for trial or service of sentence on different charges that may not be extraditable or properly documented at the time that the request is granted.

This article codifies the current formulation of the rule. Paragraph 1 provides that a person extradited under the Treaty may not be detained, tried, or punished in the Requesting State except for (a) 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;

(b) an offense committed after the extradition; or

(c) an offense for which the executive authority of the Requested State consents.[340]

Paragraph 1(c)(i) provides that before giving such consent, the Requested State may require the Requesting State to document its request as if it were an ordinary extradition request under the Treaty.

Paragraph 1(c)(ii) permits the Requesting State to detain the extraditee for 90 days, or for a longer period authorized by the Requested State, while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third State for a crime committed prior to his surrender under this Treaty, without the consent of the Requested State.[341]

Finally, Paragraph 3 removes the restrictions of paragraphs 1 and 2 on detention, trial, or punishment of an extraditee for additional offenses, or extradition to a third State, if the extraditee (1) leaves and returns to the Requesting State, or (2) does not leave the Requesting State within fifteen days of being free to do so.

ARTICLE 18—WAIVER OF EXTRADITION

Persons sought for extradition frequently elect to waive their right to extradition proceedings and 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 without further proceedings, subject to the laws of the Requested State. In such cases there would be no need for any further formal documentation or judicial proceedings.

If a person sought for extradition from the United States returns to the Requesting State before the signing of a surrender warrant, the United States would not view the return pursuant to a waiver of proceedings under this Article as an "extradition." U.S. practice has long been that the rule of speciality

does not apply when a fugitive waives extradition and voluntarily returns to the Requested State.

ARTICLE 19—TRANSIT

Paragraph 1 gives each Contracting State the power to authorize transit through its territory of persons being surrendered to the other Contracting State by third States, and to hold such persons in custody during the period of transit.[342] Requests for transit are to contain a description of the person whose transit is proposed and a brief statement of the facts of the case with respect to which he is being surrendered to the Requesting State. The paragraph provides that the request should be transmitted through the diplomatic channel. It also permits the use of INTERPOL facilities to transmit the request.

Paragraph 2 provides that no authorization is needed if the person in custody is being moved by air and no landing is scheduled in the territory of the other Contracting State. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant such a request. It also requires the transit State to detain a fugitive until a request for transit is received and executed, so long as the request is received within 96 hours of the unscheduled landing.

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. This is consistent with other U.S. extradition treaties and U.S. law on the subject.[343] Thus, the Department of Justice attorneys will represent the Government of India in connection

with a request from India for extradition before U.S. courts, and counsel designated by the Indian Government will perform reciprocal services on behalf of the United States before Indian courts.

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 paid by the Requesting State.

Paragraph 3 provides that neither Contracting State shall make a pecuniary claim against the other arising out of the arrest, detention, examination, or surrender of any fugitive. This includes any claim brought on behalf of the fugitive for damages, reimbursement, or legal fees, or other expenses occasioned by the execution of the extradition request.

ARTICLE 21—CONSULTATION

Article 21 of the treaty provides that the competent authorities of the United States and India may consult with each other with regard to an individual extradition case or extradition procedures in general. Such consultation may occur directly between the competent authorities or through the facilities of INTERPOL. A similar provision is found in other recent U.S. extradition treaties.[344]

ARTICLE 22—MUTUAL LEGAL ASSISTANCE IN EXTRADITION

This article provides that each Contracting State shall, to the extent permitted under its laws, afford the other the widest measure of mutual assistance in

criminal matters in connection with offenses for which extradition has been requested.

ARTICLE 23—RATIFICATION AND ENTRY INTO FORCE

This article contains standard treaty language providing for ratification and the exchange of instruments of ratification as soon as possible. The Treaty is to enter into force immediately upon the exchange.

Paragraph 3 provides that when the Treaty enters into force, the 1931 Treaty will cease to have effect between the Contracting States. However, if extradition documents have already been submitted to the courts of the Requested State at the time the Treaty enters into force, the 1931 treaty will remain applicable to such proceedings, although Article 17 of the Treaty (addressing the Rule of Speciality) will apply.

