

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES	:	
	:	Criminal. No. 06-089 (RWR)
v.	:	
	:	
NIZAR TRABELSI,	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO
DEFENDANT NIZAR TRABELSI’S MOTION TO DISMISS INDICTMENT**

The United States of America, by and through its undersigned counsel, respectfully opposes defendant Nizar Trabelsi’s motion to dismiss the Superseding Indictment (hereinafter “Indictment”), based on allegations that his extradition to the United States violated Articles 5, 6 and 15 of the Extradition Treaty between the United States and the Kingdom of Belgium (hereinafter “Treaty”). As discussed in detail below, that motion is meritless and should be denied.

The Belgian Minister of Justice, the country’s designated authority for granting extradition requests, specifically rejected any restrictions on defendant’s extradition based on the double jeopardy considerations set forth in Article 5. In the extradition Order, the Minister of Justice explicitly found that no double jeopardy concerns existed after comparing the offenses pursued in the prior Belgian prosecution and the offenses set forth in the U.S. indictment. By Diplomatic Note issued on October 29, 2014 and attached as Exhibit 1, the Kingdom of Belgium emphasizes that the Minister of Justice’s Order, “which is the decision by the Belgian government that sets forth the terms of [defendant’s] extradition to the United States, makes clear that [defendant] may be tried on all of the charges set out in that indictment, and that any

similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment.” That Diplomatic Note further stresses, contrary to defendant’s contention, that the “Order is also clear that the prosecution may offer facts relating to overt acts 23 through 26 in prosecuting [defendant] on the charges in the indictment.” U.S. courts, moreover, have repeatedly highlighted the importance of not interfering with a foreign country’s extradition determination.

Additionally, defendant’s standing to challenge the prosecution as inconsistent with Article 15, which embodies the rule of specialty, is questionable. The United States Court of Appeals for the District of Columbia Circuit has twice recognized, without resolving, the conflicting authority as to whether a criminal defendant – as opposed to the extraditing state – has standing to assert the doctrine of specialty. Even addressing the merits of defendant’s claim, his standing to assert the specialty principle is only derivative. The Court’s inquiry must still focus on the question of whether the Kingdom of Belgium would object on rule of specialty grounds. The Kingdom of Belgium has raised no such objection, however. To the contrary, in addition to recognizing that the prosecution of defendant does not raise double jeopardy concerns, the Kingdom of Belgium emphasizes in its Diplomatic Note that, “[n]or does such trial and offering of proof violate the rule of specialty.” Indeed, defendant is being prosecuted for the exact charges in the Indictment upon which his extradition was based, and no restrictions exist on the admissibility of evidence pertaining to the overt acts set forth in the Indictment.

Courts have also stressed that, given the substantial deference that must be provided to a foreign country’s extradition determination, the courts of that foreign country should decide whether an executive could lawfully authorize an individual’s extradition despite an alleged

prohibition under domestic law. Accordingly, this Court should decline defendant's invitation to address whether the Kingdom of Belgium allegedly violated its "domestic law" and, by implication, Article 6, through its decision to extradite defendant. Even putting aside the authority emphasizing that United States courts should abstain from entertaining such claims, defendant has failed to provide any support for the proposition that the Kingdom of Belgium somehow violated its domestic law in extraditing defendant.

Finally, even assuming that defendant could somehow substantiate a violation of Article 5, 6, or 15, dismissal of the Indictment is not an available remedy. Courts have long recognized that alleged illegalities in the manner in which a defendant is apprehended and brought within a court's jurisdiction, even if proven, do not require dismissal of the underlying charges. Defendant's alleged Treaty violations do not warrant an exception to that broad rule, and defendant cites no cases demonstrating otherwise.

Procedural and Factual Background

A. The Superseding Indictment

On April 7, 2006, a federal grand jury returned an Indictment (ECF Doc. No. 3), charging defendant with Conspiracy to Kill United States Nationals Outside of the United States, in violation of 18 U.S.C. §§ 2332(b)(2) and 1111(a) (Count One); Conspiracy and Attempt to Use Weapons of Mass Destruction, in violation of 18 U.S.C. §§ 2332a and 2 (Count Two); Conspiracy to Provide Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B (Count Three); and Providing Material Support and Resources to a Foreign Terrorist Organization, in violation of 18 U.S.C. §§ 2339B and 2 (Count Four). On November 16, 2007, a federal grand jury returned the superseding Indictment (ECF Doc. No. 6), charging

defendant with the same offenses. All of the counts in the Indictment are listed as federal crimes of terrorism as defined in 18 U.S.C. § 2332b(g)(5)(B). Counts One and Two carry a maximum penalty of life imprisonment.

B. The Request for Extradition

In April, 2008, the United States conveyed to the Belgian authorities a request for defendant's extradition for the four charges set forth in the Indictment, based on an arrest warrant issued by Magistrate Judge Alan Kay on November 16, 2007. Defendant's Motion to Dismiss, Exhibit A, hereinafter "Def. Exh. A," at 4. Various supporting documents detailing the nature of the charges were included as part of that extradition request. Id.

C. The Grant of Extradition

On November 23, 2011, Belgium's designated authority, the Minister of Justice, granted the extradition of defendant to the United States for the offenses for which extradition had been requested. Id. at 7. The Minister of Justice's grant of extradition was supported by a detailed decision setting forth prior proceedings in Belgium related to the request for extradition as well as the reasons supporting the Minister of Justice's determination that extradition was proper. Id. at 7-16.

