CHARGES AND INTERNATIONAL EXTRADITION

ROBERTO IRAOLA†

I. INTRODUCTION

An international request for the extradition of a fugitive[1] is triggered by an interest, on the part of the foreign country making the request, to prosecute the fugitive for a criminal offense, or to secure his presence so that a sentence can be imposed for an offense for which his guilt has been determined, or so that he can begin service of a sentence.[2] Extradition treaties express this concept in different ways. For example, some treaties call for the surrender of persons who have been "charged with or found guilty of,"[3] or "charged with or convicted of,"[4] extraditable offenses. Others ask for surrender "for prosecution or for

---

† Senior Trial Attorney, Office of International Affairs, U.S. Department of Justice. J.D., 1983, Catholic University. The views expressed herein are those of the author and do not necessarily represent the views of the U.S. Department of Justice or the United States.

1. Extradition treaties use the term "fugitive" to identify a "person who has left the state in which the alleged crime was committed for whatever reason and is physically within the territory and subject to the jurisdiction of the requesting state." M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE 827 (5th rev. ed. 2007) (footnote omitted). For ease of reference, at times, the term "fugitive" is used in this article.

2. *See generally* Terlinden v. Ames, 184 U.S. 270, 289 (1902) (Extradition involves "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 punish him, demands the surrender.").

3. *See, e.g.*, Extradition Treaty Between the United States of America and the Argentine Republic, U.S.-Arg., art. 1, June 10, 1997, S. TREATY DOC. NO. 105-18; Agreement Between the United States of America and the Government of Hong Kong for the Surrender of Fugitives, U.S.-H.K., art. 1, December 20, 1996, S. TREATY DOC. NO. 105-3.

4. *See, e.g.*, Extradition Treaty Between the United States of America and the Republic of South Africa, U.S.-S. Afr., art. 1, September 16, 1999, S. TREATY DOC. NO. 106-24; Extradition Treaty Between the United States of America and the Republic of Zimbawe, U.S.-Zim., art. 1, July 25, 1997, S. TREATY DOC. NO. 105-33.

imposition or execution of a sentence,"[5] or "for prosecution or for the imposition or enforcement of a sentence,"[6] or for "trial or punishment,"[7] or for "prosecution, trial, or imposition or execution of punishment" of an extraditable offense.[8]

When interpreting treaties that call for the surrender of a person "charged" with an extraditable offense, a question which has received some attention is whether the request must be supported by the filing of a formal charge.[9] This Article addresses that question. By way of background, the Article first provides an overview of the process governing international requests for extradition.[10] The Article then analyzes the developing case law on how courts have analyzed the term "charged" in extradition treaties when ruling on requests seeking the return of fugitives.

II. OVERVIEW OF EXTRADITION

Extradition from the United States, the "process by which a fugitive may be returned to another country to face criminal charges,"[11] is

---

5. *See, e.g.*, Extradition Treaty Between the United States of America and the Republic of Bulgaria, U.S.-Bulg., art. 1, September 17, 2007, S. TREATY DOC. NO. 110-12.

6. *See, e.g.*, Extradition Treaty Between the United States of America and France, U.S.-Fra., art. 1, April 23, 1996, S. TREATY DOC. NO. 105-13.

7. *See, e.g.*, Extradition Treaty Between the United States of America and the Republic of Sri Lanka, U.S.-Sri Lanka, art. 1, September 30, 1999, S. TREATY DOC. NO. 103-64; Extradition Treaty Between the United States of America and the Republic of Paraguay, U.S.-Para., art. 1, November 9, 1998, S. TREATY DOC. NO. 106-4.

8. *See, e.g.*, Extradition Treaty Between the United States of America and the Republic of Korea, U.S.-S. Kor., art. 1, June 6, 1998, S. Treaty Doc. No. 106-2.