ARTICLE 24—TERMINATION

This Article contains standard treaty language describing the procedure for termination of the Treaty by either Contracting State. Either Contracting State may terminate the Treaty at any time after its entry into force by giving written notice to the other Contracting State. Termination becomes effective six months after the date of such notice.[345]

Technical Analysis of the Extradition Treaty Between the United States of America and St. Christopher and Nevis Signed September 18, 1996

On September 18, 1996, the United States signed a treaty on extradition with St. Christopher and Nevis (hereinafter "the Treaty"), which is intended to

replace the outdated treaty currently in force between the two countries[346] with a modern agreement on the extradition of fugitives. The new extradition treaty is one of twelve treaties that the United States negotiated under the auspices of the Organization of Eastern Caribbean States to modernize our law enforcement relations in the Eastern Caribbean. It represents a major step forward in the United States' efforts to strengthen cooperation with countries in the region in combating organized crime, transnational terrorism, and international drug trafficking.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 18, United States Code, Section 3184 *et seq*. No new implementing legislation will be needed for the United States. St. Christopher and Nevis has its own internal legislation on extradition,[347] which will apply to United States' requests under the treaty.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

Pages 212 through 213

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 14 concerning the Rule of Specialty would preclude the resurrender of any person from the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to Trinidad and Tobago by the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

SUPREMACY OF THE CONSTITUTION.—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.

Treaty with India:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, signed at Washington on June 25, 1997 (Treaty Doc. 105–30), subject to the understanding of subsection (a), the declaration of subsection (b), and the proviso of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 17 concerning the Rule of Specialty would preclude the resurrender of any person from the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to India by the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as

required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Zimbabwe:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Zimbabwe, signed at Harare on July 25, 1997 (Treaty Doc. 105–33), subject to the understanding of

subsection (a), the declaration of subsection (b), and the proviso of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 14 concerning the Rule of Specialty would preclude the resurrender of any person from the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to Zimbabwe by the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATIONS.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

Pages 227 through 228

1994, entered into force November 22, 1996; Article 21, U.S.-Hungary Extradition Treaty, signed at Budapest Dec. 1, 1994, entered into force March 18, 1997.

[299] *See* 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59.

[300] *See* Extradition Act, 1962, as amended by the Extradition (Amendment) Act, 1993 § 3184 (hereinafter the Indian Extradition Act).

[301] *See, e.g.,* Article 2 of the Indian Extradition Act, providing that an "extradition offense" in relation to another Contracting State is "an offense provided for in the extradition treaty with that State."

[302] *See* Stanbrook and Stanbrook, *Extradition: The Law and Practice* 25-26 (1979).

[303] Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Blakesley, *United States Jurisdiction over Extraterritorial Crime,* 73 Journal of Criminal Law and Criminology 1109 (1982).

[304] Indian Penal Code of 1860 §§ 3,4.

[305] *See* Article 2, U.S.-Bolivia Extradition Treaty, signed at La Paz June 27, 1995, entered into force November 21, 1996.

[306] 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 is underscored by Title 18 U.S. Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

[307] *See* Commentary to Chapter I(1)(1), Indian Extradition Act.

[308] Section 31(a) of the Indian Extradition Act provides that extradition shall be denied if the offense for which a fugitive is sought is "of a political character."

[309] Done at the Hague December 16, 1970, entered into force October 14, 1971 (22 UST 1641, TIAS 7192).

[310] Done at Montreal September 23, 1971, entered into force January 26, 1973 (24 UST 564, TIAS 7570).

[311] Done at New York December 14, 1973, entered into force February 20, 1977 (28 UST 1975, TIAS 8532, 1035 UNTS 167).

[312] Done at New York December 17, 1979, entered into force June 3, 1983 (TIAS 11081).

