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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOHN DOE, aka Robert Borko, ALEKSANDRS HOHOLKO, JEVGENIJS KUZMENKO, and VITALIJS DROZDOVS,** **Defendants.**	**CR 08-33-GF-CCL** **UNITED STATES' RESPONSE TO DEFENDANTS' FIRST AND SECOND MOTIONS TO DISMISS**

The United States, by and through its counsel, Ryan M. Archer, Assistant United States Attorney, hereby files this response to JEVGENIJS KUZMENKO's ("Kuzmenko") first and second motions to dismiss. This response addresses the arguments raised by Kuzmenko, but applies to all the defendants collectively since they joined the motions to dismiss.

As detailed below, the defendants lack standing to challenge dual criminality and other procedural requirements of the extradition treaty between the United States and the Netherlands. In any case, the Dutch fully complied with dual criminality requirements. Defendants also cannot claim that detention in the Netherlands violated due process because that constitutional provision does not apply to foreign governments applying their own laws. Finally, defendants claim there is not probable cause supporting the charges in the Indictment, but since the Indictment is valid on its face, the defendants cannot challenge the grand jury's determination.

Background

A. The Offense

Between December 20, 2007, and January 11, 2008, John Doe, aka Robert Borko, engaged in a series of unauthorized intrusions into the D.A. Davidson ("Davidson") computer system and stole account information of 220,000 client files. Borko demanded $80,000 in exchange for disclosing security vulnerabilities to Davidson and destroying any confidential information stolen from the computer system.

Davidson contacted law enforcement and notified the United States Secret Service of the breach. The Secret Service worked with Davidson to "negotiate" with Borko and determine his identity and location. From February 8, 2008, to February 18, 2008, the Secret Service corresponded with Borko to set up delivery of the demanded money to the Netherlands through Western Union transfers. Borko specifically identified Hoholko and Kuzmenko as individuals who would pick up these money transfers.

In subsequent correspondence Borko designated Kuzmenko as the individual who would pick up a Western Union transfer in the

Netherlands on February 14, 2008. *See* Def.'s Exhibit 1 at 2-3.[1] Secret Service agents wired the money to the Netherland's in Kuzmenko's name, but placed a "suspend/hold" order on the transfer so the money would not actually be disbursed. Although someone with knowledge of the wire transfer sent to Kuzmenko inquired about the availability of the money on February 14, 2008, it was never picked up. *Id*. at 18-19.

The next day, a second wire of $1,500 was sent to the Netherlands and picked up by Hoholko who provided Western Union with his Latvian passport for identification. On February 18, 2008, Hoholko attempted to pick up another transfer in Einhoven, Netherlands. Agents of the Netherlands High Tech Crime Unit saw Hoholko attempting to pick up the money and arrested him. They also arrested Drozdovs, who drove Hoholko to pick up the transfer. A gun and money transfer receipts were found in the car, and Kuzmenko was arrested in the apartment where Drozdovs and Hoholko were staying. Drozdovs' cellular telephone was seized and contained a text message referring to

[1] Defendant's Exhibit 1 is the United States' request for extradition and is filed under seal at clerk's docket 32, Kuzmenko's Memorandum in Support of Motion to Vacate Trial Schedule.

one of the transfers from Davidson to the Netherlands. *Id*. at 3. Each of the defendants made a statement in interviews with Dutch police.

B. The Extradition Proceedings

All three defendants were arrested on Dutch charges on February 18, 2008. The next day, Judge Strong signed a complaint and arrest warrant for the defendants, and the United States requested a provisional arrest warrant under Article II of the extradition treaty between the United States and the Netherlands. Gov. Exhibit 1. The Dutch received the request on February 20, 2008, dismissed local charges and held the defendants in custody pending extradition proceedings. All three defendants are citizens of Latvia.

A Montana grand jury Indicted the defendants a month later in a five count Indictment in this case. In Counts I, II and V, the Indictment charged the three Latvians with conspiracy, aiding and abetting extortion, and receiving money obtained by extortion. An arrest warrant for defendants was issued on March 20, 2008, specifying the three charged offenses. *See* Def.'s Exhibit 1 at bates # 361. Shortly after the Indictment was filed, the United States submitted an extradition request to the Netherlands which included the Indictment,

arrest warrant, affidavits of AUSA Michael Lahr and Special Agent Brian O'Neil, and the statutory language of the charged offenses. Def.'s Exhibit 1.

The defendants challenged their extradition at various levels in the Dutch legal system. The Dutch Minister of Justice authorized final extradition in an order dated April 14, 2009. As is clear from the decision, a Dutch court authorized extradition on the Indictment on August 11, 2008. Kuzmenko appealed to the Supreme Court which authorized extradition on March 3, 2009. *See* Gov. Exhibit 2 and Exhibit 3 at 2 (§ 3.1 and 3.3).[2] Even after this final decision, Kuzmenko's counsel "announced that interlocutory proceedings will be started," which further delayed the extradition. Gov. Exhibit 2 at 1.[3]

Section 4 of the Minister of Justice's final decision addresses some

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[2] Government's Exhibit 2 comprises two diplomatic letters from the Netherlands granting extradition of Kuzmenko et al., along with the final decision in Dutch. Exhibit 3 is a rough, uncertified translation of the Dutch extradition decision. The government apologizes for the absence of a certified translation, but the undersigned contacted Kuzmenko's counsel on December 18, 2009, and January 28, 2010, to offer assistance in obtaining whatever Dutch documents were required. No response was provided to the inquiries and it was not until the current motions were filed that the government became aware that Kuzmenko was claiming that he had insufficient documentary evidence regarding the extradition decisions. A certified translation would require time in excess of the motions response deadline.

[3] The extradition decision references only Kuzmenko, but identical decisions exist for Drozdovs and Hoholko.

of Kuzmenko's challenges to the extradition. In section 4.1, Kuzmenko challenged extradition under Article 9, paragraph 3(b) of the Treaty. Gov. Exhibit 3 at 2. That paragraph states that an extradition request must provide evidence, "according to the law of the Requested State, [that] would justify that person's arrest and committal for trial if the offense had been committed there." Gov. Exhibit 5 at 7. The extradition decision explains that the Dutch court in Rotterdam ruled that the documents met the requirements of this section. Gov. Exhibit 3 at 2. In the end, the Minister of Justice authorized extradition for prosecution on the offenses listed in the March 20, 2008, arrest warrant "insofar as those facts relate to the period of March 8, 2002, [ ] and in mid 2006." Gov. Exhibit 3 at 4.

Significantly, the acts in this case that are charged in the Indictment occurred in 2007 and 2008. The Department of Justice did not possess the Dutch decision until it became an issue in these motions. Upon discovering this error, the Dutch Ministry of Justice was contacted and issued a letter explaining that the dates of March 8, 2002, until mid 2006 was "mistakenly part of the decision." Gov. Exhibit 4. The Ministry of Justice clarified that "The extradition is

allowed – also by the Court en Supreme Court – for all the counts in the indictment." *Id.*

Argument

I. Defendants have no standing to assert non-compliance with extradition treaty requirements that could have been asserted by the Netherlands.

Kuzmenko argues that since the government chose to invoke the extradition treaty between the United States and the Netherlands "Plaintiff must follow the terms of the Treaty . . . and prove that it has done so." Def.'s Br. at 12. He claims that this Court should dismiss the case for lack of personal jurisdiction since the government has not proved a finding of "dual criminality," and failed to list the extraterritorial nature of the charged offenses as required by the treaty. Def.'s Br. at 7-12.

Defendants' arguments fail to accord with basic precepts of personal jurisdiction and international law. The purpose of an extradition treaty is to bind "two countries to surrender fugitives to one another under certain circumstances." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986). The treaty "does not purport to limit the discretion of the two sovereigns to surrender fugitives for reasons of

comity, prudence, or even as a whim. Nor does it purport to describe the procedural requirements for extradition incumbent on the rendering country." *Id.*

It is also well established that "[p]ersonal presence of a defendant before a district court gives that court jurisdiction over him regardless of how his presence was secured." *United States v. Zammiello*, 432 F.2d 72, 72 (9th Cir. 1970). This principle is embodied in international law through the "Ker-Frisbie" doctrine which "establishes that the means by which a defendant is brought within [the court's] jurisdiction does not affect a state's power to bring him to trial." *United States v. Valot*, 625 F.2d 308, 309 (9th Cir. 1980) (citing *Frisbie v. Collins*, 342 U.S. 519 (1952) and *Ker v. Illinois*, 119 U.S. 436 (1886)).

In contradiction to these principles, Kuzmenko cites *United States v. Rauscher*, 119 U.S. 407 (1886) (decided on the same day as *Ker*) for the proposition that "A defendant may not be prosecuted in the United States in violation of the terms of an extradition treaty." Def.'s Br. at 11. But *Rauscher* has not been read so broadly by the Ninth Circuit.