9. *See* Bassiouni, *supra* note 1, ch. X, §3, at 875 ("If the treaty . . . uses the term 'charge' or 'charged' (with an offense), then the question arises as to whether it means a formal criminal charge in the nature of a complaint, information or indictment in United States law, or whether it is synonymous with 'accused,' whereby an arrest warrant without a formal accusation will suffice"). If the request is based on a conviction, a certified copy of the judgment generally will suffice to support a grant of the request. *See, e.g.*, Sidali v. INS, 107 F.3d 191, 196 (3d Cir. 1997) ("[A] foreign conviction obtained after a trial at which the accused is present is sufficient to support a finding of probable cause for the purposes of extradition."). For a discussion of how courts treat extradition requests based on *in absentia* convictions, *see* Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 33 SETON HALL L. REV. 843 (2009).

10. The overview of the extradition process contained in this Article follows the format I have used in other articles discussing various international extradition topics. *See, e.g.*, Roberto Iraola, *Statutes of Limitations and International Extraditions*, 2010 MICH. ST. L. REV. 103 (2010); Roberto Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 IND. INT'L & COMP. L. REV. 29, 29-35 (2007).

11. Mironescu v. Costner, 480 F.3d 664, 665 (4th Cir. 2007).

governed by statute (18 U.S.C. §§ 3181, 3184, 3186, 3188-3191)[12] and treaty.[13] The process commences when the Department of State receives a request from a foreign country.[14] After reviewing the request to ensure that it conforms to the requirements of the applicable treaty, the Department of State will prepare a declaration authenticating the request and send it to the Department of Justice's Office of International Affairs, which will in turn review it and, if sufficient, send it to the U.S. attorney for the district where the person sought to be extradited is located.[15] The U.S. attorney in that district then files a complaint in support of an arrest warrant for the fugitive.[16]

After the arrest of the fugitive, a judicial officer (generally a magistrate judge)[17] holds a hearing under section 3184[18] to determine

12. *See* Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) ("The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181-3195.").

13. *See* In re Extradition of Bolanos, 594 F. Supp.2d 515, 517 (D.N.J. 2009) ("International extradition proceedings are governed by statute . . . and by treaty"). If there is no treaty, comity allows for the return of third country nationals–persons who are not citizens, nationals, or residents of the United States–provided certain conditions are satisfied. 18 U.S.C. § 3181(b); *see* Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) ("International extradition is governed only by considerations of comity and treaty provisions").

14. *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000) ("Extradition is ordinarily initiated by a request from the foreign state to the Department of State"); *accord* Cohen v. Benov, 374 F. Supp.2d 850, 855 (C.D. Cal. 2005).

15. *See* U.S. Dep't of Justice, U.S. Attorney's Manual, *International Extradition and Related Matters*, § 9-15.700 (1997) (explaining how the Office of International Affairs will review request for sufficiency and then forward it to appropriate district) *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm (last visited May 7, 2011).

16. *See* Barapind v. Reno, 225 F.3d. 1100, 1105 (9th Cir. 2000) ("Once approved, the United States Attorney for the judicial district where the person sought is located files a complaint in federal district court seeking an arrest warrant for the person sought."). In some instances, because of concerns over the fugitive's risk of flight, the request will first seek his provisional arrest. *See* Duran v. United States, 36 F. Supp.2d 622, 624 (S.D.N.Y. 1999) ("In order to avoid the flight of a defendant during preparation of a full formal request, many extradition treaties permit a provisional arrest to be made upon receipt of an informal request."). After the fugitive is arrested, as called for by the treaty, the foreign government will then provide the United States with additional information necessary to execute the extradition request. See Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161, 172 (1998) ("After executing the provisional arrest request, the requesting state furnishes the United States with any additional information that is required for extradition under the governing statute or treaty.") (footnote omitted).