[313] Done at New York March 30, 1961, entered into force December 13, 1964, for the United States June 24, 1967 (18 UST 1407, TIAS 6298, 520 UNTS 204).

[314] Done at Geneva March 25, 1972, entered into force August 8, 1975 (26 UST 1439, TIAS 8118, 976 UNTS 3).

[315] Done at Vienna December 20, 1988, entered into force November 11, 1990.

[316] An example of such a crime is desertion. *Matter of Extradition of Suarez-Mason,* 694 F. Supp. 676, 702-03 (N.D. Cal. 1988).

[317] There are similar provisions in many U.S. extradition treaties. *See, e.g.,* Article III(3) U.S.-Jamaica Extradition Treaty, signed June 14, 1983. Article 5(4) U.S.-Spain Extradition Treaty, signed May 29, 1970; Article 4 U.S.-Netherlands Extradition Treaty, signed June 24, 1980.

[318] *See Eain v. Wilkes,* 641 F.2d 504, 513 (7th Cir.), *cert. denied* 454 U.S. 894 (1981); *Koskotosv. Roche,* 744 F. Supp. 904, 916 (D. Mass. 1990), aff'd 931 F.2d 169 (1st Cir. 1991). *See also* 18 U.S.C. § 3186.

[319] Indian Extradition Act, § 31 (a).

[320] *See, e.g.,* Article 5, U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force July 29, 1995.

[321] This is consistent with settled law in the United States, which holds that lapse of time is not a defense to extradition unless the treaty specifically provides to the contrary. *Freedman v. United States,* 437 F. Supp. 1252, 1263 (D. Ga. 1977); *United States v. Galanis,* 429 F. Supp. 1215, 1224 (D. Conn. 1977).

[322] Other United States extradition treaties contain similar provisions. *See, e.g.,* Article 4(1)(II), U.S.-Canada Extradition Treaty, signed at Washington Dec. 3, 1971, entered into force March 22, 1976 (UST 983, TIAS 8273); Article 5, U.S.-Switzerland Extradition Treaty, signed Nov. 11, 1990.

[323] *See, e.g.,* Article 7, U.S.-Netherlands Extradition Treaty, signed at the Hague June 24, 1980, entered into force September 15, 1983 (TIAS 10733); Article 6, U.S.-Ireland

Extradition Treaty, signed at Washington July 13, 1983, entered into force December 15, 1984 (TIAS 10813).

[324] Such a document must be issued by a competent authority.

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

[326] *See* Indian Extradition Act § 7(4).

[327] *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).

[328] *See* Indian Extradition Act § 10.

[329] *See* 18 U.S.C. § 3190.

[330] Similar provisions appear in all recent U.S. extradition treaties.

[331] *See United States v. Clark,* 470 F. Supp. 976 (D. Vt. 1979).

[332] Title 18, U.S. Code, Section 3188 provides that any U.S. court, upon application, may discharge from custody a person so committed.

[333] *Jimenez 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).

[334] Indian Extradition Act, Section 24.

[335] This is a discretionary provision exercisable by the Requested State only; it does not create any right which a fugitive might exercise.

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

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

[338] Indian Extradition Act § 30.

[339] Similar provisions are found in all recent U.S. extradition treaties.

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

[341] This provision is consistent with provisions in all recent U.S. extradition treaties.

[342] A similar provision exists in many recent U.S. extradition treaties.

[343] *See, e.g.,* Article 19, U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force July 29, 1995 (Treaty Doc. No. 102-17). See also 18 U.S.C. §3195.

[344] *See* Article 20, U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995 (Treaty Doc. No. 102-17); article 19, U.S.-Belgium Extradition Treaty, signed at Brussels April 27, 1987 (Treaty Doc. No. 102-17).

[345] On the date the Treaty was signed, the parties expressed their understanding in an exchange of letters, which have been provided to the Senate for its information, that

"... as a general matter, upon extradition, a person shall be proceeded against or punished under the ordinary criminal laws of the Requesting State, and shall be subject to prosecution or punishment in accordance with the Requesting State's ordinary rules of criminal procedure. If either party is considering prosecution or punishment upon extradition based on other laws or other rules of criminal procedures, the Requesting State shall request consultations and shall make such a request only upon the agreement of the Requested State."