Instead, in the Ninth Circuit an individual has no standing to assert the rights and provisions of an extradition treaty that could have

been asserted by the extraditing country. In *United States v. Antonakeas*, the defendant objected to the district court's jurisdiction because the in the process of his extradition from Germany a deadline listed in the treaty was violated. 255 F.3d 714, 718 & n.3 (9th Cir. 2001). The Court discussed *Rauscher*, explaining that it "recognized the right of a person extradited to enforce what has become known as a 'specialty' provision in a treaty – a requirement that the receiving country may proceed against the person extradited only for offenses that are enumerated in the treaty and upon which extradition actually rested." *Id.* at 719. But *Antonakeas* distinguished *Rauscher* and concluded that "unlike the substantive right of specialty, procedural violations do not give rise to individually enforceable rights." *Id.* at 720.

The Court reasoned that a defendant could raise a specialty treaty violation because the extraditing country would have no recourse to raise a claim that United States courts were prosecuting a defendant for offenses not listed in the extradition. But foreign authorities could have refused extradition on other alleged violations of the treaty, such as a blown deadline or other procedural violations. The Court

concluded that once Germany determined that the treaty provisions were fulfilled and extradition was proper, "there is no policy reason to accord . . . standing to raise" a missed extradition deadline. *Id.*

Additional Ninth Circuit cases have acknowledged that extradition treaties do not accord defendants individually enforceable rights outside of a "specialty" argument. In *United States v. Merit*, the Court explained that "[e]xtradition arrangements serve primarily to protect the interests of the requesting and asylum states, not the interests of the extraditee." 962 F.2d 917, 920 (9th Cir. 1992). The Court went on to quote a distinguished international law treatise, noting that "There is no case known to this writer anywhere in the world where a claim made in the requesting state by an extradited person after his return that such requirements have been violated in the requested state has resulted in a ruling in favor of the extraditee (and which would have resulted in the invalidation of the extradition and the release of the returned claimant)." *Id.* at 920 n.2 (quoting M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 319-20 (2d ed. 1987)); *see also Valot*, 625 F.2d at 310 (explaining that "even where a treaty provides certain benefits for

nationals of a particular state . . . individual rights are only derivative through the states." (internal quotations and citations omitted)).

In this case defendants have no standing to assert their alleged treaty violations in this Court. First, Kuzmenko asserts there was no finding by a Dutch court concerning the dual criminality of offenses in this case. Def.'s Br. at 7. This is clearly an alleged procedural violation of the treaty because the Netherlands was obviously in a position to write as much or as little as it desired to satisfy itself of the dual criminality requirement. Because the Netherlands extradited defendants, even if they failed to make a specific finding of dual criminality, it would be a procedural issue that defendants lack standing to raise under *Antonakeas*.

Likewise, Kuzmenko's argument that the extradition request failed to list the "extraterritorial" applicability of the charged offenses is merely a procedural violation that the Dutch could have asserted if they did not assent to extradition on those grounds. Again, *Antonakeas* bars defendants' standing on this issue.

The only possible remaining "substantive" claim made by Kuzmenko regards dual criminality itself. Although unclear, it appears

that Kuzmenko may also be arguing that the United States has a duty to establish dual criminality in this Court by citing to a foreign statute punishable by a year or more imprisonment. Def.'s Br. at 8. But the United States has no such obligation since the Dutch already satisfied themselves that extradition was proper.

Once more, under *Antonakeas* the Dutch could have refused to extradite on grounds of dual criminality. Since they are not now objecting, and recently confirmed that defendants are extradited on the charges in the Indictment (Gov. Ex. 4), defendants should not have standing to challenge that decision in this Court. Moreover, in *United States v. Van Cauwenberghe*, the Ninth Circuit followed the Third Circuit in holding that *Johnson v. Browne*, 205 U.S. 309 (1907) "precludes any review" of a foreign "court's decision as to the extraditable nature of the offense. . . ." 827 F.2d 424, 429 (9th Cir. 1987). Under *Van Cauwenberghe*, this Court has no authority to review the Dutch decision that the charged offenses are extraditable.

In conclusion, this Court has personal jurisdiction over the defendants because they are now personally before the court. Defendants do not allege any violation of "specialty" under *Rauscher*,

and lack standing to challenge procedural violations of the treaty under *Antonakeas*. And finally, review of a foreign court's decision as to the extraditable nature of the offense, such as dual criminality, is precluded by *Van Cauwenberghe*.

II. Even if defendants had standing to assert individual rights under the extradition treaty, dual criminality is established in this case.

"Under the principle of dual criminality, an extraditee is subject to extradition only for those offenses that are crimes in both the requesting and asylum countries." *Merit*, 962 F.2d at 921. As Kuzmenko notes, dual criminality is embodied in Article 2, sections 1 and 2, and Article 9 section 3(b), of the extradition treaty between the Netherlands and United States. *See* Gov. Exhibit 5 at 4, 7.

Dual criminality is established if the charged offenses are listed in the treaty's schedule of offenses. In *Oen Yin-Choy v. United States*, the petitioner claimed that the charged offenses failed to satisfy the dual criminality requirement. 858 F.2d 1400, 1404 (9th Cir. 1988). The Ninth Circuit held that the charged offenses "are listed in the schedule of offenses referred to in Article III of the Treaty. Thus, the Treaty

specifically refers to the offenses with which Oen is charged, and the requirement of dual criminality is met." *Id*. at 1405.

Dual criminality is established if a foreign court concludes that there is sufficient evidence to put the defendant on trial had the offense been committed in that country. In *Merit*, the defendant claimed that South Africa failed to make a dual criminality determination. While South Africa never identified a specific comparable crime, it did conclude that a prima facie case had been made for two counts in the indictment and determined that "there was sufficient evidence to put Merit on trial had the offense been committed in the Republic." *Merit*, 962 F.2d at 922. The Ninth Circuit held that the South African court's analysis that the crime would be similarly charged in South African courts fully complied with dual criminality. *Id*.[4]

In this case, dual criminality is established because: (1) the extradition treaty specifically includes the charged offenses; and (2) the Dutch court concluded that a prima facie case had been established.

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[4] It should be noted that *Merit* was decided prior to *Antonakeas* which clarified that defendants lack standing to raise procedural violations of a treaty. Thus, under current law as discussed above, there should be no standing to raise the argument that the extraditing country failed to make a proper dual criminality determination.

Defendants are charged with conspiracy (Count I), extortion (Count II), and receiving money obtained from extortion (Count V). The schedule of offenses listed in the Dutch extradition treaty specifically include extortion and "receiving, possessing or transporting anything of value knowing it to have been unlawfully obtained." Gov. Exhibit at 12 (offense numbers 12 and 13). While conspiracy is not listed separately, the conspiracy charge here is derivative of the charges for extortion and receipt of extorted money. Under *Oen Yin-Choy*, this is sufficient to establish dual criminality.

The Dutch court also specifically concluded that the facts in the extradition request satisfied Article 9, paragraph 3(b) of the treaty. Gov. Exhibit 3 at 2 (section 4.1). That section of the treaty requires the Netherlands to "justify that person's arrest and committal for trial if the offenses had been committed there . . ." Gov. Exhibit 5 at 7. In finding that this section of the treaty had been satisfied, the Dutch concluded that there was sufficient evidence to try the defendants in the Netherlands, and under *Merit* this sufficiently satisfies the dual criminality requirement.

In sum, even if defendants had standing to challenge dual criminality, it is clear that the Dutch courts made an adequate finding supported by the schedule of offenses in the treaty.

III. Kuzmenko's detention throughout extradition proceedings does not violate Due Process because that constitutional right does not apply to the acts of a foreign government.

Kuzmenko makes several allegations concerning his prolonged pretrial detention. He claims that his 24 month pretrial detention violates constitutional due process rights, and cites several European opinions for the proposition that his detention was excessive under European legal principles. Def.'s Br. at 13-14. But if Kuzmenko felt that his detention in the Netherlands violated European legal principles, he should have raised those issues in Europe. Those principles have no bearing or precedential value on the present posture of this case.

The only issue before this Court regarding defendants' pretrial detention is whether it violated Due Process under the United States Constitution and/or the Bail Reform Act. In this regard, defendants first appeared in this Court on October 26, 2009. They have been

detained here for about four months. During that time no defendant has requested a detention hearing. All defendants agreed to a continuance. It is disingenuous for defendants to now claim that their detention in the United States contributed to a violation of due process rights when they have not even requested the process that was due by way of a detention hearing. Moreover, defendants are only paroled into the United States for purposes of prosecution, and have no ties to the community or means of livelihood here. *See United States v. Townsend*, 897 F.2d 989, 996 (9th Cir. 1990) (explaining that the lack of defendants' ties to the United States supported detention).