Those preliminary proceedings included, among others, the decision of the Chamber of the Court of First Instance of Nivelles, on November 19, 2008, holding that the arrest warrant was enforceable, "except as concerns the acts declared to be 'Overt Acts,' nos. 23, no. 24, 25 [*sic*] and 26, listed in paragraph 10 of the first count and expected to be repeated in support of the other three counts." Id. at 8.¹ That decision was affirmed on February 19, 2009, by the

¹ Overt Act 23 provides, "In or about July 2001, in Uccle, Brussels, NIZAR TRABELSI rented

Indictment Division of Brussels. Id. Defendant appealed to the Court of Cassation, in Belgium. Id. That appeal was rejected on June 24, 2009. Id. On June 10, 2010, the Indictment Division of Brussels issued an opinion addressing various aspects relating to defendant's extradition. Id.

Among the topics addressed in the Minister of Justice's Order were "[p]rosecution and trial by a special court," namely a military commission; "[f]uture application of the death penalty"; "[t]he possible application of life imprisonment without the possibility of parole"; "possible reextradition to the Republic of Tunisia"; and "[t]he application of Article 5 of the [Treaty] – [t]he principle of 'double jeopardy' concerns 'offenses' and not 'facts.'" Id. at 7-16. In addressing Article 5 of the Treaty, the Minister of Justice explained that the Treaty prohibits extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." Id. at 13. The Minister of Justice found that there were no restrictions on defendant's extradition to face the charges included in the U.S. indictment arising from the double jeopardy considerations set forth in Article 5.

The Minister of Justice further explained that "the offenses for which the person to be extradited was irrevocably sentenced by the Court of Appeal of Brussels on 9 June, 2004 [based

an apartment." Overt Act 24 provides, "In or about July and August 2001, in Belgium, NIZAR TRABELSI bought quantities of chemicals, including acetone, sulfur, nitrate, and glycerine, to be used in manufacturing a 1,000-kilogram bomb." Overt Act 25 provides, "In or about August 2001, in Belgium, NIZAR TRABELSI, traveled at night with conspirators to scout the Kleine-Brogel Air Force Base – a facility used by the United States and the United States Department of the Air Force, and at which United States nationals were present – as a target for a suicide bomb attack." Overt Act 26 provides, "In or about early September 2001, in the vicinity of Brussels, Belgium, NIZAR TRABELSI, moved, and caused to be moved, a quantity of chemicals, including acetone and sulfur, from Trabelsi's apartment to a restaurant operated by a conspirator known to the Grand Jury, after police had visited the apartment for an apparently innocuous purpose."

on the Belgian prosecution] do not correspond to the offenses listed under counts A through D that appear in the arrest warrant on which the U.S. extradition request is based.”² Def. Exh. A at 15. In reaching this conclusion, the Minister of Justice stated that Article 5 does not incorporate the broader doctrine of *non bis in idem*, rather than double jeopardy. Id. at 14. The Minister of Justice explained that “it is not the deeds, but the designation of these, the offenses, that have to be identical” for purposes of the extradition limitation set forth in Article 5. Id. The Minister of Justice also found that, “[c]ontrary to the principle of ‘*ne (or non) bis in idem*,’ the principle of ‘double jeopardy’ set forth in Article 5 of the convention on extradition limits itself to the same crimes or to crimes which are substantially the same.” Def. Exh. A. at 14. The Minister of Justice clarified that Article 5’s double jeopardy concept “excludes the (same) elements of evidence, the (same) evidence or the (same) presented material facts that were, where necessary, used for proving the offenses for which the person had previously been prosecuted, convicted, or acquitted.” Def. Exh. A. at 14.

The Minister of Justice further emphasized that, “[c]onforming to the principle of ‘double jeopardy’ as set forth in Article 5, cited above, the authorities in charge of the prosecution [in the requesting country] may make selection among all available evidence in order to prosecute the person concerned for such [facts] or such (a) charge(s), even if all the facts are identical to the set of facts used in prior proceedings.” Def. Exh. A. at 14. The Minister of Justice specifically addressed Overt Acts 23, 24, 25, and 26 of the Indictment, which relate to acts (among others)

² On September 30, 2003, a Brussels criminal court sentenced defendant to a term of ten years in prison for, among other criminal activities, having attempted to destroy the military base of Kleine-Brogel with explosives. Def. Exh. A at 3. A more detailed recitation of the charges on which defendant was convicted is set forth in the Ruling of the Brussels Court of Appeal, 12th Chamber, dated June 9, 2004. That Ruling is attached to defendant’s motion as Exhibit B.

occurring in Belgium, for which defendant continues to be prosecuted in the United States, and did not prohibit the use of evidence supporting those overt acts. Thus, although recognizing the limitation presented by the Chamber of the Court of First Instance of Nivelles with respect to Overt Acts 23, 24, 25, and 26, the Minister of Justice did not incorporate that limitation into the final grant of extradition. Id.

Defendant subsequently requested the annulment of the Minister of Justice's order granting his extradition to the United States. Def. Exh. A at 2. On September 23, 2013, the Belgian Council of State, Division of Administrative Litigation, issued an Order rejecting defendant's challenges to his extradition in its entirety. Id. at 30.