This understanding was developed during the negotiations after discussions of India's Terrorist and Disruptive (Prevention) Act (TADA), which was in force when the negotiations commenced in 1994 and has been used in connection with the detention and prosecution of persons charged with terrorist offenses. Although TADA lapsed on May 23, 1995, it has continuing effect with respect to cases under investigation and trial on such date. TADA limits defendants' rights in ways that have been the subject of criticism from non-governmental human rights groups and the State Department's annual human rights report. This Understanding reflects the Parties' agreement that if either party is considering prosecution or punishment upon extradition based on laws or rules of criminal procedures such as those in TADA, the Requesting State shall

request consultations and shall make such a request only upon the agreement of the Requested State.

[346] Extradition between the U.S. and St. Christopher and Nevis is governed by the U.S.-U.K. Extradition Treaty (hereinafter "the 1972 Treaty"), signed June 8, 1972, entered into force January 21, 1977 (28 UST 227, TIAS 8468), which continued in force after St. Christopher and Nevis became an independent nation on September 19, 1983.

[347] Extradition Act, 1870, 33 & 34 Vict., c. 52 (hereinafter the "Extradition Act 1870"). This British statute governed extradition at the time St. Christopher and Nevis became independent from the United Kingdom, and continues to be the law in effect on this topic. The key sections of the Extradition Act 1870 which are germane to the interpretation and implementation of the Treaty are discussed in more detail in this Technical Analysis. The St. Christopher and Nevis delegation stated that in St. Christopher and Nevis treaties do not take priority over statutes, and that the courts are bound by the Act, though the Government is bound by the Treaty. The United States delegation was assured that the terms of this Treaty would be given full effect, since under Section 2 of the Extradition Act 1870, the government of St. Christopher and Nevis may embody the terms of this Treaty in an Order in Council that will "render the operation of [the Extradition Act 1870] subject to such conditions, exceptions, and qualifications as may be deemed expedient" to implement the Treaty.

[348] See Stanbrook and Stanbrook, *Extradition: The Law and Practice,* 25-26 (1979).

[349] Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Blakesley, *United States Jurisdiction over Extraterritorial Crime,* 73 Journal of Criminal Law and Criminology 1109 (1982).

[350] See Article 2, U.S.-Bolivia Extradition Treaty, signed at La Paz June 27, 1995, entered into force November 21, 1996.

[351] *See generally* Shearer, Extradition in International Law 110-114 (1970); 6 Whiteman, *Digest of International Law* 871-876 (1968). Our policy of drawing no distinction between nationals of the United States and those of other countries in extradition matters is underscored by Title 18, U.S. Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens pursuant to treaties that permit (but do

not require) surrender of citizens, if other requirements of the Treaty have been met.

[352] Section 3(1), Extradition Act 1870, provides that extradition shall be denied if the crime is an offense "of a political character." The St. Christopher and Nevis delegation assured the United States that this is identical to the political offense defense. Similar provisions appear in all recent U.S. extradition treaties.

[353] Done at Vienna December 20, 1988, entered into force November 11, 1990.

[354] There are similar provisions in many U.S. extradition treaties. See Article III(3), US-Jamaica Extradition Treaty, signed at Kingston June 14, 1983, and entered into force July 7, 1991; Article 5(4), US-Spain Extradition Treaty, signed at Madrid May 29, 1970, entered into force June 16, 1971 (22 UST 737, TIAS 7136, 796 UNTS 245); Article 4, US-Netherlands Extradition Treaty, signed at The Hague June 24, 1980, entered into force September 15, 1983 (TIAS