So defendants' only real argument is that their 20 month detention pending extradition in the Netherlands violated due process in the United States. Unfortunately, constitutional due process does not apply to acts of foreign governments. In *Wentz v. United States*, the defendant argued that the court lacked jurisdiction because he was denied an attorney in Mexico and had no proceedings there before being turned over to the United States. 244 F.2d 172, 176 (9th Cir. 1957). The Ninth Circuit explained that since defendant did not allege any action by officers of the United States the argument would have to be

that "the defendant was denied 'due process' in Mexico by Mexicans." *Id.* The Court held that such a claim "is no legal concern of an American court." *Id.*

This conclusion is based on the principles of comity underlying treaties with foreign nations. In *Sahagian v. United States*, an American citizen detained in Spain under an extradition treaty sued federal officials for violating his constitutional rights. 864 F.2d 509 (7th Cir. 1988). The Seventh Circuit explained that the United States does not have the right or "power to insist that the Spanish courts comply with the United States' laws concerning extradition proceedings or criminal procedure." *Id.* at 514. In other words:

> it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based.

Id. The Court went on to explain that such comity applied to "cases where a person claims to have been denied constitutional rights in a foreign extradition proceeding." The Court ultimately held that "merely detaining an individual pending his extradition to the United States" simply does not present a case where due process can be

applied to acts of a foreign government. *Id.*; *see also United States v. Lira*, 515 F.2d 68, 71 (2d Cir. 1975) (explaining that the "DEA can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards.").

Here, the defendants were arrested on Dutch charges on February 18, 2008. Local charges were dropped and they were held pending extradition since February 20, 2008. The first Dutch ruling held them extraditable in August 2008. Defendants decided to appeal that ruling, and received a second ruling in March 2009. Gov. Exhibit 3 at 2. They then initiated "interlocutory proceedings" until ultimately extradited. Gov. Exhibit 2 at 1-2. Defendants make no claim that an officer of the United States caused their detention in the Netherlands at any time, or that the Dutch engaged in any action that "shocks the conscience." Indeed, much of their detention was self-wrought since they continued to appeal extradition decisions while remaining in custody. As in *Wentz* and *Sahagian*, the fact that the Dutch detained defendants pending extradition is no legal concern of American courts.

IV. Defendants are barred from challenging the adequacy of the evidence supporting an indictment returned by a legally constituted grand jury.

In Kuzmenko's second motion to dismiss, he claims that the charges in the Indictment against him should be dismissed because they are not supported by probable cause. Def.'s Memorandum in Support of Second Motion to Dismiss at 5-8. Kuzmenko's argument fails because it runs contrary to the entire history and purpose of our grand jury system.

"An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). In holding that the Grand jury could rely on hearsay testimony, *Costello* held that if "indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed." *Id.* The Court held that such a result would require a "kind of preliminary trial to determine the competency and adequacy of the evidence" which is not required by the Fifth Amendment. *Id.* *Costello* further held that allowing indictments to be challenged on the ground that they are not

supported by adequate or competent evidence "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries . . . ." *Id.* at 364.

Following *Costello*, the Supreme Court more recently decided *United States v. Williams*, 504 U.S. 36 (1992). In *Williams* the Court explained that motions to "quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England." *Id.* at 53. And the American tradition is that there is no "authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof. . . ." *Id.* at 54; *see also Reyes v. United States*, 417 F.2d 916, 919 (9th Cir. 1969) (holding that it has been "repeatedly stated and well established that an indictment cannot be attacked on the ground that the evidence before the grand jury was incompetent or inadequate.").

Here, the Indictment against Kuzmenko and his co-defendants was returned on March 20, 2008, by a legally constituted and unbiased grand jury. Defendants have made no allegations of any impropriety in the grand jury proceedings, nor could they. Thus, the Indictment is

valid on its face and the Supreme Court has refused to allow challenges to the adequacy and competency of the evidence at this stage in the proceedings.

The Supreme Court's concern that preliminary trials would ensue if such a challenge were allowed is confirmed by the facts of this case. The government has disclosed over 2500 pages of discovery, including technical reports and foreign documents. Multiple search warrants were issued, physical evidence was seized, foreign witnesses were developed and defendants' statements were recorded. To present a full probable cause hearing would be a trial unto itself. *Costello* and *Williams* clearly bar such challenges to a lawful Indictment returned by the grand jury, and Kuzmenko's motion to dismiss on these grounds should be denied.

Conclusion

For the foregoing reasons, Kuzmenko's first and second motions to dismiss should be denied. To the extent Hoholko and Drozdovs joined these motions, they should be denied as well.

DATED this 19th Day of February 2010,

MICHAEL W. COTTER
United States Attorney,

/s/ Ryan M. Archer
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response Memorandum is in compliance with Local Rule 7.1(d)(2). This brief is double spaced with 14 point font and contains less than 6500 words.

DATED this 19th day of February 2010,

MICHAEL W. COTTER
United States Attorney,

/s/ Ryan M. Archer
Assistant U.S. Attorney

U.S. Department of Justice

Criminal Division

MEW:SCR:KH:JHF:JMB:jmb
95-100-

Washington, D.C. 20005

February 19, 2008

URGENT

VIA E-MAIL

Mr. M.E. Coffeng
Chief
Office of International Assistance
in Criminal Matters
Legal and Operational Affairs Department
Ministerie van Justitie
Schedeldoekshaven 100
2511 EX Den Haag
The Netherlands

Dear Mr. Coffeng:

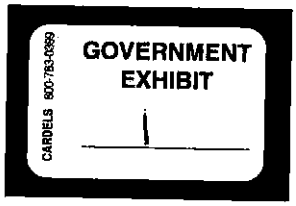
Re: Request to the Netherlands for the Provisional Arrest with a view toward Extradition of Jevgenijs KUZMENKO

Dear Mr. Coffeng:

Pursuant to Article 11 of the extradition treaty between the United States and the Netherlands, the United States requests the provisional arrest with a view toward extradition of Jevgenijs Kuzmenko in the Netherlands. We also request that, pursuant to Article 17 of the treaty, any items in the fugitive's possession at the time of his arrest which may serve as evidence of the offenses be seized and surrendered at the time of extradition.

Pertinent descriptive information for Jevgenijs Kuzmenko is as follows:

Citizenship:	Latvian
Date of Birth:	November 5, 1983
Place of Birth:	Riga, Latvia
Race/Sex:	White/Male
Height:	190 centimeters
Weight:	-
Hair Color:	-
Eye Color:	-
Passport:	Latvia - number LZ2113135, issued on August 15, 2005
Location:	In custody in the Netherlands



Statement of the Facts:

Between December 20, 2007 and January 11, 2008, a person who later identified himself as "Robert," gained unauthorized access to the computer servers of a company in Montana (U.S.) and successfully copied and exfiltrated detailed personal and financial information on 360,000 clients and former clients of the victim company, a financial services company in Great Falls, Montana (the "Victim"). (In subsequent e-mails, Robert admitted to these actions.) To support his claim of having committed this theft (using a SQL server injection attack) of the Victim's database, Robert provided the Victim with a file containing records on 20,000 of Victim's customers, including their personal and financial information. Subsequent forensic examination verified that 360,000 clients' personal information had, in fact, been stolen. The Victim thereafter contacted the U.S. Secret Service ("USSS") and the USSS, through the Victim, began corresponding with Robert via e-mail. Robert has demanded $80,000 from the Victim in exchange for: 1) disclosing to the Victim the server vulnerabilities he exploited; and 2) allegedly deleting the stolen client information.

On February 8, 2008, Robert sent the Victim an e-mail in which he named two individuals to whom the extortionate funds were to be paid. Specifically, Robert demanded that the monies be sent via Western Union ("WU") to "Evgenijs Kuzmenko" and "Aleksandrs Hoholko." Pursuant to these payment instructions, USSS Agents sent a WU transfer to Kuzmenko on February 13, 2008, through the Victim. The transfer was constructed in such a way that the money would not be disbursed. Kuzmenko made an attempt to pick up the money and failed. As a result, Robert contacted the Victim for an explanation. At that time, the Victim agreed to make further transfers, but to the other individual named in the instructions, i.e., Hoholko.

On February 15, 2008, USSS Agents sent a WU transfer to Hoholko, as directed by Robert. The transfer amount was $1,500. According to Western Union's records, the money was picked up on February 16, 2008. Dutch law enforcement authorities, having been previously contacted by USSS, went to the Western Union location where the money was picked up and obtained a photo copy of the Latvian passport used by Hoholko when picking up the money.

On February 18, 2008, USSS Agents sent Hoholko a second WU transfer, as directed by Robert. This time, the transfer was again constructed in such a way that the money would not be disbursed. Upon Hoholko's attempt to obtain the funds, he was

arrested by Dutch police and they determined that Hoholko matched the photograph obtained by the Dutch police from the February 16 pick-up. The person who had driven Hoholko to the Western Union location, Vitalis Drozdovs, was also arrested. An address was obtained for the two individuals upon their arrest. When police went to that address, they found Kuzmenko and arrested him as well.