17. *See* In re Extradition of Rodriguez Ortiz, 444 F. Supp.2d 876, 882 (N.D. Ill. 2006) ("Federal magistrate judges are expressly authorized to hear and decide extradition cases if authorized to do so by a court of the United States. In addition, the jurisdiction of federal magistrate judges in extradition proceedings has been upheld as being consistent with Article III of the Constitution.") (internal quotation marks and citation omitted).

whether the evidence presented by the foreign government is "sufficient to sustain the charge under the provisions of the proper treaty or convention."[19] This hearing, which is not a criminal proceeding,[20] is comparable to a preliminary hearing in a criminal case.[21] The controlling standard at the hearing is probable cause,[22] "meaning that the magistrate's role is merely to determine whether there is competent evidence to justify holding the accused to await trial."[23] The Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Rules of Civil Procedure do not apply in extradition proceedings.[24] The requesting country is permitted under 18 U.S.C. section 3190 to introduce properly authenticated evidence collected

---

18. Section 3184 provides, in relevant part:

> 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, or any judge of a court of record of general jurisdiction of any State may . . . issue [a] warrant for the apprehension of [a] person . . . charged [with having committed within the jurisdiction of any such foreign government any of the crimes provided for by treaty or convention], 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.

18 U.S.C. § 3184; *see Cohen*, 374 F. Supp.2d at 855 ("A hearing is then held . . . to determine whether the offense is extraditable and probable cause exists to sustain the charge(s).").

19. 18 U.S.C. § 3184.

20. *See* In re Extradition of Chavez, 408 F. Supp.2d 908, 911 (N.D. Cal. 2005) ("An extradition hearing is not a criminal proceeding, and the person whose return is sought is not entitled to the rights available in a criminal trial.").

21. *See* Benson v. McMahon, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is "of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused"); In re Extradition of Cervantes Valles, 268 F. Supp.2d 758, 772 (S.D. Texas 2003) ("[T]he probable cause hearing is akin to a preliminary hearing, and not to determine whether the accused is guilty or innocent.").

22. *See* In re Extradition of Exoo, 522 F. Supp.2d 766, 777 (S.D.W. Va. 2007) ("The probable cause standard is identical to the probable cause standard applicable in preliminary hearings in federal criminal proceedings.").

23. Haxhiaj v. Hackman, 528 F.3d 282, 287 (4th Cir. 2008) (internal quotation marks omitted); *see also* In re Extradition of Strunk, 293 F. Supp.2d 1117, 1121 (E.D. Cal. 2003) ("The judge in an extradition proceeding applies a standard similar to that of a preliminary hearing, determining whether the evidence justifies holding the accused for trial, not whether the evidence may justify a conviction.").

24. *See In re Extradition of Chavez*, 408 F. Supp.2d at 911 ("[T[he rules of evidence and civil procedure . . . do not apply in extradition hearings."); FED. R. EVID. 1101(d)(3) ("The rules . . . do not apply . . . [to] [p]roceedings for extradition or rendition"); FED. R. CRIM. P. 1(a)(5) ("Proceedings not governed by these rules include . . . extradition and rendition of . . . fugitives[s]").

there[25] and a fugitive "is not permitted to introduce evidence on the issue of guilt or innocence, but can only offer evidence that tends to explain the government's case of probable cause."[26] Further, the evidence at the extradition hearing may consist of unsworn statements[27] and hearsay evidence reflected in reports.[28] There is no appeal from an order denying or certifying extradition.[29]

A certificate of extradition ultimately will issue if the judicial officer has jurisdiction over the subject matter and the person sought to be extradited, the offense for which extradition was sought was an extraditable offense under a treaty in effect at the time of the request, and competent evidence is presented sufficient to establish probable cause that the fugitive committed the alleged offense.[30] Upon the issuance of a certificate of extraditability, the secretary of state will review the case and determine whether to issue a surrender warrant for the fugitive.[31]

---

25. Section 3190, captioned "Evidence on hearing," states:

> 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.

26. Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978); *see also* In re Extradition of Mainero, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997) ("Extradition treaties do not contemplate the introduction of testimony of live witnesses by the [fugitive] to contradict the demanding country's proof."). *See generally* Roberto Iraola, *Contradictions, Explanations, and the Probable Cause Determination at a Foreign Extradition Hearing*, 60 SYRACUSE L. REV 95 (2009) (discussing the "Rule of Non-Contradiction" which governs foreign extradition hearings).