Appendix I

TABLE OF UNITED STATES BILATERAL EXTRADITION TREATIES THAT USE "OFFENSE" IN *NON BIS IN IDEM* ARTICLES

Country	**Citation/ TIAS**	**Entry into Force**	**Article/ Section**	**Language**
Extradition Treaty with Albania	Treaty Doc. 117-2, 117th Congress 2d Session	Dec. 22, 2020 (Signed)	Art. 5(1)	Extradition shall be denied when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Antigua and Barbuda	T.I.A.S. 99-701.1	July 1, 1999	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Argentina	T.I.A.S. 12866	June 15, 2000	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Australia	T.I.A.S. 8234	May 8, 1976	Art. VII	Extradition shall not be granted in any of the following circumstances: (a) when the person whose extradition is requested is being proceeded against, has been tried and discharged or punished, or has been pardoned, in the territory of the requested State for the offence for which his extradition is requested
Extradition Treaty with Austria	T.I.A.S. 12916	Jan. 1, 2000	Art. 6(1)	Extradition shall not be granted when the person sought has been convicted or discharged with final and binding effect by the competent authorities in the Requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				State for the offense for which extradition is requested.
Extradition Treaty with the Bahamas	T.I.A.S. 94-922	Sept. 22, 1994	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Barbados	T.I.A.S. 00-303	Mar. 3, 2000	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Belgium	T.I.A.S. 97-901	Sept. 1, 1997	Art. 5(1)	Extradition shall not be granted when the person sought has been found guilty, convicted, or acquitted in the Requested State for the offense

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				for which extradition is requested.
Extradition Treaty with Belize	T.I.A.S. 13089	Mar. 27, 2001	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Bolivia	T.I.A.S. 196-112	Nov. 21, 1996	Art. V(2)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Brazil	T.I.A.S. 7718	Dec. 17, 1964	Art. V(2)	When the person whose surrender is sought has already been or is at the time of the request being prosecuted in the requested State for the crime or

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				offense for which his extradition is requested.
Extradition Treaty with Bulgaria	T.I.A.S. 09-521	May 21, 2009	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or discharged from proceedings with final and binding effect by the competent authorities in the Requested State for the offense for which extradition is requested. In applying this Article, an acquittal or discharge for lack of jurisdiction shall not constitute an obstacle to extradition.
Extradition Treaty with Burma, originally	47 Stat. 2122; TS 849; 12 Bevans	Nov. 1, 1941		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
signed with the United Kingdom	482; 163 LNTS 59			
Extradition Treaty with Canada	T.I.A.S. 8237	Mar. 22, 1976	Art. 4(1)(a)	Extradition shall not be granted in any of the following circumstances: (a) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.
Extradition Treaty with Chile	T.I.A.S. 16-1214	Dec. 14, 2016	Art. 5(1)	Extradition shall be denied when the person sought has been convicted or acquitted in the Requested State for the

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				offense for which extradition is requested.
Extradition Treaty with Colombia *Treaty is being re-negotiated after Colombia stopped extraditions to the U.S.	S. Treaty Doc. 97-8	Mar. 2, 1982	Art. 5(1)	Extradition shall not be granted when the person sought has been tried and convicted or acquitted by the Requested State for the offense for which extradition is requested.
Extradition Treaty with Cyprus	T.I.A.S. 10-201.4	Feb. 1, 2010	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Denmark and Iceland	T.I.A.S. 10-201.6	Feb. 1, 2010	Art. 7(1)	When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested. If the charge against a person sought in Denmark has been waived, extradition may be granted only if the conditions of applicable Danish law permit.
Extradition Treaty with Dominica	T.I.A.S. 00-525	May 25, 2000	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with the Dominican Republic	T.I.A.S. 16-1215	Dec. 15, 2016	Art. 5(1)	Extradition shall be denied when the person sought has been convicted or acquitted in the Requested Party for the offense for which extradition is requested.
Extradition Treaty with Estonia	T.I.A.S. 09-407	Apr. 7, 2009	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with European Union				No non bis in idem section, but enshrined in EU law: Art. 50 CFR and Art. 54 CISA
Agreement continuing in force between	T.I.A.S. 7707	Aug. 17, 1973	Art. 4	The extradition shall not take place if the person claimed has already been tried and