Complaint and Warrant Information:

Jevgenijs Kuzmenko is the subject of a complaint, number MJ-08-15-GF-RKS, filed on February 19, 2008, in the United States District Court for the District of Montana, Great Falls Division. This complaint charges Jevgenijs Kuzmenko with the following offenses:

1. one (1) count of conspiracy to communicate extortionate threats, in violation of Title 18, Sections 371 and 875(d) of the United States Code; and

2. one (1) count of receiving the proceeds of extortion, in violation of Title 18, Sections 371 and 880 of the United States Code.

Based on this complaint, United States Magistrate Judge Keith Strong of the United States District Court for the District of Montana, issued a warrant, number MJ-08-15-GF-RKS, for the arrest of Jevgenijs Kuzmenko on February 19, 2008.

Treaty Citations:

Provisional arrest is covered by Article 11 of the extradition treaty between the Netherlands and the United States.

The offenses with which Jevgenijs Kuzmenko is charged are covered by Article 2(1) of the extradition treaty, and Items 12 and 13 of the Schedule of Offenses annexed to the treaty. All charges were brought within the time allowed by the applicable U.S. statute of limitations.

Assurances:

The United States will submit a formal request for the extradition of Jevgenijs Kuzmenko, supported by the documents required under the treaty, within the time specified by the treaty.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me at (202) 514-0951, or Jonathan Breyan, the paralegal assigned, at (202) 514-6188.

Sincerely,

Mary Ellen Warlow
Director
Office of International Affairs
Criminal Division

By: Judith H. Friedman

Judith H. Friedman
Senior Trial Attorney

cc: Michel Guilani, L/LEI, DOS
Ruud Hooijkaas /Susan Garro, U.S. Embassy, The Hague

Consular Affairs Department
Legal Consular Affairs Division
CJ/AH – 09/258

The Ministry of Foreign Affairs presents its compliments to the Embassy of the United States of America and, with reference to the latter's Note no. 53/08 of 18 April 2008, has the honour to inform the Embassy that the request for the extradition of Jevgenijs Kuzmenko has been honoured. A copy of the decision is enclosed.

Counsel announced that interlocutory proceedings will be started. If a writ will be handed over very soon, Mr Kuzmenko will be permitted to stay in the Netherlands for the duration of the proceeding up until the sentencing in first instance. Actual extradition will be suspended until after such interlocutory proceedings.

As soon as the surrender has taken place, a final dispatch will be forwarded stating the length of time Mr Kuzmenko was kept in detention awaiting his extradition.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy the assurances of its highest consideration.

The Hague, 21 April 2009

MINISTRY OF FOREIGN AFFAIRS

To the Embassy of the United States of America
The Hague

GOVERNMENT EXHIBIT
2

CARDELS 800-733-0099

Legal Affairs Department
Civil Law Division
CR/AH – 09/736

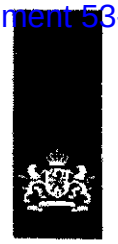
The Ministry of Foreign Affairs presents its compliments to the Embassy of the United States of America and, with reference to the latter's Notes no. 51, 52, 53/08 of 18 April 2008, has the honour to inform the Embassy that the requests for the extradition of Vitalis Drozdovs, Alexander Hoholka, Jevgenijs Kuzmenko, have been honoured. Copies of the decisions are enclosed.

Surrenders have already taken place. A final dispatch will be forwarded as soon as possible stating the length of time Vitalis Drozdovs, Alexander Hoholka and Jevgenijs Kuzmenko were kept in detention awaiting their extradition.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

The Hague, 11 November 2009

To the Embassy of the United States of America
The Hague



Directie Juridische en Operationele Aangelegenheden
Afdeling Internationale Rechtshulp in Strafzaken
UTL-I-2008008505

BESCHIKKING

van de Minister van Justitie op het verzoek van de Verenigde Staten van Amerika tot uitlevering van **Jevgenijs KUZMENKO**, geboren op 5 september 1983 te Riga (Letland), thans gedetineerd in de penitentiaire inrichting Midden-Nederland, De Geniepoort te Alphen aan den Rijn.

1. Het verzoek

1.1 Bij nota van 18 april 2008, nummer 53/08, heeft de Amerikaanse ambassade namens de Verenigde Staten van Amerika om uitlevering van de opgeëiste persoon verzocht.

1.2 Bij het onder 1.1 genoemde verzoek was onder meer gevoegd:
A. een aanhoudingsbevel van het 'United States District Court District of Montana, Great Falls Division' van 20 maart 2008;
B. een aanklacht van het 'United States District Court for the District of Montana Great Falls Division', nummer CR 08-33-GF-SEH, van 20 maart 2008, met daarin een uiteenzetting van de feiten waarvoor de uitlevering wordt verzocht;
C. een beëdigde verklaring van Michael Lahr, 'Assistant United States Attorney' in dienst van het United States District Court for the District of Montana, van 28 maart 2008, inhoudende een nadere uiteenzetting van de feiten waarvoor de uitlevering wordt verzocht;
D. een beëdigde verklaring van Brian O'Neil, speciaal agent in dienst van 'United States Secret Service' van 21 maart 2008, eveneens inhoudende een uiteenzetting van de feiten waarvoor de uitlevering wordt verzocht;
E. een overzicht van de toepasselijke wetsbepalingen.

2. Het toepasselijke recht

2.1 Van toepassing is het Uitleveringsverdrag tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika (Trb. 1980, 111 en 1983, 133), hierna te noemen het Uitleveringsverdrag.

2.2 Tevens is van toepassing de Uitleveringswet (Wet van 9 maart 1967, Stb. 139).

3. De rechterlijke procedure

3.1 De rechtbank te Rotterdam heeft bij haar uitspraak van 11 augustus 2008, onder parketnummer: 10/600033-08, de uitlevering van de opgeëiste persoon toelaatbaar verklaard ter strafvervolging van de feiten, zoals hiervoor vermeld onder 1.2 sub B.
De opgeëiste persoon heeft tegen deze uitspraak beroep in cassatie ingesteld.

3.2 De rechtbank te Rotterdam heeft bij haar advies van 11 augustus 2008 geadviseerd de gevraagde uitlevering van de opgeëiste persoon toe te staan.

3.3 De Hoge Raad heeft bij zijn arrest van 3 maart 2009, kenmerk: S 08/03890, het beroep van de opgeëiste persoon verworpen.

4. De beoordeling

4.1 Bij brief van 1 april 2009 aan het Ministerie van Justitie heeft de raadsman namens de opgeëiste persoon gesteld dat — kort gezegd — bewijsmateriaal waarmee de dagvaarding van de opgeëiste persoon zou worden gerechtvaardigd ontbreekt.

Ingevolge artikel 9 lid 3 onder b. van het Verdrag dient een marginale toets plaats te vinden of het overgelegde bewijsmateriaal ter aanhouding en dagvaarding op zichzelf voldoende is om een aanhouding in de aangezochte staat, in casu Nederland, te rechtvaardigen. Ingevolge artikel 28 Uitleveringswet komt dit oordeel toe aan de rechtbank. In dat kader heeft de rechtbank te Rotterdam geoordeeld dat de stukken voldoen aan de eisen van artikel 18 van de Uitleveringswet en artikel 9, tweede en derde lid van het Verdrag.

Gelet op het voorgaande en in aanmerking genomen de ter beschikking zijnde informatie acht de Minister van Justitie zich gehouden afwijzend op onderhavig verweer te beslissen.

4.2 Voorts verzoekt de raadsman van de opgeëiste persoon tot vervolging in Nederland in plaats van uitlevering. In dat kader wordt als volgt overwogen.

In artikel 1 van het Uitleveringsverdrag is de verplichting neergelegd om personen aan elkaar uit te leveren. Uitlevering kan slechts worden geweigerd indien sprake is van een in het Uitleveringsverdrag genoemde weigeringsgrond. Het Uitleveringsverdrag voorziet, anders dan het Europees Uitleveringsverdrag, niet in de mogelijkheid de uitlevering te weigeren om reden dat de feiten zich (gedeeltelijk) op het grondgebied van de aangezochte staat hebben afgespeeld. Artikel 5 van het Uitleveringsverdrag vermeldt weliswaar de mogelijkheid om de uitlevering te weigeren op grond van een vervolging door de aangezochte staat wegens dezelfde feiten als waarvoor de uitlevering wordt gevraagd, doch deze weigeringsgrond ziet op de situatie dat in de aangezochte staat ter zake van de feiten waarvoor de uitlevering wordt

verzocht reeds een vervolging gaande is. In de toelichtende nota op het Uitleveringsverdrag wordt daarbij verwezen naar de situatie voorzien in artikel 9 lid 1 onder a van de Uitleveringswet. Artikel 5 van het Uitleveringsverdrag biedt de aangezochte staat dus niet de mogelijkheid de uitlevering te weigeren om vervolgens zelf een vervolging wegens de feiten waarvoor de uitlevering wordt verzocht te starten.

Het voorgaande in overweging nemende komt de Minister van Justitie tot de conclusie dat gelet op de bepalingen in het Uitleveringsverdrag, vervolging van de opgeëiste persoon in de Verenigde Staten de voorkeur heeft.