On October 3, 2013, the Belgian government extradited defendant to the United States.

ARGUMENT

I. The Belgian Minister of Justice Granted Extradition, After Extensively Reviewing the Double Jeopardy Considerations Set Forth in Article 5, and the Court Should Decline Defendant's Invitation to Second-Guess that Decision

Under the law of the United States, the Belgian proceedings would not preclude further proceedings in this country. It is well established that the Constitution's Double Jeopardy Clause does not bar separate sovereigns from undertaking sequential prosecutions of the same offense. Heath v. Alabama, 474 U.S. 82, 93, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Rather, defendant maintains that the principles of double jeopardy embodied in *Belgian* law require dismissal of the indictment. Defendant's Motion to Dismiss, hereinafter "Def. Mot.," at 10. However, Belgian's designated authority – the Belgian Minister of Justice – reviewed the U.S. indictment after fully considering the prior prosecution in that country, and concluded that Belgian law would permit defendant to be extradited and tried on the charges set forth in that

indictment. See Def. Exh. A. at 8 (recognizing that the Minister of Justice granted the defendant's extradition to U.S. "for the offenses for which it was requested"). As the Kingdom of Belgium emphasized in its recent Diplomatic Note, the Minister of Justice's Order "makes clear that [defendant] may be tried on all of the charges set out in that indictment, and that any similarity between the United States case and the Belgian case does not give rise to any bar to his being tried on the charges in that indictment." The courts have stressed that such extradition determinations should not be second-guessed. Accordingly, this Court should decline to question the Belgian Minister of Justice's informed conclusion that Belgian law would permit him to stand trial here.

A. The Belgian Minister of Justice Specifically Considered and Rejected Restrictions on Defendant's Extradition Based on the U.S. Indictment

Article 5 of the Treaty prohibits extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested." Defendant contends that his extradition "violated this provision because he was convicted in Belgium for the offenses charged in the Indictment." Def. Mot. at 10. The Belgian Minister of Justice, however, specifically considered and rejected any restrictions on defendant's extradition to face charges in the U.S. indictment based on double jeopardy considerations set forth in Article 5.

The Minister of Justice, after comparing the offenses pursued in the Belgian prosecution and the offenses set forth in the U.S. indictment, explained that no double jeopardy concerns arise from Article 5:

In this case, the offenses for which the person to be extradited was irrevocably sentenced by the Court of Appeal of Brussels on 9 June, 2004 do not correspond to the offenses listed under counts A

through D that appear in the arrest warrant on which the U.S. extradition request is based. The essential elements of the respective US and Belgian offenses, their scope and the place(s) and time(s) when they were committed do not correspond.

Def. Exh. A at 15.

Indeed, each of the charged offenses in the U.S. indictment is notably distinct from the offenses prosecuted in Belgium. Significantly, for example, the U.S. indictment specifies that “the objects of the conspiracy were to destroy by terrorist means – including destructive violence and murder – people, property, and interests of the United States of America, *wherever located*.” ECF No. 6, ¶ 8 (emphasis added). Thus, while paragraph 25 of the indictment references defendant’s efforts “to scout the Kleine-Brogel Air Force Base . . . as a target for a suicide bomb attack,” the indictment is not limited to that location, as defendant suggests (Def. Mot. at 11). In fact, paragraph 9.D. of the indictment explains that “[o]perational targets were changed as circumstances changed.”

Even defendant recognizes that each of the offenses set forth in the indictment is charged distinctly. See, e.g., Def. Mot. at 15 (recognizing that “the Indictment accus[es] Mr. Trabelsi of conspiring to kill U.S. nationals ‘wherever located’” and describing this language as “[c]harging Mr. Trabelsi with this broader conspiracy”). As a result, defendant attempts to support his challenge by stating that, “[i]f permitted to proceed with this prosecution, the government will present at trial only the narrow evidence of the plot to bomb Kleine-Brogel and thereby circumvent Article 5 of the Treaty” (Def. Mot. at 16). There is, of course, simply no evidence to support the contention that the government will not proceed at trial on the indictment as charged and, unsurprisingly, defendant cites none.

B. This Court Should Decline Defendant’s Invitation to Second-Guess the Minister of Justice’s Determination that Extradition Was Proper

Because the Belgian Minister of Justice – the country’s designated official for authorizing extradition – determined that no double jeopardy concerns arise under Article 5, any further comparative analysis of the Belgian and U.S. offenses is simply unnecessary and inappropriate. As the Diplomatic Note recognizes, the Minister of Justice’s Order “is the decision by the Belgian government that sets forth the terms of [defendant’s] extradition to the United States.” U.S. courts have repeatedly stressed the importance of not interfering with such extradition determinations. Accordingly, the Court should reject defendant’s labored efforts to engage in an after-the-fact comparative analysis in an attempt to support his extradition challenge.

The United States Court of Appeals for the District of Columbia Circuit, for example, has emphasized that U.S. courts should not engage in such second-guessing of a foreign country’s extradition decision. In Casey v. Dep’t of State, the Court explained that:

[a] foreign court’s holding as to what that country’s criminal law provides should not lightly be second-guessed by an American court – if it is ever reviewable. And the foreign court’s understanding of the nature of the American charge is, in truth, inextricably intertwined with its reading of its own law.