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
the United States and Fiji the extradition treaty of December 22, 1931 (47 Stat. 2122) between the United States and the United Kingdom.				discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.
Extradition Treaty with France	T.I.A.S. 02-201	Feb. 1, 2002	Art. 8(1)	Extradition shall not be granted when the person sought has been finally convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with the Gambia, originally signed with the United Kingdom	1931 U.S.T. LEXIS 60; 12 Bevans 482	June 24, 1935		U.K. Treaty language
Extradition Treaty with The Federal Republic Of Germany	TIAS 9785	Aug. 29, 1980	Art. 8	Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for the offense for which his extradition is requested.
Extradition Treaty with Ghana,	47 Stat. 2122; TS 849;	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
originally signed with the United Kingdom	12 Bevans 482; 163 LNTS 59			
Extradition Treaty with Grenada	T.I.A.S. 99-914.1	Sept. 14, 1999	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Guyana, originally signed with the United Kingdom	47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Hungary	T.I.A.S. 97-318	Mar. 18, 1997	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted or the case dismissed by court order with binding and final effect in the Requested State for the offense for which extradition is requested.
Extradition Treaty with India	T.I.A.S. 12873	Jul. 21, 1999	Art. 6(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Instrument Amending the Treaty of July 13, 1983 Between the	T.I.A.S. 10-201.2	Feb. 1, 2010	Art. IV(a)	Extradition shall not be granted in any of the following circumstances: (a) when the person whose surrender is sought has been convicted or

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
United States of America and Ireland				acquitted, or a prosecution is pending against that person, in the Requested State, for the offence for which extradition is requested.
Protocol Amending the Convention between the United States of America AND Israel of December 10, 1962	T.I.A.S. 07-110	Jan. 10, 2007	Art. VI(1)(a)	Extradition shall not be granted if the person whose extradition is sought has been tried and either convicted or acquitted in the Requested Party for the offense for which his extradition is requested.
Extradition Treaty with Japan	TIAS 9625	Mar. 26, 1980	Art. IV(1)(2)	Extradition shall not be granted under this Treaty in any of the following circumstances: . . . When the person sought has been

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.
Extradition Treaty with Jordan	S. Treaty Doc. 104-3	Jul. 29, 1995	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Continued Application to Kenya of the United States-United Kingdom Treaty of	T.I.A.S. 5916	Aug. 19, 1965		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
December 22, 1931				
Extradition Treaty with Kirbati, originally signed with the United Kingdom	T.I.A.S. 08-1124	Jan. 21, 1977		U.K. Treaty language
Extradition Treaty with Kosovo	T.I.A.S. 19-613	June 13, 2019	Art. 4(1)	Extradition shall be denied when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with South Korea	T.I.A.S. 12962	Dec. 20, 1999	Art. 5	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				State for the offense for which extradition is requested.
Extradition Treaty with Latvia	T.I.A.S. 09-415	Apr. 15, 2009	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Lithuania	T.I.A.S. 13166	Mar. 31, 2003	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Conviction or acquittal also means, under Lithuanian law, an agreed resolution approved by a court with final and binding effect.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Luxembourg	T.I.A.S. 12804	Feb.1, 2002	Art. 6	Extradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Malawi, originally signed with the United Kingdom	47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59	June 24, 1935		U.K. Treaty language
Extradition Treaty with Malaysia	T.I.A.S. 97-602	June 2, 1997	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				State for the offense for which extradition is requested.
Extradition Treaty with Malta	T.I.A.S. 09-701	July 1, 2009	Art. 6(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Law Enforcement Agreement between the United States of America and the Marshall Islands	T.I.A.S. 04-501.2	May 1, 2004	Art. III(1)	Extradition shall not be granted when the person whose surrender is sought is being prosecuted or has been convicted, discharged or acquitted by the requested Government for the offense for which extradition is requested.
Extradition Treaty with Mauritius,	47 Stat. 2122; TS 849;	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
originally signed with the United Kingdom	12 Bevans 482; 163 LNTS 59			
Extradition Treaty with Mexico	No. 19462	Dec. 9, 1980	Art. 6	Extradition shall not be granted when the person has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.
Law Enforcement Agreement between the United States of America and Micronesia	T.I.A.S. 04-625.4	June 25, 2004	Art. III(1)(a)	Extradition shall not be granted: (a) When the person whose surrender is sought is being prosecuted or has been convicted, discharged or acquitted by the requested Government for the offense for which extradition is requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Nauru, originally signed with the United Kingdom	47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59	Aug. 30, 1935		U.K. Treaty language
Agreement Amending the Treaty of June 24, 1980 Between the United States of America and the Netherlands	T.I.A.S. 10-201.16	Feb. 1, 2010	Art. 5(a)	Extradition shall not be granted when the person has been prosecuted, or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.
Extradition Treaty with New Zealand	T.I.A.S. 7035	Aug. 12, 1970	Art. VI(1)	Extradition shall not be granted in any of the following circumstances : 1. When the