4.3 Verder beroept de raadsman van de opgeëiste persoon zich op een dreigende schending van artikel 6 EVRM, wegens het systeem van plea bargaining, waardoor volgens de raadsman verdachten worden gedwongen tot het bekennen van schuld.

Hierbij overweegt de Minister dat in het bijzonder van belang is dat er geenszins een verplichting bestaat een plea-bargain te accepteren. Daarnaast is door de raadsman niet aannemelijk gemaakt dat het na uitlevering eventueel aan de opgeëiste persoon aan te bieden voorstel tot plea-bargaining onredelijke en/of onevenredige gevolgen voor de opgeëiste persoon zal hebben, die het risico van een flagrante schending van artikel 6 van het EVRM met zich meebrengt. Niet kan worden gesteld dat het systeem van plea-bargaining in het algemeen strijdig is met de onder andere in artikel 6 EVRM en artikel 14 IVBPR neergelegde onschuldpresumptie (vgl. Rb Den Haag, 22 december 2005, LJN AU8586).

De Verenigde Staten van Amerika zijn partij bij het Internationale verdrag inzake burgerrechten en politieke rechten (Trb. 1969, 99), zodat kan worden uitgegaan van een eerlijke berechting. De Minister is daarnaast ook overigens niet gebleken van een aanleiding om vertrouwen in de procesgang binnen de Verenigde Staten van Amerika niet langer op zijn plaats te achten.

Het verweer van de raadsman dient derhalve te worden verworpen.

4.4 De raadsman beroept zich op een dreigende (flagrante) schending van artikel 3 van het EVRM. De Verenigde Staten van Amerika zijn partij bij het Internationale verdrag inzake burgerrechten en politieke rechten (Trb. 1969, 99), zodat alleen daarom al kan worden uitgegaan dat de Verenigde Staten van Amerika de daaruit voortvloeiende rechten en verplichtingen -daaronder begrepen het recht op een behandeling vrij van foltering, dan wel een onmenselijke, wrede of vernederende behandeling of bestraffing (art. 7 IVPBR)- jegens de opgeëiste persoon zullen eerbiedigen .

De opgeëiste persoon heeft evenmin aannemelijk kunnen maken dat de individuele omstandigheden in zijn geval een wezenlijk andere behandeling met zich mee kunnen brengen en wel in zodanige zin dat er daadwerkelijk concrete redenen aanwijsbaar zijn dat juist hij ten gevolge van de uitlevering het reële risico loopt te worden onderworpen aan foltering dan wel een onmenselijke of vernederende behandeling.

Het verweer van de raadsman dient derhalve te worden verworpen.

4.5 De raadsman beroept zich tevens op een dreigende (flagrante) schending van artikel 5 EVRM. De raadsman heeft onvoldoende aannemelijk gemaakt dat er sprake zou zijn van een onrechtmatige vrijheidsbeneming.

Het verweer van de raadsman dient derhalve te worden verworpen.

4.5 Tot slot stelt de raadsman dat de medische situatie van Kuzmenko van dien aard is dat gevreesd moet worden dat gebrek aan medische zorg en faciliteiten hem in levensgevaar kunnen brengen.

De Minister zal de autoriteiten van de Verenigde Staten -alvorens hem uit te leveren- van de medische toestand van opgeëiste persoon op de hoogte stellen, met het verzoek voor de benodigde behandeling van de opgeëiste persoon zorg te dragen.

4.6 Door of namens de opgeëiste persoon zijn ook overigens geen feiten of omstandigheden aangevoerd op grond waarvan de uitlevering zou moeten worden geweigerd, noch is daarvan anderszins sprake.

5. <u>De beslissing</u>

De Minister van Justitie besluit:

de uitlevering **toe te staan** ter fine van strafvervolging ter zake van de verdenking dat hij zich schuldig heeft gemaakt aan de feiten zoals genoemd in het onder 1.2 sub A genoemde bevel tot aanhouding, voor zover die feiten betrekking hebben op de periode van 8 maart 2002 tot en met medio 2006.

Den Haag, 14 april 2009,

De Minister van Justitie,
namens deze,
de secretaris-generaal,

J. Demmink

Legal and Operational Affairs Department
Department of International Assistance in Criminal
UTL-I-2008008505

ORDER

the Minister of Justice at the request of the United States to extradite Jevgenijs Kuzmenko, born on September 5, 1983 in Riga (Latvia), currently detained in the prison central Netherlands, The Genie Gate in Alphen aan den Rijn.

1. The Request

1.1 When memorandum of April 18, 2008, number 53/08, the U.S. Embassy on behalf of the United States to extradite the person sought been demanded.

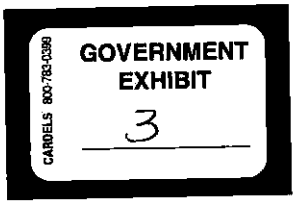
1.2 When mentioned in 1.1 above request was accompanied among others:

A. an arrest warrant from the "United States District Court District of Montana, Great Falls Division" of March 20, 2008;
B. an indictment of the "United States District Court for the District of Montana Great Falls Division, number CR 08-33-GF-SEH, from March 20, 2008, containing a statement of the facts for which extradition is requested;
C. a sworn statement by Michael Lahr, "Assistant United States Attorney 'in the service of the United States District Court for the District of Montana, on March 28, 2008, holding a fuller account of the facts for which extradition is requested;
D. a sworn statement by Brian O'Neil, special agent in service of United States Secret Service "from March 21, 2008, also holding out the facts for which extradition is requested;
E. an overview of the relevant legal provisions.

2. The applicable law

2.1 applies the Extradition Treaty between the Kingdom of the Netherlands and the United States of America (Treaty Series 1980, 1983 and 111, 133), hereinafter referred to as the Extradition Treaty.

2.2 also applies the Extradition Act (Act of March 9, 1967, Stb. 139).



3. Contribute a better translation

3.1 The court has to Rotterdam in its ruling of August 11, 2008, under parquet number: 10/600033-008, demanded the extradition of the person be declared admissible in the prosecution of offenses, as mentioned under 1.2 sub B.

The person has been demanded by the ruling appealed.

3.2 The court in Rotterdam has its opinions on August 11, 2008 advised the requested extradition of the person to be required to allow.

3.3 The Supreme Court in its ruling of March 3, 2009, feature: S 08/03890, the occupation of the person demanded be dismissed.

4. The assessment

4.1 When a letter of April 1, 2009 to the Ministry of Justice, counsel on behalf of that person be required - in short- evidence that the summons be demanded of the missing person would be justified.

Article 9 paragraph 3 under b. of the Treaty, a key marginal place or the evidence to arrest and summons in itself sufficient for an arrest in the requested State, in this case the Netherlands, to justify. Article 28 Extradition Act, this opinion to the court. In that context, the court in Rotterdam ruled that the documents meet the requirements of Article 18 of the Extradition Act and Article 9, second and third paragraph of the Treaty.

Given the above, and considered the available relevant information, the Minister of Justice dismissed this defense held to decide.

4.2 The lawyer asks the person claimed to be the prosecution in the Netherlands instead of extradition. In that framework is considered as follows.

Article 1 of the Extradition Treaty is the obligation to set people together to deliver. Extradition may be refused only if there is a refusal under the Extradition Treaty. The Extradition Treaty, unlike the European Extradition Convention, not the possibility to refuse extradition on the grounds that the facts (in part) on the territory of the Requested State have played. Article 5 of the Extradition Treaty mentions Although the possibility to refuse extradition on the basis of a prosecution by the State for the same offense for which extradition is requested, but this refusal to see the ground situation in the requested State in respect of the facts which extradition is requested is already an ongoing

prosecution. The explanatory memorandum to the Extradition Treaty will be made to the situation provided for in Article 9 paragraph 1 a of the Extradition Act. Article 5 of the Extradition Treaty, the requested State is not the possibility of refusing extradition for prosecution for themselves then the facts for which extradition is requested to start.

Considering the foregoing, the Minister of Justice concluded that given the provisions in the Extradition Treaty, demanded prosecution of experience living in the United States preferred.

Further appeals counsel for the required experience is on a threatened violation of Article 6 ECHR, because the system of plea bargaining, which according to counsel for the defendants be compelled to confess guilt.

It considers that the Minister in particular is important that there is no way an obligation and to accept plea-bargain. In addition the counsel not demonstrated that it was possible after delivery to the person be required to offer plea-bargaining proposal to unreasonable and / or disproportionate impact on the person would have been demanded, the risk of a flagrant violation of Article 6 of the ECHR entails. It can not be said that the system of plea-bargaining is generally contrary to the other under Article 6 ECHR and Article 14 ICCPR set out innocence (cf. Rb Den Haag, December 22, 2005, LJN AU8586).

The United States of America are parties to the International Covenant on Civil and Political Rights (Treaty Series 1969, 99), so it can be assumed a fair trial. The Minister is also incidentally revealed no reason for confidence in a procedure within the United States of America no longer in place to consider.