27. *See* Collins v. Loisel, 259 U.S. 309, 317 (1922) ("[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."); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986) ("[U]nsworn hearsay statements contained in properly authenticated documents can constitute competent evidence to support a certificate of extradition.").

28. *See, e.g.*, Harshbarger v. Regan, 599 F.3d 290, 293 (3d Cir. 2010) ("Evidence that might be excluded at trial, including hearsay evidence, is generally admissible at extradition hearings."); *Haxhiaj*, 528 F.3d at 292 ("[C]ourts have consistently concluded that hearsay is an acceptable basis for a probable cause determination.").

29. *See* Quinn v. Robinson, 783 F.2d 776, 786 n.6 (9th Cir. 1986) ("[T]here is no appeal from an extradition order by [the] government or by [the] defendant.").

30. *See, e.g.*, In re Extradition of Rodriguez Ortiz, 444 F. Supp.2d 876, 881-82 (N.D. Ill. 2006) (identifying factors).

31. *See* 18 U.S.C. § 3184 (Judicial officer "shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person"); *id.* § 3186 ("The

Although there is no direct appeal from a magistrate's ruling certifying a fugitive as being extraditable, prior to the secretary's consideration of the matter, a limited review of the certification order is available to the fugitive through a petition for a writ of habeas corpus under 28 U.S.C. section 2241.[32] The review of the findings of the magistrate judge who presides over an extradition hearing is "narrow in scope."[33] Specifically, such review is limited only to "whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[34] Lastly, a final order in a habeas proceeding is subject to appellate review under 28 U.S.C. section 2253.[35]

III. THE MEANING OF "CHARGED" IN EXTRADITION TREATIES

In *In re Assarsson (Assarsson I),*[36] the Swedish authorities sought the extradition of Jal Alf Assarsson so that he could stand trial for arson, fraud and attempted fraud.[37] Before the magistrate, Assarsson argued in part that the extradition request was defective because no "charges" had been filed against him under Swedish law.[38] The magistrate rejected this claim and entered an order finding Assarsson extraditable and Assarsson petitioned the district court for a writ of habeas corpus challenging the

---

Secretary of State may order the person committed under section[] 3184 . . . to be delivered to any authorized agent of such foreign government"); *see also* Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) ("If the case *is* certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender."). The Secretary has a broad range of options which include, but are not limited to, "reviewing de novo the judge's findings of fact and conclusions of law, refusing extradition on a number of discretionary grounds, including humanitarian and foreign policy considerations, granting extradition with conditions, and using diplomacy to obtain fair treatment for the fugitive." Mironescu v. Costner, 480 F.3d 665, 666 (4th Cir. 2007); *accord* United States v. Kin-Hong, 110 F.3d 103, 109 (1st Cir. 1997).

32. *See* Manta v. Chertoff, 518 F.3d 1134, 1140 (9th Cir. 2008) ("[A] habeas petition is the only available avenue to challenge an extradition order.") (internal quotation marks omitted); Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006) ("An individual challenging a court's extradition order may not appeal directly, because the order does not constitute a final decision under 28 U.S.C. § 1291, but may petition for a writ of habeas corpus.").

33. *See* Sacirbey v. Guccione, 589 F.3d 52, 62 (2d Cir. 2009) (internal quotation marks omitted).

34. Fernandez v. Phillips, 268 U.S. 311, 312 (1925); *accord Sacirbey*, 589 F.3d at 63.

35. *See* In re Requested Extradition of Artt, 158 F.3d 462, 468-69 (9th Cir. 1998).

36. 635 F.2d 1237 (7th Cir. 1980).

37. *Id.* at 1238.