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				person whose surrender is sought is being proceeded against or has been tried and discharged or punished or is otherwise lawfully detained in consequence of such acquittal or conviction in the territory of the requested Party for the offence for which his extradition is requested.
Extradition Treaty with Nigeria, originally signed with the United Kingdom	47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Norway	T.I.A.S. 9679	Mar. 7, 1980	Art. 7(1)(a)	Extradition shall not be granted in any of the following circumstances: (a) When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested State for the offense for which extradition is requested.
Extradition Treaty with Pakistan, originally signed with the United Kingdom	47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59	Mar. 9, 1942		U.K. Treaty language
Extradition Treaty with	47 Stat. 2122;	Aug. 30, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Papua New Guinea, originally signed with the United Kingdom	TS 849; 12 Bevans 482; 163 LNTS 59			
Extradition Treaty with Paraguay	T.I.A.S. 12995	Mar. 9, 2001	Art. V(1)	Extradition shall not be granted if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Peru	T.I.A.S. 03-825	Aug. 25, 2003	Art. IV(1)(a)	Extradition shall not be granted if the person sough has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Philippines	T.I.A.S. 96-1122	Nov. 22, 1996	Art. 4(1)	Extradition shall not be granted when the person sought has been tried and convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Poland	T.I.A.S. 99-917	Sept. 17, 1999	Art. 7(1)	Extradition shall not be granted when the person sought has been convicted or acquitted with final and binding effect in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Romania	T.I.A.S. 09-508	May 8, 2009	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				State for the offense for which extradition is requested.
Extradition Treaty with Saint Kitts and Nevis	T.I.A.S. 12805	Feb. 23, 2000	Article 5(1)	1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Saint Lucia	T.I.A.S. 00-202	Feb. 2, 2000	Article 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Saint Vincent and the Grenadines	T.I.A.S. 99-908	Sept. 8, 1999	Article 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				State for the offense for which extradition is requested.
Extradition Treaty with Serbia	T.I.A.S. 19-423	Apr. 23, 2019	Art. 5(1)	Extradition shall be denied when the person sought has been convicted or acquitted or discharged from proceedings with final and binding effect by the competent authorities in the Requested State for the offense for which extradition is required.
Extradition Treaty with Seychelles, originally signed with the United Kingdom	47 Stat. 2122 (U.S.-U.K. treaty)	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Sierra Leone, originally signed with the United Kingdom	47 Stat. 2122 (U.S.-U.K. treaty)	June 24, 1935		U.K. Treaty language
Agreement confirming the continuance in force between the United States and Singapore of the December 22, 1931, extradition treaty between the United	20 UST 2764; TIAS 6744; 723 UNTS 201	June 10, 1969		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
States and the United Kingdom)				
Extradition Treaty with South Africa	T.I.A.S. 13060	June 25, 2001	Art. 6(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State of the offence for which extradition is requested.
Instrument Amending the Treaty of May 29, 1970, and the Supplementary Treaties of January 25, 1975, February 9, 1988, and	T.I.A.S. 10-201.21	Feb. 1, 2010	Art. V(A)(1)	Extradition shall not be granted in any of the following circumstances: 1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested. 2.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
March 12, 1996 Between the United States Of America and Spain				When the person whose surrender is sought has been tried and acquitted or has undergone his punishment in a third State for the offense for which his extradition is requested.
Extradition Treaty with Sri Lanka	T.I.A.S. 13066	Jan. 12, 2001	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Suriname, originally signed with the Netherlands	Treaty Series 256 1887 U.S.T. LEXIS 17; 10 Bevans 47	Jan. 18, 1904	Art. V	A fugitive criminal shall not be surrendered [*6] under the provisions hereof when, by lapse of time, he is exempt from prosecution or punishment for the crime or offence for which