The defense counsel must therefore be dismissed.

The adviser relies on a threat (flagrant) violation of Article 3 of the ECHR. The United States of America are parties to the International Covenant on Civil and Political Rights (Treaty Series 1969, 99), so for that reason alone can be assumed that the United States of America the resulting rights and obligations, including the right to a treatment free from torture or inhuman, cruel or degrading treatment or punishment (art. 7 IVPBR) - against the person will be demanded respect.

the person has been demanded could not be supposed that the individual circumstances in his case a substantially different treatment and can bring in such a way that there really specific identifiable reasons that he is just following the surrender the real risk of being subjected to torture or inhuman or degrading treatment.

The defense counsel must therefore be dismissed.

4.5 The counsel also invokes a threat (flagrant) as violation of artikle 5 ECHR. The lawyer has enough plausible that there would be an unlawful detention.

The defense counsel must therefore be dismissed.

4.5 Finally, the counsel that the medical situation of Kuzmenko is such that we are afraid that lack of medical care and facilities could bring him into danger.

The Minister, the authorities of the United States prior to extradite him - the medical condition be required to inform person, asking for the necessary treatment of the person to have been demanded.

4.6 Been claimed by or for the person are also no facts or circumstances which claimed the extradition would be refused, nor is it otherwise there.

5. The Decision

The Minister of Justice Decision:

to allow the extradition for the purpose of prosecution in respect of the suspicion that he is guilty of the offenses listed in the under 1.2 listed in A warrant of arrest, insofar as those facts relate to the period of March 8, 2002 to and in mid 2006.

Den Haag, 14 April 2009,

The Minister of Justice,

behalf,

The Secretary-General,

J. Demmink

Ministry of Justice

> Return address Postbus 20301 2500 EH The Hague

To the US Department of Justice
Office of International Affairs
Criminal Division
Attn. Ms. Judith Friedman

Directorate General for the Administration of Justice and Law Enforcement
Legal and Operational Affairs Department

Schedeldoekshaven 100
2511 EX The Hague
Postbus 20301
2500 EH The Hague
www.justitie.nl

Contact
Robbert de Groot
Legal Advisor

T 070 370 44 74
M 06 48 10 02 93
F 070 370 79 45
r.de.groot@minjus.nl

Our reference
UTL-I-2008008505

Please quote date of letter and our ref. when replying. Do not raise more than one subject per letter.

Date 18 February 2010
Concerning Extradition Kuzmenko

Dear Ms. Friedman,

On 14 April 2009, the Netherlands approved the extradition of Jevgenijs Kuzmenko to the United States of America.

Paragraph 5 of my decision states that the extradition is allowed only for the purpose of prosecution on the counts cited in the arrest warrant of March 20, 2008, insofar as these counts occurred in the period March 8, 2002 until and including mid 2006. The mentioning of this period is erroneous.

The extradition is allowed - also by the Court en Supreme Court - for all the counts in the indictment. The period of 2002-2006 is therefore mistakenly part of the decision.

Please feel free to contact me if further clarification is needed.

Head,
Department of International Legal Assistance in Criminal Matters
For the Minister of Justice,

M.E. Gofferig

1 of 100 DOCUMENTS

U.S. Treaties on LEXIS

KINGDOM OF THE NETHERLANDS

EXTRADITION TREATY WITH THE KINGDOM OF THE NETHERLANDS

TREATY DOC. No. 97-7

1980 U.S.T. LEXIS 133

June 24, 1980, Date-Signed

STATUS:
[*1] PENDING: June 1, 1981. Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

TRANSMITTING THE TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF THE NETHERLANDS (NETHERLANDS), SIGNED AT THE HAGUE ON JUNE 24, 1980

TEXT:
97TH CONGRESS

1st Session

SENATE

LETTER OF TRANSMITTAL

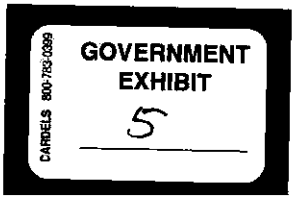
THE WHITE HOUSE, *May 28, 1981.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty of Extradition between the United States of America and the Kingdom of the Netherlands, signed at The Hague on June 24, 1980.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the treaty.

The treaty is one of a series of modern extradition treaties being negotiated by the United States. It expands the list of extraditable offenses to include narcotics violations, aircraft hijacking, bribery, and obstruction of justice, as well as many other offenses not covered by our existing extradition [*2] treaty with the Netherlands. Upon entry into force, it



will terminate and supersede the existing Extradition Treaty and Supplementary Treaty between the United States and the Netherlands.

This treaty will make a significant contribution to international cooperation in law enforcement. I recommend that the Senate give early and favorable consideration to the treaty and give its advice and consent to ratification.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,

Washington, May 9, 1981.

THE PRESIDENT,
The White House,

THE PRESIDENT: I have the honor to submit to you the Extradition Treaty between the United States of America and the Kingdom of the Netherlands (Netherlands), signed at The Hague on June 24, 1980. I recommend that the treaty be transmitted to the Senate for its advice and consent to ratification.

This treaty follows generally the form and content of extradition treaties recently concluded by this Government. The treaty provides for the extradition of fugitives who have been charged with or convicted of any of thirty-six offenses listed in the schedule annexed to the treaty. Significant newly-listed offenses, which are not in our existing treaty with [*3] the Netherlands, include those relating to narcotics, aircraft hijacking, and obstruction of justice (both the Netherlands and the United States are Parties to a multilateral convention which in effect has amended the existing bilateral treaty to include hijacking offenses).

Article 1 obligates both States, subject to the provisions of the treaty, to extradite to the other persons charged with or convicted of extraditable offenses.

Article 2 includes as extraditable offenses those which are, under the laws of the Netherlands and the Federal law of the United States, punishable by imprisonment for a maximum period exceeding one year.

Article 2 also authorizes extradition under certain conditions for an attempt to commit or a conspiracy to commit any extraditable offense. This article also permits the Government of the United States to request the extradition of a person for any extraditable offense when Federal jurisdiction is based upon the use of the mails or other means of carrying out interstate commerce.

Article 2 in addition includes a jurisdictional provision which allows for extradition where the offense has been committed outside the territory of the requesting State by a [*4] national of that State. Crimes committed outside the territory of the requesting State may also provide the basis for extradition if the offenses so committed would also be punishable under the law of the requested State in similar circumstances. Like provisions are contained in United States extradition treaties with the Federal Republic of Germany, Japan, Norway, and Mexico. It is anticipated that such provisions will be useful in the areas of narcotics and counterfeiting violations.

Article 3 defines the territorial application of the treaty. This article expands the normal context of that concept to include aircraft in flight. This provision also extends jurisdiction to acts of aircraft piracy, whether or not they occur over the territory of either of the Parties.

Article 4 contains the political offense exception clause. It excludes, however, from the category of political offenses murder or other willful crimes against the life or physical integrity of a Head of State or Head of Government

or their families. Military offenses are excluded as extraditable offenses.

Article 4 gives the Executive Authority of each Party the responsibility of determining whether a request for extradition [*5] involves a political or military offense, unless the national laws of the requested Party grant such powers to its courts. In the United States, the laws do not grant such powers to the courts, and the authority, therefore, would rest with the Executive branch.

Article 5 contains a prior jeopardy provision. It excludes extradition in cases where the person requested has been prosecuted by the requested Party for the offense for which extradition is requested.

Article 6 precludes extradition where prosecution or enforcement of the penalty for the offense for which extradition is sought has become barred by lapse of time according to the law of requested Party.

Article 7 permits refusal of extradition in capital cases unless satisfactory assurances are received that the death penalty will not be imposed or, if imposed, will not be executed for an offense not punishable by death in the country from which extradition is requested. A similar article has been included in most recent treaties.

Article 7 also provides that the Executive Authority may refuse extradition on humanitarian grounds having regard to the age or other personal condition of the person sought. Similar provisions are [*6] found in our extradition treaties with Norway and Finland.

Article 8 deals with the extradition of nationals. It contains two provisions similar to those included in some of our other recently signed extradition treaties. It grants the Executive Authority the discretionary power to extradite its own nationals. If extradition is denied on the basis of nationality, the requested Party undertakes to submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense. This article thus takes into account the law of the Netherlands ordinarily prohibiting the extradition of Dutch nationals but allowing for their prosecution in the Netherlands for offenses committed abroad.

Article 8 also contains an innovation. It provides that the requested Party may not refuse extradition solely on the basis of nationality where there exists a treaty between the Parties on the execution of foreign penal sanctions. Such agreements, more often referred to as prisoner transfer treaties, would, for example, allow a Dutch national tried and convicted in the United States to return to the Netherlands to serve out his ordered term of incarceration. [*7] This provision was put in Article 8 to provide for liberalization of the nationality clause should the Parties in the future conclude such an agreement.

Articles 9-18 outline the procedures by which extradition shall be accomplished. Of particular note are Articles 9 and 13.