980 F.2d 1472, 1477 (D.C.Cir. 1992); see also United States v. Guevara, 443 Fed. Appx. 641, 643-44 (2d Cir. 2011) (declining to question on double jeopardy grounds the Dominican judiciary’s informed conclusion, following its review of the prior proceedings in that country, that Dominican law would permit the defendant to stand trial here); United States v. Campbell, 300 F.3d 202, 209-210 (2d Cir. 2002) (recognizing that “our courts cannot second-guess another country’s grant of extradition to the United States,” and emphasizing that “[i]t could hardly promote harmony to request a grant of extradition and then, after extradition is granted, have the

requesting nation take the stance that the extraditing nation was wrong to grant the request”); United States v. Salinas Doria, No. 01 Cr. 21, 2008 WL 4694229, at *2 (S.D.N.Y. Oct. 21, 2008) (“It is well-established that ‘a foreign government’s decision to extradite an individual in response to a request from the United States is not subject to review by United States courts”) (citing United States v. Medina, 985 F. Supp. 397, 401 (S.D.N.Y. 1997)).

C. The Minister of Justice Extensively Considered and Specifically Rejected Arguments Based on the Doctrine of *Non Bis In Idem* in Approving the U.S. Extradition Request

Even looking, *arguendo*, more closely into defendant’s purported comparison analysis, his claim still fails. The Minister of Justice extensively considered, and specifically rejected, arguments based on the doctrine of *non bis in idem*, similar to the contentions heavily relied upon in defendant’s motion. Indeed, an entire section of the Minister of Justice’s Order is devoted to the topic. Defendant specifically contends that “Article 5 of the Treaty incorporates the doctrine of *non bis in idem*” and consequently, “[i]n examining [defendant’s] claims based on the principle of *non bis in idem*, [the court] must look not only to the denomination of the charged crime but the acts that constitute the alleged crime.” Def. Mot. at 17. Defendant further contends that “[a] comparison of the offenses in the United States with the charges prosecuted in Belgium, *along with the alleged conduct underlying the charges*, demonstrates that prosecution in the United States violates the principle of *non bis in idem*.” Def. Mot. at 11 (emphasis added).

In the section of the Minister of Justice’s Order specifically entitled, “*The application of Article 5 of the Convention on Extradition (1987) - The principle of ‘double jeopardy’ concerns ‘offences’ and not ‘facts’*,” the Minister of Justice explicitly rejected the premise, upon which defendant bases his entire challenge, that Article 5 incorporates the broader doctrine of *non bis in*

idem, rather than double jeopardy. The Minister of Justice emphasized that “it is not the deeds, but the designation of these, the offenses, that have to be identical” for purposes of the extradition limitation set forth in Article 5. Id. at 14 (emphasis added).

First and foremost, the Minister of Justice explained that the plain language of Article 5 specifically refers to “offenses,” rather than “facts.” Def. Exh. A. at 13 (emphasis added). The Minister of Justice emphasized that Article 5’s specific reference to “offense” was not lightly included, and cited consistent wording in the provisions of other international agreements addressing “double prosecution or double punishment.” Def. Exh. A. at 14 (referring to the similar inclusion of the word “offense” in the Convention on Human Rights and Fundamental Liberties and the International Pact on Civil and Political Rights); see also Sale v. Haitian Ctrs. Council, 509 U.S. 155, 194, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (“It is axiomatic that a treaty’s plain language must control absent ‘extraordinarily strong contrary evidence.’”) (citations omitted).

The Minister of Justice also explained that, “[c]ontrary to the principle of ‘*ne (or non) bis in idem*,’ the principle of ‘double jeopardy’ set forth in Article 5 of the convention on extradition limits itself to the *same crimes or to crimes which are substantially the same.*” Def. Exh. A at 14 (emphasis added). Contrary to defendant’s contention that the court “must look not only to the denomination of the charged crime but the acts that constitute the alleged crime” (Def. Mot. at 17), the Minister of Justice emphasized that Article 5’s double jeopardy concept “*excludes* the (same) elements of evidence, the (same) evidence or the (same) presented material facts that

were, where necessary, used for proving the offenses for which the person had previously been prosecuted, convicted, or acquitted.” Def. Exh. A at 14 (emphasis added).³

Rather, only “[t]o the degree that these factual and/or evidential elements are identical or substantially identical as the basis of an identical or substantially identical *offense*, second prosecutions are prohibited.” Def. Exh. A at 14 (emphasis added). Thus, the Minister of Justice makes abundantly clear that it is a comparison of the *offenses*, rather than the underlying acts, that controls the narrower double jeopardy determination under Article 5. This Court should decline defendant’s request to revisit that determination. See Casey, 980 F.2d at 1477 (emphasizing, as discussed above, that a “foreign court’s holding as to what that country’s criminal law provides should not lightly be second-guessed by an American court – if it is ever reviewable”).