38. *Id.* at 1239.

extradition order.[39] The district court denied the petition and he then appealed that ruling to the U.S. Court of Appeals for the Seventh Circuit.[40]

The Seventh Circuit held that the magistrate's finding that Assarsson had been "charged" was reviewable under habeas corpus only if the treaty conditioned the extradition of extraditable offenses "on the existence of formal charges."[41] The treaty with Sweden did not condition the extraditability of an offense on the filing of a charge; therefore, the magistrate's determination was not subject to review.[42]

In response to Assarsson's contention that the reference in Article I of the treaty to persons "*charged with or convicted* of" extraditable offenses created a substantive requirement that a charge needed to be filed, the Seventh Circuit preliminarily found that the term "charge" was used to contrast that category of persons who were subject extradition because they had been "convicted."[43] In other words, the term was "used in the generic sense only to indicate 'accused.'"[44] The court further observed that "Assarsson's argument convert[ed] the treaty's language that individuals be 'charged,' a verb, into a requirement that 'charges,' a noun, be filed," and that such a contention was "based on semantics, not substance."[45] This was because, as the court explained, the treaty contained a number of substantive requirements affecting a grant of extradition, none of which entailed the production of a charging document.[46] Lastly, the Seventh Circuit observed that respect for the sovereignty of other nations, as well as the "dangers inherent in determining the applicability of foreign law" militated in favor of the

39. *Id.*

40. *Id.*

41. *Id.* at 1241.

42. *In re Assarsson*, 635 F.2d at 1241-42. As noted in the text above, under *Fernandez v. Phillips*, 268 U.S. 311 (1925), habeas review is limited only to "whether the magistrate had jurisdiction, whether the offense charged [wa]s within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Id.* at 312. Assarsson argued that the magistrate's finding regarding the filing of formal "charges" was reviewable under habeas under the second prong of *Fernandez* because a magistrate could not ascertain whether an offense under the treaty had been charged unless he first determined that the fugitive "ha[d] in fact been properly 'charged' with committing such a crime." *In re Assarsson*, 635 F.2d at 1241.

43. *In re Assarsson*, 635 F.2d. at 1242.

44. *Id.*

45. *Id.* at 1242-43.

46. *Id.* at 1243.

narrow scope of habeas review which governed an extradition proceeding.[47]

In *In re Assarsson (Assarsson II),*[48] which concerned the extradition of Jal Alf Assarsson's brother Sven Ulf Ingemar Assarsson, also for arson and fraud, the Eighth Circuit adopted the holding of *Assarsson I* that a magistrate's finding that a fugitive was charged under the terms of the treaty was not reviewable on habeas unless the treaty conditioned the extradition of offenses on the filing of charges.[49] As in *Assarsson I*, the magistrate judge in *Assarsson II* concluded that the fugitive (in this case Jal Alf's brother) had been "charged" with extraditable offenses and the district court ruled that this finding was not reviewable by way of a petition for a writ of habeas corpus.[50]

The teaching of *Assarsson I* was followed by the Ninth Circuit in *Emami v. U.S. District Court for the Northern District of California*,[51] which dealt with an extradition request from Germany where the fugitive was wanted for fraud offenses.[52] After a finding that he was extraditable, the fugitive in *Emami* filed a petition for a writ of habeas corpus challenging that order, in part because a public charge had not yet been filed against him in Germany for the offense for which Germany sought his extradition.[53] The district court denied the petition and the fugitive thereafter appealed that denial to the Ninth Circuit, which affirmed the ruling below.[54]

The circuit court found that the term "charged" in the treaty with Germany was used to delineate one class of extraditees, the other being those convicted of criminal offenses.[55] In addition, the court determined that the term was used as a verb to identify those accused of a crime and that it "could not be transmuted into a requirement that 'charges,' a noun, be filed."[56] Lastly, the circuit court found that the treaty with Germany

47. *Id.* at 1244.

48. 687 F.2d 1157 (8th Cir. 1982).

49. *Id.* at 1160. *See also* Garcia-Guillern v. United States, 450 F.2d 1189, 1192 n.1 (5th Cir. 1971); Freedman v. United States, 437 F. Supp. 1252, 1258 (N.D. Ga. 1977).

50. *In re Assarsson*, 538 F. Supp. 1055, 1058 (D. Minn. 1982). Even if the issue were reviewable, the district court ruled that the magistrate's determination was supported by the record. *Id.* The court reasoned that the Swedish judge overseeing the proceedings against Sven Ulf Ingemar Assarsson had found "good grounds to suspect" him of fraud and arson and subsequently ordered that he be arrested. *Id.* (internal quotation marks omitted).