Article 9, *inter alia*, limits extradition to cases where there is sufficient evidence, according to the laws of the requested Party, to bring the person sought to trial had the offense been committed in the requested Party or where the person is shown to have been convicted by the courts of the requesting Party

Article 13 contains another innovation. It allows the requested Party to temporarily surrender a person sought to the requesting Party for purposes of prosecution. The provision was designed to cover the situation where the person sought is found extraditable on foreign charges while serving a sentence in the requested Party for an entirely different offense.

Article 19 provides, among other things, that the requested Party shall make all arrangements necessary for internal extradition procedures and employ all legal means to obtain from the judicial authorities the decisions necessary to perfect the [*8] extradition request. We expect to continue the present practice under which each country is represented in extradition proceedings by the other's Justice Department.

Article 19 also provides that the requesting Party shall only pay the costs associated with the transportation of the

person sought and with the translation of extradition documents.

Article 20 stipulates that the treaty is retroactive in effect as to extraditable offenses which were committed before the date of its entry into force and which were punishable under the laws of both Parties when committed.

Article 21 provides that the treaty will enter into force on the date of exchange of the instruments of ratification. Upon entry into force, this treaty will terminate the Treaty of Extradition between the United States and the Netherlands signed on June 2, 1887, and the Supplementary Treaty on Extradition signed on January 18, 1904.

Article 22 makes the treaty applicable to the Netherlands Antilles unless the Netherlands' ratification shall provide otherwise.

The Department of Justice joins the Department of State in favoring approval of this treaty by the Senate at an early date.

Respectfully submitted,

WILLIAM CLARK. [*9]

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF THE NETHERLANDS

The Government of the United States of America and the Government of the Kingdom of the Netherlands;

Desiring to provide for more effective cooperation between the two States in the repression of crime; and

Desiring to make a new Treaty for the reciprocal extradition of offenders;

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

The Contracting Parties agree to extradite to each other, subject to the provisions described in this Treaty, persons found in the territory of one of the Contracting Parties who have been charged with an offense, found guilty of committing an offense, or are wanted for the enforcement of a judicially pronounced penalty involving a deprivation of liberty or detention order.

ARTICLE 2

Extraditable Offenses and Jurisdiction

1. Extraditable offenses under this Treaty are:

a. Offenses referred to in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties;

b. Offenses, whether listed in the Appendix to this Treaty or not, provided they are punishable under the Federal laws of the United States of America and the laws [*10] of the Kingdom of the Netherlands.

In this connection it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offenses or denominate an offense by the same technology.

2. Extradition shall be granted in respect of an extraditable offense:

a. For prosecution, if the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year;

b. For the imposition of a penalty or detention order, if the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year; or

c. For the enforcement of a penalty or detention order for such an offense, if the duration of the penalty or detention order still to be served amounts to at least four months.

3. Extradition shall be granted in respect of an extraditable offense committed outside the territory of the Requesting State if:

a. The courts of the Requested State would be competent to exercise jurisdiction in similar circumstances, or

b. The person sought is a national of the Requesting State.

4. Subject to the conditions set out in paragraphs 1, 2 and 3, extradition [*11] shall also be granted:

a. For attempts to commit or participation in an extraditable offense, including participation in an association of persons whose intention it is to commit the offense;

b. For any extraditable offense when, for the purpose of granting jurisdiction to the United States Government, transportation of persons or property, the use of the mails or other means of carrying out interstate or foreign commerce is also an element of the specific offense.

5. When extradition has been granted in respect of an extraditable offense, it may also be granted in respect of any other extraditable offense which would otherwise not be extraditable only by reason of the operation of paragraph 2.

ARTICLE 3

Territorial Application

For the purpose of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including airspace and territorial waters.

ARTICLE 4

Political and Military Offenses

1. Extradition shall not be granted when in the view of the Requested State the offense for which extradition is requested is of a political character, is connected with an offense of a political character, or it is established [*12] that extradition is requested for political purposes.

2. For the purpose of this Treaty a murder or willful crime against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of that person's family, including attempts to commit such offenses, shall not be deemed to be offenses within the meaning of paragraph 1.

3. Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

4. It shall be the responsibility of the Executive Authority of the Requested State to decide on any question raised under this Article, except to the extent that the national laws of that State expressly grant such powers to its courts.

ARTICLE 5

Prior Jeopardy for the Same Offense

Extradition shall not be granted when:

a. The person sought is being proceeded against, has been prosecuted, or has been tried and convicted or acquitted by the Requested State for the offense for which extradition is requested; or,

b. The person sought is otherwise immune from prosecution for the offense for which extradition is requested by reason of the law in the Requested State relating to prior jeopardy.

[*13]

ARTICLE 6

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the law of the Requested State.

ARTICLE 7

Capital Punishment and Special Circumstances

1. When the offense for which extradition is requested is punishable by death under the laws of the Requesting State and the laws of the Requested State do not permit such punishment for that offense, extradition may be refused unless the Requesting State furnishes such assurances as the Requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

2. In special circumstances, having particular regard to the age, health or other personal condition of the person sought, the Executive Authority of the Requested State may refuse extradition if it has reason to believe that extradition will be incompatible with humanitarian considerations.

ARTICLE 8

Extradition of Nationals

1. In the event there is a treaty in force between the Contracting Parties on the execution of foreign penal sanctions, neither Contracting Party may [*14] refuse to extradite its own nationals solely on the basis of their nationality.

2. As long as there is no treaty in force between the Contracting Parties on the execution of foreign penal sanctions, neither Contracting Party shall be bound to extradite its own nationals, but the Executive Authority of the Requested State shall, if not prevented by the law of that State, have the power to extradite them if, in its discretion, it be deemed proper to do so.

3. If extradition is not granted solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for the purpose of prosecution, provided that the offense constitutes a criminal offense under the law of that State and that State has jurisdiction over the offense.

ARTICLE 9

Extradition Procedures and Required Documents

1. The request for extradition shall be made through the diplomatic channel.

2. The request for extradition shall be accompanied by:

a. All available information concerning the identity, nationality, and probable location of the person sought;

b. A statement of the facts of the case including, if possible, [*15] the time and location of the crime;

c. The provisions of the law describing the essential elements and the designation of the offense for which extradition is requested;

d. The provisions of the law describing the punishment for the offense;

e. The provisions of the law providing for jurisdiction when the offense was committed outside of the territory of the Requesting State.

3. A request for extradition relating to a person sought for the purpose of prosecution shall be accompanied by:

a. The original or a certified copy of the warrant of arrest issued by a judge or other competent judicial officer of the Requesting State; and

b. Such evidence as, according to the law of the Requested State, would justify that person's arrest and committal for trial if the offense had been committed there, including evidence establishing that the person sought is the person to whom the warrant of arrest refers.

4. A request for extradition relating to a convicted person shall be accompanied by:

a. The original or certified copy of the judgment of conviction pronounced by a court of the Requesting State;

b. Evidence establishing that the person sought is the person to whom the conviction refers.
[*16]

If the person was found guilty but not sentenced, the request for extradition shall be accompanied by a statement to that effect by the appropriate court and by the original or certified copy of the warrant of arrest.

If the convicted person was sentenced, the request for extradition shall be accompanied by the original or certified copy of the sentence imposed, a statement that the sentence has final and binding effect and is enforceable and a statement showing to what extent the sentence has not been carried out.

5. The documents to be submitted in support of the request for extradition, in accordance with this Article and Article 10, shall be translated into the language of the Requested State.

6. The documents which, according to this Article, shall accompany the extradition request, shall be admitted in evidence when:

a. In the case of a request emanating from the United States, they are signed by a judge or other competent officer;

b. In the case of a request emanating from the Kingdom of the Netherlands, they are signed by a judge or other judicial authority and are certified by the principal diplomatic or consular officer of the

United States in the Kingdom of the Netherlands.

[*17]

ARTICLE 10

Additional Evidence

1. If the competent authority of the Requested State considers that the evidence furnished in support of the request for the extradition of a person sought is not sufficient to fulfill the requirements of this Treaty, that State shall request the submission of necessary additional evidence. The Requested State may set a time limit for the submission of such evidence and, upon the Requesting State's application, may grant a reasonable extension of such time limit.

2. If the person sought has been taken into custody and the additional evidence or information submitted is not sufficient, or if such evidence or information is not received within the period specified by the Requested State, that person may be discharged from custody. However, such discharge shall not bar either the continued consideration of the request on the basis of supplemented documents, or, if a final decision has already been taken, the submission of a subsequent request for the same offense. In such a case it shall be sufficient if reference is made in the subsequent request to the supporting documents already submitted, provided these documents will be available at the extradition [*18] proceedings.

ARTICLE 11

Provisional Arrest

1. In case of urgency, either Contracting Party may request the provisional arrest of any accused or convicted person. Application for provisional arrest may be made either through the diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice in the Netherlands, or the Ministry of Justice in the Netherlands Antilles, as the case may be.