Notably, the Minister of Justice’s determination is consistent with the intended interpretation of Article 5 by the United States at the time of the Treaty’s ratification. As set forth in the Senate Report addressing its ratification, Article 5 was specifically intended to permit extradition if the person sought is charged in each respective country with different offenses despite the alleged similarity of the underlying conduct:

Article 5 – Prior jeopardy for the same offense

Paragraph 1, which prohibits extradition if the person sought has been found guilty, convicted, or acquitted in the Requested State for the offense for which extradition is requested, is similar to provisions in many United States extradition treaties. *This paragraph permits extradition, however, if the person sought is*

³ By comparison, the Minister of Justice Order emphasizes that Article 5.2 of the convention on extradition, which address “acts” as opposed to “offenses,” excludes the otherwise applicable principle *ne bis in idem* for “acts” for which the person being sought has not been prosecuted in the State to which the request is being made. Def. Exh. A. at 15.

charged in each Contracting State with different offenses arising out of the same basic transaction.

S. Rep. No. 104-28 (July 30, 1996) (original emphasis in heading, emphasis in text added); see United States v. Stuart, 489 U.S. 353, 368 n.7 (1989) (recognizing that the Senate’s preratification reports are a proper interpretative guide). Thus, even where the offenses arise, unlike here, from the same basic transaction, Article 5 is not intended to bar extradition. This interpretative construction is also consistent with the “familiar rule that the obligations of [a] treaty should be liberally construed to effect their purpose, namely, the surrender of fugitives to be tried for their alleged offenses.” Ludecke v. U.S. Marshal, 15 F.3d 496, 498 (5th Cir. 1994) (further recognizing that the “obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure”) (citations omitted).

D. The Minister of Justice Specifically Considered and Rejected the Imposition of Any Limitations on the Evidence that Could Be Presented to Support the Prosecution of the U.S. Indictment, Following an Analysis of the Double Jeopardy Considerations Arising from Article 5

Recognizing the Minister of Justice’s conclusion that “[t]he constitutive elements of the American and Belgian offenses respectively, their significance, and the places(s) and time(s) at which they were committed do not match,” defendant attempts to relitigate his extradition challenge before this Court by arguing that the “Minister of Justice’s finding was based on the mistaken belief that Mr. Trabelsi would not be prosecuted in the United States for acts that occurred in Belgium.” Def. Mot. at 14. In particular, defendant raises an apparent anticipatory challenge to the Government’s use of evidence to prove certain overt acts set forth in the indictment which arise from defendant’s conduct in Belgium, to the extent that the same

evidence was used by the Belgian government in its prosecution. The Minister of Justice rejected that argument as well.

The Minister of Justice clarified that, as long as the *offenses* are not the same or substantially similar, the requesting government may pursue its prosecution based on *all* available evidence, even in circumstances, unlike here, where *all* the facts are identical to the set of facts used in prior proceedings in the surrendering country:

Conforming to the principle of “double jeopardy” as set forth in Article 5, cited above, the authorities in charge of the prosecution may make selection among *all* available evidence in order to prosecute the person concerned for such [facts] or such (a) charge(s), *even if all the facts are identical to the set of facts used in prior proceedings*. This choice having been once made, the principle of “double jeopardy” forbids prosecution for the *same offense or a substantially similar offense* based on substantially similar facts (citing Michael ABBELL, *Extradition to and from the United States, Leiden and Boston*, Martinus Nijhoff-Brill, charts, pp. 52-58, and M. Cherif BASSIOUNI, *International Extradition: United States Law and Practice*, New York, Oxford University Press, Oceana, 5th edition, 2007, p. 749 and following).

Def. Exh. A at 14 (emphasis added).

Notably, while defendant quotes selected language out-of-context from the above passage stating that “the principle of ‘double jeopardy’ forbids prosecution for the same offense or a substantially similar offense based on substantially similar facts” (Def. Mot. at 14), defendant omits the qualifying language in the preceding sentence stating that “the authorities in charge of the prosecution may make selection among *all available evidence* in order to prosecute the person concerned for such [facts] or such (a) charge(s), even if all the facts are identical to the set of facts used in prior proceedings.” Def. Exh. A at 14 (emphasis added). The notable absence of this pertinent language speaks volumes of its effectiveness at directly undercutting defendant’s

contention that the government is now somehow prohibited from selecting among “all available evidence” in order to prosecute him.

Moreover, the Minister of Justice specifically addressed Overt Acts 23, 24, 25, and 26 of the indictment, which relate to acts (among others) occurring in Belgium, for which evidence will be presented in the United States prosecution. The Minister of Justice did not prohibit the use of those Overt Acts in any way:

The facts upon which the alleged offenses are founded correspond to “overt acts” that individually or as a whole function as elements in support of the indictments. *The principle of “double jeopardy” does not exclude the possibility of using or not using these factual elements.*

Def. Exh. A at 14 (emphasis added).