51. 834 F.2d 1444 (9th Cir. 1987).

52. *Id.* at 1446.

53. *Id.* at 1448.

54. *Id.* at 1446-54.

55. *Id.* at 1448.

56. *Id.*

did not require that the extradition request be supported by a copy of a document reflecting the filing of a formal charge in relation to the offense for which extradition was sought, and that respect for German sovereignty and the risk of an erroneous interpretation of its laws mandated that it not "entangle itself" in the procedural requirements governing German law.[57]

The fugitive in *Emami* also argued that a different provision of the treaty, with respect those who had not been convicted, permitted extradition for "prosecution," and that Germany was seeking his extradition "only for detention and investigation."[58] The Ninth Circuit rejected this contention, finding that Germany's request for the provisional arrest of the fugitive, as well as its formal request for his extradition, reflected a sufficient manifestation of Germany's intent to prosecute the fugitive.[59]

The most recent case addressing the meaning of the term "charged" in an extradition treaty is *Sacirbey v. Guccione*.[60] In that case, the Bosnia and Herzegovina (Bosnia) sought the extradition of Muhamed Sacirbey, its former ambassador to the United Nations, so that he could stand trial for embezzlement.[61] Sacirbey opposed his extradition, in part, on the ground that Bosnia had not formally charged him with an extraditable offense.[62] The magistrate judge rejected this argument and other arguments presented by Sacirbey and found him extraditable, after which Sacirbey sought review of that ruling in the district court through a petition for a writ of habeas corpus.[63] The district court denied the

57. *Emami*, 834 F.2d at 1449.

58. *Id.* (internal quotation marks omitted).

59. *Id.*; *see* In re Extradition of Lehming, 951 F. Supp. 505, 512 (D. Del. 1996) (holding sufficient information presented through arrest warrant and letter from German prosecutor of intention to prosecute fugitive). Relying on *Assarsson I, Assarsson II,* and/or *Emami*, lower courts also have uniformly held that references in extradition treaties to persons "charged" do not trigger a requirement that the fugitive must have been formally charged for the extradition request to be valid. *See* In re Extradition of Lam, No. 1:08-mj-247, 2009 WL 1313242, at *3 (E.D. Cal. May 12, 2009) (interpreting treaty with Belgium); Borodin v. Ashcroft, 136 F. Supp.2d 125, 129-30 (E.D.N.Y. 2001) (interpreting treaty with Switzerland); Kaiser v. Rutherford, 827 F. Supp. 832, 834 (D.D.C. 1993) (interpreting treaty with Germany); In re Extradition of La Salvia, No. 84 Cr. Misc .1, 1986 WL 1436, at *6 (S.D.N.Y. Jan. 31, 1986) (interpreting treaty with Argentina); Republic of France v. Moghadam, 617 F. Supp. 777, 781 (N.D. Cal. 1985) (interpreting treaty with France).

60. 589 F.3d 52 (2d Cir. 2009).

61. *Id.* at 54-56.

62. *Id.* at 58.

63. *Id.*

petition and Sacirbey thereafter appealed that ruling to the Second Circuit which reversed the ruling of the district court.[64]

The Second Circuit found that, under the terms of the treaty, "a valid arrest warrant and the evidence submitted in order to obtain that warrant" was the proof required to show that a person had been "charged" with an extraditable offense.[65] In the case before it, however, the court in Bosnia which had issued the arrest warrant for Sacirbey—the Cantonal Court in Saravejo—currently lacked jurisdiction over the investigation of the crimes allegedly perpetrated by Sacirbey and also did not have any power to enforce the warrant which had been originally issued.[66] Furthermore, no Bosnian court with jurisdiction over the matter re-issued or ratified the warrant.[67] As a result, the Second Circuit concluded that "the existence of this arrest warrant—issued by a court ousted of jurisdiction and no longer able to enforce it—c[ould not] satisfy the Treaty's requirement that Bosnia demonstrate a 'charge' by producing a valid arrest warrant."[68]