2. The application shall contain: a description of the person sought, including, if available, the person's nationality; a brief statement of the facts of the case including, if possible, the time and location of the offense; a statement of the existence of a warrant of arrest or a judgment of conviction against that person; and a statement that a request for extradition of the person sought will follow.

3. On receipt of such an application the Requested State shall take the appropriate steps to secure the arrest of the person sought. The Requesting State shall be promptly notified of the result of its application.

4. Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person sought, the Requested State has [*19] not received the formal request for extradition and the supporting documents mentioned in Article 9.

5. The termination of provisional arrest pursuant to paragraph (4) shall not prejudice the extradition of the person sought if the extradition request and the supporting documents mentioned in Article 9 are delivered at a later date.

ARTICLE 12

Decision and Surrender

1. The Requested State shall promptly communicate through the diplomatic channel to the Requesting State the decision on the request for extradition.

2. The Requested State shall give the reasons for any complete or partial rejection of the request for extradition.

3. If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the law of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within such time as may be agreed, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offense.

ARTICLE 13

Delayed Decision and Temporary [*20] *Surrender*

After a decision on a request for extradition has been rendered in the case of a person who is being proceeded against or is serving a sentence in the territory of the Requested State for a different offense, the Requested State may:

a. Defer the surrender of the person sought until the conclusion of the proceedings against that person, or the full execution of any punishment that may be or may have been imposed; or

b. Temporarily surrender the person sought to the Requesting State solely for the purpose of prosecution. The person so surrendered shall be kept in custody while in the Requesting State and returned at the conclusion of the proceedings against that person in accordance with conditions to be determined by mutual agreement of the Contracting Parties.

ARTICLE 14

Requests for Extradition made by Third States

The Executive Authority of the Requested State, upon receiving requests from the other Contracting Party and from one or more third States for the extradition of the same person, either for the same offense or for different offenses, shall determine to which State it will extradite that person.

ARTICLE 15

Rule of Speciality

1. A person extradited [*21] under this Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State, unless:

a. That person has left the territory of the Requesting State after extradition and has voluntarily returned to it;

b. That person has not left the territory of the Requesting State within 30 days after being free to do so; or

c. The Executive Authority of the Requested State has consented to detention, trial, or punishment of that person for an offense other than that for which extradition was granted, or to extradition to a third State. For this purpose, the Requested State may require the submission of any document or statement mentioned in Article 9, including any statement made by the extradited person with respect to the offense concerned.

These stipulations shall not apply to offenses committed after extradition.

2. If the charge for which the person was extradited is legally altered in the course of proceedings, that person may be prosecuted or sentenced provided the offense under its new legal description is:

a. Based on the same set of facts [*22] contained in the extradition request and its supporting documents; and

b. Punishable by the same maximum penalty as, or a lesser maximum penalty than, the offense for which that person was extradited.

ARTICLE 16

Simplified Extradition

If the extradition of a person sought is not obviously precluded by the law of the Requested State and provided the person sought irrevocably agrees in writing to extradition after personally being advised by a judge or competent magistrate of other rights granted in formal extradition proceedings and the protection afforded by them that this person would lose, the Requested State may grant extradition without a formal extradition proceeding having taken place. In this case Article 15 shall not be applicable.

ARTICLE 17

Surrender of Property

1. To the extent permitted under the law of the Requested State and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be evidence for the prosecution, shall at the request of the Requesting State be seized and surrendered upon the [*23] granting of the extradition. The property mentioned in this Article shall be handed over even if the extradition cannot be effected due to the death, escape or disappearance of the person sought.

2. The Requested State may condition the surrender of property upon a satisfactory assurance from the Requesting State that the property will be returned to the Requested State as soon as possible.

ARTICLE 18

Transit

1. Either Contracting Party may authorize the other transit through its territory of a person surrendered by a third State. The Contracting Party requesting transit shall provide the information mentioned in Article 11, paragraph 2, through channels provided in that Article. No such authorization is required where air transportation is used and no landing is scheduled on the territory of the other Contracting Party.

2. If an unscheduled landing on the territory of the other Contracting Party occurs, transit shall be subject to the provisions of paragraph 1. That Contracting Party may detain the person to be transited for a period of 96 hours while awaiting the request for transit.

ARTICLE 19

Expenses

1. The Requested State shall review for legal sufficiency documentation [*24] in support of an extradition request prior to submission to its judicial authorities and shall present the request of the Requesting State to such authorities.

2. Expenses related to the translation of documents supporting the request for extradition and to the transportation of the person sought shall be borne by the Requesting State. All other expenses related to the extradition request and proceedings shall be borne by the Requested State. No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Treaty, shall be made by the Requested State against the

Requesting State.

ARTICLE 20

Scope of Application

This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force.

ARTICLE 21

Ratification and Entry Into Force

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

2. This Treaty shall enter into force 30 days after the exchange of the instruments of ratification.

3. On entry into force of this Treaty, the Convention for the Extradition of Criminals of June [*25] 2, 1887 and the Treaty Extending the Extradition Convention of January 18, 1904, Between the United States of America and the Kingdom of the Netherlands shall cease to have effect, provided that any extradition proceedings pending in the Requested State at the time this Treaty enters into force shall remain effective thereafter.

4. If the instrument of ratification for the Kingdom of the Netherlands does not provide for simultaneous entry into force of the present Treaty for both of its constituent parts, the Agreements mentioned in paragraph 3 above will remain in force between the United States of America and that part of the Kingdom of the Netherlands not yet bound to the present Treaty.

ARTICLE 22

Territory of the Kingdom of the Netherlands

As regards the Kingdom of the Netherlands, the present Treaty shall apply to the territory of the Kingdom in Europe and to the Netherlands Antilles, unless the instrument of ratification of the Government of the Kingdom of the Netherlands, referred to in Article 21, shall otherwise provide.

ARTICLE 23

Denunciation

1. Either Contracting Party may terminate this Treaty at any time by giving notice to the other Party and the termination [*26] shall be effective six months after the date of receipt of such notice.

2. Termination of this Treaty by the Government of the Kingdom of the Netherlands may be limited to one of the constituent parts of the Kingdom.

DONE at The Hague on 24 June 1980 in duplicate in the English and Dutch languages, each version being equally authentic.
FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA,

FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS,

APPENDICES:

APPENDIX

SCHEDULE OF OFFENSES

1. Murder; assault with intent to commit murder.

2. Manslaughter.

3. Malicious wounding; inflicting grievous bodily harm.

4. Arson.

5. Rape; indecent assault; incest; bigamy.

6. Unlawful sexual acts with or upon children under the age specified by the laws of both the Requesting and Requested States.

7. Wilful abandonment of a minor or other dependent person when the life of that minor or that dependent person is or is likely to be injured or endangered.

8. Kidnapping; abduction; false imprisonment.

9. Robbery; burglary; larceny; embezzlement.

10. Fraud, including obtaining property, money or valuable securities by false pretenses, deceit, falsehood, or other fraudulent means.

11. Bribery, including soliciting, offering [*27] and accepting.

12. Extortion.

13. Receiving, possessing or transporting anything of value knowing it to have been unlawfully obtained.

14. Offenses relating to criminal breach of trust.

15. An offense against the laws relating to counterfeiting and forgery; including the forging of seals, trademarks, documents, or use of such forgeries.

16. An offense against the laws relating to international transfers of funds.

17. An offense against the laws relating to importation, exportation or transit of goods, articles, or merchandise, including violations of the customs laws.

18. Offenses relating to slavery or the illegal transporting of persons.

19. Offenses against the laws relating to bankruptcy.

20. Offenses against the laws relating to prohibition of private monopoly or unfair trade practices.

21. Perjury; subornation of perjury; making a false statement to a government agency or official.

22. Offenses relating to wilful evasion of taxes and duties.

23. Any act or omission intended or likely to: (a) endanger the safety of an aircraft in flight or of any person on board such aircraft; or (b) destroy or render any aircraft incapable of flight.

24. Any unlawful seizure or exercise of control [*28] of an aircraft in flight by force or violence, or by threat of force or violence, or by any other form of intimidation.

25. Any unlawful act or omission intended or that is likely to endanger the safety of any person in a railway train or in any vessel or other means of transportation.

26. Piracy, mutiny, or any mutinous act committed on board a vessel.

27. Malicious damage to property.

28. Offenses against the laws relating to the traffic in, or the possession, production or manufacture of narcotic drugs, cannabis, psychotropic drugs, cocaine and its derivatives, and other dangerous drugs and chemicals.

29. Offenses against laws relating to the poisonous chemicals or substances injurious to health.

30. Offenses against the laws relating to firearms, ammunition, explosives, incendiary devices or nuclear materials.

31. Offenses against the laws relating to the abuse of official authority.

32. Offenses against the laws relating to obstruction of justice.

33. Offenses relating to securities and commodities.

34. Facilitating or permitting the escape of a person from custody.

35. Incitements to violence.

36. Any other act for which extradition may be granted in accordance with the laws [*29] of both Contracting Parties.