The Minister of Justice explained that the “‘overt acts’ enumerated in the [U.S.] indictment . . . are not the offenses for which extradition is requested.” Def. Exh. A at 15. Rather, “the *indictment* constitutes the basis for the arrest warrant and forms part of the documents supporting the extradition request, in conformance with Article 7 of the convention on extradition.” *Id.* (emphasis added). Further, the Minister of Justice acknowledged that, “[e]ach ‘overt act’ is nothing other than supporting evidence that, by itself or in combination with other overt acts, can help to establish the offense or offenses for which the person is being prosecuted, ie conspiracy – association or collusion – for example, to kill U.S. nationals (cf. indictment A).” *Id.* The Minister of Justice’s Order also sets forth that, “[a]ccording to [U.S.] federal criminal law . . . , an ‘overt act’ is an element (of deed or fact), act, behavior, or transaction which in itself cannot inevitably be described as an offense.” *Id.* Indeed, the

Minister of Justice emphasized that, even given the criminal nature of Overt Acts 24, 25, and 26, those overt acts still did not constitute the offenses for which extradition was requested:

“Overt acts’ 24, 25, and 26 could certainly each be qualified as offenses, *but they do not constitute the offenses for which extradition is requested.*” Indeed, *if* the ‘overt acts’ were offenses for which the person sought would – or could be – prosecuted, they would constitute additional charges for which, in fact, extradition has not been sought. In this case, granting extradition for these “hidden” charges – *offenses* – would constitute a violation of the principle of specialty as set forth in Article 15 of the applicable convention on extradition.”

Id. (emphasis added).

Accordingly, contrary to defendant’s unfounded claim, the Minister of Justice was aware of the indictment’s enumerated overt acts, and placed no restrictions on their use in the prosecution. See Casey, 980 F.2d at 1477 (stressing, as discussed above, the importance of not interfering with an extradition determination, especially given that that “the foreign court’s understanding of the nature of the American charge is, in truth, inextricably intertwined with its reading of its own law”).

The Minister of Justice plainly recognized that overt acts “do not constitute the offenses for which extradition is requested” and that “the principle of ‘double jeopardy’ does not exclude the possibility of using or not using these factual elements.” Def. Exh. A. at 14-15. As the Diplomatic Note emphasizes:

The Order is also clear that the prosecution may offer facts relating to overt acts 23 through 26 in prosecuting [defendant] on the charges in the indictment. Neither [defendant’s] trial on the charges set out in the indictment, nor the prosecution’s offering proof as to any of the overt acts recited in the indictment, is inconsistent with the Order.

The United States Court of Appeals for the Fifth Circuit similarly recognized that the use of such overt acts in a separate prosecution does not raise double jeopardy concerns. Even in the context of addressing a treaty provision which prohibited extradition “if the person claimed has been tried for the same *act* in the country to which the requisition is addressed,” as opposed to “offenses” as in this case, the Court in United States v. Archbold-Newball nonetheless recognized that a conspiracy count alleging many overt acts, of which the challenged overt act was one, was not a prosecution within the coverage of the “same act” provision of the treaty. 554 F.2d 665, 684 (5th Cir. 1977) (emphasis added). The Court in Archbold-Newball explained that:

A prosecution for conspiracy is not the equivalent of a prosecution for having done or performed the overt act, for an overt act may not, itself, be unlawful at all. [Yates v. United States, 354 U.S. 298 (1956)]. Thus where the overt act is as innocent as the act of a man walking across the street, see generally Yates, supra; Castro v. United States, 296 F.2d 540 (5th Cir. 1961), a defendant is subject to no prosecution for it, standing alone. It follows that immunity from prosecution for a crime incidentally committed against a local law while performing an overt act pursuant to a conspiracy does not confer immunity to the conspiracy charge nor the naming and proving of the act as an “overt act.” Were this not so, the successful prosecution of a defendant for jay-walking while crossing the street in pursuit of the object of a conspiracy would end the conspiracy charge.

554 F.2d at 684. Accordingly, the Court concluded that evidence in the extraditing country could properly be shown of an overt act pursuant to the conspiracy whether it was, itself, lawful or criminal under some law of that foreign jurisdiction. Id.

Moreover, defendant misplaces his reliance on the decision of the Chamber of the Court of First Instance of Nivelles, which held that the arrest warrant was enforceable, “except as concerns the acts declared to be ‘Overt Acts,’ nos. 23, no. [sic] 24, 25, and 26’” of the Indictment

(Def. Mot. at 8, Def. Exh. A. at 1, 8). The Minister of Justice acknowledged that Court's decision but, as discussed above, explicitly rejected any restriction on evidence of those overt acts being presented in support of the U.S. indictment. It is the extradition determination of the Minister of Justice, as the designated authorizing official, which ultimately controls. See Def. Exh. A. at 8 (recognizing the Minister of Justice as the authorizing official for defendant's extradition to the U.S.). Indeed, there would be no reason for the Minister of Justice to engage in an extended discussion of the distinctiveness of the offenses in the U.S. and Belgian prosecutions and of the propriety of the use of defendant's acts in Belgium to support the U.S. prosecution, if the Minister of Justice "mistakenly" believed, as defendant contends, defendant's acts in Belgium would simply not be at issue in the U.S. prosecution.