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
				the surrender is asked, according to the laws of the country from which the extradition is demanded, **or when his extradition is asked for the same crime or offence for which he has been tried, convicted or acquitted in that country, or so long as he is under prosecution for the same.**
Extradition Treaty with Swaziland, originally signed with the United Kingdom	47 Stat. 2122; 21 U.S.T. 1930	June 24, 1935; July 28, 1970		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Instrument Amending the Convention of October 24, 1961, and the Supplementary Convention of March 14, 1983, Between the United States Of America And Sweden	T.I.A.S. 10-201.22	Feb. 1, 2010	Article IV(1)	Extradition shall not be granted in any of the following circumstances: When the person sought has already been or is at the time of the request being proceeded against in the requested State in accordance with the criminal laws of that State for the offense for which his extradition is requested.
Extradition Treaty with Tanzania, originally signed with the United Kingdom	47 Stat. 2122 (U.S.-U.K. treaty) 16 U.S.T. 2066	June 24, 1935; Dec.6, 1965		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Thailand	T.I.A.S. 91-517	May 17, 1991	Article 5(1)&(2)	1. Extradition shall not be granted when the person sought has been tried and convicted or acquitted in the Requested State for the offense for which extradition is requested. 2. Extradition may be denied when the person sought is being or has been proceeded against in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Tonga, originally signed with the	47 Stat. 2122; 28 U.S.T. 5290	Aug. 1, 1966; Apr. 13, 977		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
United Kingdom				
Extradition Treaty with Trinidad and Tobago	T.I.A.S. 99-1129	Nov. 29, 1999	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.
Extradition Treaty with Turkey	T.I.A.S. 9891	Jan. 1, 1987	Art. 3(d)	If the person whose surrender is sought has been tried and acquitted or punished with final and binding effect in the Requested Party for the offense for which extradition is requested;
Extradition Treaty with Tuvalu, originally	28 U.S.T. 227; 32 U.S.T. 1310	Jan. 21, 1977; Apr. 25, 1980		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
signed with the United Kingdom				
Extradition Treaty with the United Kingdom of Great Britian and Northern Ireland; Instrument Amending the Treaty of March 31, 2003 Between the U.K. and Northern Ireland	T.I.A.S. 07-426; T.I.A.S. 10-201.23	Apr. 26, 2007; Feb. 1, 2010	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Uruguay	T.I.A.S. 10850	Apr. 11, 1984	Art. 5(1)	Extradition shall not be granted in any of the following circumstances: 1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.
Extradition Treaty with Zambia, originally signed with the United Kingdom	47 Stat. 2122	June 24, 1935		U.K. Treaty language

Country	Citation/ TIAS	Entry into Force	Article/ Section	Language
Extradition Treaty with Zimbabwe	T.I.A.S. 00-426	Apr. 26, 2000	Art. 5(1)	Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offence for which extradition is requested. criminal proceedings against the person sought.