In response to the government's contention that statements in the record in support of the application indicating Bosnia's intent to prosecute Sacirbey for the alleged crimes remedied any defect in the request, the Second Circuit found that the treaty did not require "proof of such an intention."[69] Rather, the treaty called for "a valid arrest warrant as proof that an individual sought for extradition has been charged with a crime."[70] Even so, the court found that the statements from the Bosnian authorities "[we]re equivocal, at best" on the issue of whether the authorities intended to prosecute Sacirbey.[71]

IV. CONCLUSION

A number of treaties currently in force call for the surrender of persons "charged" with extraditable offenses.[72] When interpreting the meaning of this term, the following principles emerge from the

64. *Id.* at 62, 67.

65. *Id.* at 67. Article III of the treaty provided that when "[a] fugitive is merely *charged* with a crime, *a duly authenticated copy of the warrant of arrest in the country where the crime has been committed, and of the depositions or other evidence upon which such warrant was issued*, shall be produced." *Id.* at 66 (internal quotation marks omitted; footnote omitted).

66. *Sacirbey*, 589 F.3d at 67.

67. *Id.*

68. *Id.*

69. *Id.* (footnote omitted).

70. *Id.* at 69.

71. *Id.* at 67.

72. *See supra* notes 3-4 and accompanying text.

developing case law: First, if the treaty does not condition extradition on the existence of formal charges, following a finding of extraditability, the status of such charges is not subject to review by way of a petition for a writ of habeas corpus.[73] Second, relying on *Assarsson I, Assarsson II,* and/or *Emami*, courts uniformly have ruled that proof of a formal charging document is not required.[74] Rather, central to the holdings of the courts, when interpreting the terms of the treaties at issue, was the existence of an arrest warrant[75]—in all instances from a foreign court that had jurisdiction over the matter and authority to enforce it.[76] Broadly speaking, these decisions take heed of the well-established principle that "extradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement because they are in the interest of justice and friendly international relationships."[77]

---

73. *See* In re Assarsson, 635 F.2d 1237, 1241 (7th Cir. 1980); In re Assarsson, 687 F.2d 1157, 1160 (8th Cir. 1982); *see also* Garcia-Guillern v. United States, 450 F.2d 1189, 1193 n.1 (5th Cir. 1971); Freedman v. United States, 437 F. Supp. 1252, 1258 (N.D. Ga. 1977).

74. *See* In re Extradition of Lam, No. 1:08-mj-247, 2009 WL 1313242, at *3 (E.D. Cal. May 12, 2009); Borodin v. Ashcroft, 136 F. Supp.2d 125, 130 (E.D.N.Y. 2001); Kaiser v. Rutherford, 827 F. Supp. 832, 834 (D.D.C. 1993); In re Extradition of La Salvia, No. 84 Cr. Misc .1, 1986 WL 1436, at *6 (S.D.N.Y. Jan. 31, 1986); Republic of France v. Moghadam, 617 F. Supp. 777, 781 (D.C. Cal. 1985).

75. *See In re Extradition of Lam*, No. 1:08-mj-247, 2009 WL 1313242, at *3; *Borodin*, 136 F. Sup. 2d at 130; *Kaiser*, 827 F. Supp. at 834; *La Salvia*, No. 84 Cr. Misc .1, 1986 WL 1436, at *6; *Moghadam*, 617 F. Supp. at 781.

76. *See* Sacirbey v. Guccione, 589 F.3d 52, 69 (2d Cir. 2009); Zelenovic v. O'Malley, No. 10 C 3768, 2010 WL 3548007, at *2-4 (N.D. Ill. Sept. 7, 2010).

77. United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (internal quotation marks omitted). As the Court explained in *Factor v. Laubenheimer*:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles the principles deemed controlling in the interpretation of international agreements. Considerations which should govern diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.

Factor v. Laubenheimer, 290 U.S. 276, 293 (1993).