Defendant similarly misplaces his reliance on the decision of the Belgian Council of State. While defendant correctly acknowledges that the "Belgian Council of State rejected Mr. Trabelsi's argument that extradition would violate Article 5 of the Extradition Treaty and the principle of *non bis in idem*," he incorrectly asserts that this decision was based on the omission of Overt Acts 23, 24, 25 and 26 from its analysis. Def. Mot. at 14-15. The Belgian Council of State recognized, consistent with the Minister of Justice's extradition decision, that "[i]t appears from the evidence that [defendant] is claimed by U.S. authorities for offenses for which he has not 'been convicted, sentenced or acquitted in the State to which the request is being made' and that 'overt acts' constitute elements that shall serve the U.S. judicial authorities to determine whether [defendant] is guilty of the four charges brought against him." Def. Exh. A at 29. Accordingly, the Council of State's decision, which sets forth the Minister of Justice's Order in

its entirety (Def. Exh. A at 7-16), properly rejected defendant's application seeking annulment of the grant of extradition.⁴

Finally, to the extent that the Minister of Justice believed that evidentiary limitations were somehow necessary to prevent defendant's prosecution in the United States in a manner that would purportedly violate Belgian domestic law, the Minister of Justice could have explicitly set forth those limitations, as it had done on other topics, such as emphasizing the restrictions on the defendant's prosecution by a "special court, namely a military commission" or punishment by the death penalty. Def. Exh. A at 9, 10. No such limitations on the charges to be prosecuted or on the evidence to be presented were set forth, because no such concerns existed.

E. Even Assuming, *Arguendo*, that Defendant Could Somehow Substantiate a Violation of Article 5, Dismissal of the Indictment Is Not an Available Remedy

In addition to the deference, as discussed above, that must be accorded to foreign decisions granting extradition, "the Supreme Court has long held that illegalities in the manner in which a defendant is apprehended and brought within a court's jurisdiction neither deprive that court of its power to try the defendant nor require dismissal of the underlying charges." Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *4 (citing Ker v. Illinois, 119 U.S. 436, 440 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1952); United States v. Alvarez-Machain, 504 U.S. 655,

⁴ While the Council of State does not specifically mention Overt Acts 23-26 in its analysis, neither does the Council of State specifically state that those acts, as defendant suggests, were excluded from the Minister of Justice's grant of extradition. Moreover, while the Council of State describes the overt acts included in the grant of extradition as having "no territorial connection" to the Kingdom of Belgium, it does not follow that the Council of State somehow perceived that Overt Acts 23-26 were therefore excluded from the grant, as based on acts occurring in that country. Indeed, Overt Acts 27 and 28 were specifically identified in the Council of State's decision as included in the grant of extradition, yet those overt acts clearly occurred in the Kingdom of Belgium. Def. Exh. A at 27 – 29.

657 (1992)).⁵ In situations in which the Supreme Court has invoked the Ker-Frisbie doctrine, “the illegalities attending the manner of a defendant's apprehension have been blatant – often involving forcible abduction – and orchestrated or undertaken principally by agents of the government seeking to prosecute him.” Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *4 (citing Alvarez-Machain, 504 U.S. at 657; Frisbie, 342 U.S. at 520; Ker, 119 U.S. at 438)).

Here, “it follows that charges against a defendant in an American court should not be dismissed solely because of an alleged defect in the judicial or diplomatic processes leading to that defendant's extradition.” Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *4. Tellingly, defendant has cited no cases in which a court has deviated from “the broad rule of disregarding major or minor alleged violations of extradition treaties.” Id. (further recognizing that “the cases following this [broad rule] are legion”) (citations omitted).

While possible exceptions to the Ker-Frisbie doctrine have been recognized in cases involving egregious misconduct on the part of the United States, defendant does not – and could not – argue that the particular violations that he alleges here are so extreme that they would warrant such an exception. Defendant only contends that his extradition violated Article 5 of the Extradition Treaty, which precludes the requested state from granting extradition “when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested.” The language of Article 5, however, sets forth circumstances in which extradition shall not be granted and makes clear that its prohibitions are directed to the extraditing state, not to the courts of the requesting state. Thus, the very treaty

⁵ Courts refer to this principle as the “Ker-Frisbie doctrine.” Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *4

provision on which defendant relies even fails to offer any support for the proposition that the requesting state is prohibited from prosecuting where an Article 5 violation is alleged. See id.

II. Defendant's Challenge Based on Article 15, Embodying the Rule of Specialty, Must Fail

The rule of specialty is based on “principles of international comity and is designed to guarantee the surrendering nation that the extradited individual will not be subject to indiscriminate prosecution by the receiving government.” United States v. Leighnor, 884 F.2d 385, 389 (8th Cir. 1989) (citations omitted). The doctrine of specialty “requires that a requisitioning state may not, without the permission of the asylum state, try or punish a fugitive for any crimes committed before the extradition except the crimes for which he was extradited.” United States v. Kember, 685 F.2d 451 (D.C. Cir. 1982) (citations omitted); see United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995) (“a nation that receives a criminal defendant pursuant to an extradition treaty may try the defendant only for those offenses for which the other nation granted extradition”).

The Treaty incorporates the rule of specialty in Article 15, which provides that “[a] person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for . . . the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted” On the basis of this doctrine, defendant asserts that the indictment must be dismissed. In particular, defendant claims that, although he is being prosecuted solely on the offenses set forth in the indictment upon which he was extradited, the Minister of Justice allegedly refused extradition with respect to Overt Acts 23, 24, 25, and 26, and those acts form the basis for charges in the indictment. Def. Mot. at 1, 20. Defendant’s challenge is meritless and should be denied.

A. Standing to Assert a Rule of Specialty Violation

As a preliminary matter, there is some question whether defendant has standing to claim a violation of the rule of specialty. The United States Court of Appeals for the District of Columbia Circuit has twice recognized, without resolving, the “conflicting authority as to whether a criminal defendant – as opposed to the extraditing state – has standing to assert the doctrine of specialty.” United States v. Lopesierra-Gutierrez, 708 F.3d 193, 206 (D.C. Cir. 2013) (citing United States v. Sensi, 879 F.2d 888, 892 n.1 (D.C. Cir. 1989)); see also United States v. Day, 700 F.3d 713, 721 (4th Cir. 2012) (recognizing “the circuits are split on the question of whether an individual defendant has standing to raise a specialty violation”). One court in this district stated, after Sensi, that “the rule of specialty is not a right of the accused but is a privilege of the asylum state,” Kaiser v. Rutherford, 827 F. Supp. 832, 835 (D.D.C. 1993), but proceeded to “assum[e], arguendo, that the [defendant] had standing” and to reject the specialty challenge on the merits. Id. As in these three cases, this Court need not resolve whether defendant is permitted to raise a specialty claim because, as is explained below, that claim fails on the merits.

B. Even Assuming Defendant Has Standing to Assert a Rule of Specialty Violation, His Claim Must Fail

Even assuming arguendo defendant has standing to assert his specialty claim, it must be denied, especially in light of the narrow scope of review of such claims. “[R]eview of the indictment is to be guided by the standard applicable to a defendant’s assertion of the doctrine of specialty: ‘whether the requested state has objected or would object to prosecution.’” Sensi, 879 F.2d at 895 (citations omitted). At most, “[t]he extraditee’s standing to assert the specialty principle is only derivative; the extraditee may object only to breaches to which the surrendering country would have been entitled to object.” Leighnor, 884 F.2d at 389 (citing United States v.

Diwan, 864 F.2d 715, 721 (11th Cir. 1989) and United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987)). Accordingly, in addressing defendant’s claim that his extradition violated the rule of specialty, the inquiry must focus on the question of whether the Kingdom of Belgium would consider the extradition to be a breach of the specialty principle. Leighnor, 884 F.2d at 389. Here, the Kingdom of Belgium would have no grounds to object to the extradition because defendant is being prosecuted for the exact charges in the indictment upon which his extradition was based. In fact, in addition to recognizing that the prosecution of defendant does not raise double jeopardy concerns, the Kingdom of Belgium explicitly recognized in its Diplomatic Note that, “[n]or does such trial and offering of proof violate the rule of specialty.” See also Kaiser, 827 F. Supp. at 835 (D.D.C. 1993) (finding that the “rule of specialty is satisfied” where an individual’s extradition was “for matters clearly set forth in the arrest warrant and other documents tendered to the Court”); Day, 700 F.3d at 721 (rejecting specialty claim where “defendant is tried for the exact offenses described in his extradition agreement”).

Furthermore, neither the principle of specialty nor the manifestation of it in Article 15 lends support to defendant’s contention that the evidence pertaining to Overt Acts 23, 24, 25 and 26 is somehow inadmissible to prove the charged offenses in the indictment. The United States Court of Appeals for the District of Columbia Circuit has stressed that the specialty doctrine “has nothing to do with the ‘scope of proof admissible into evidence in the judicial forum of the requisitioning state’”. United States v. Kember, 685 F.2d 451, 458 (D.C. Cir. 1982) (quoting United States v. Flores, 538 F.2d 939, 944 (2d Cir. 1976)). The Court in Kember explained that “the normal procedural and evidentiary rules continued to apply in the case” after extradition. 685 F.2d at 458; see also Lopesierra-Gutierrez, 708 F.3d at 205-206 (holding that “[w]e agree

with the other circuits to have considered this question that the doctrine of specialty governs prosecutions, not evidence”) (citations omitted).

In Flores, the Court of Appeals for the Second Circuit recognized that, where “a defendant is indicted and tried for the precise offense contained in the foreign extradition order . . . , the specialty doctrine does not authorize [the Court] to disregard normal evidentiary rules followed by this forum.” 538 F.2d 939, 944 (2d Cir. 1976). The Court explained:

It is clear, however, that even as the specialty doctrine has been defined and broadened in this century, it has never been construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state, as distinguished from limiting the jurisdiction of domestic courts to “try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited.”

Id. (citing Friedmann, Lissitzyn & Pugh; International Law 493 (1969)).

Indeed, Courts have consistently held that the nature of the prosecution’s evidentiary case, regardless of its breadth, does not violate the doctrine of specialty, so long as the defendant was charged with and convicted of only those offenses for which the foreign government approved extradition. See Lopesierra-Gutierrez, 708 F.3d at 206 (holding that “the doctrine of specialty has no bearing” where testimony about a prior incident was introduced only as evidence of the conspiracy for which defendant was extradited, and defendant was never prosecuted for any crime stemming from the prior incident); Flores, 538 F.2d at 944 (holding that, although prosecution for specified earlier offenses was barred, evidence of such earlier offenses might be introduced to establish the later crimes for which defendant was tried); United States v. Bowe, 221 F.3d 1183, 1192 (8th Cir. 2000) (“Because [the appellant] was charged with and convicted of only the conspiracy . . . for which the Bahamian government approved his

extradition, the prosecution’s sweeping evidentiary case did not violate the doctrine of specialty”); United States v. Thirion, 813 F.2d 146, 150-53 (8th Cir. 1987) (evidence of membership in a conspiracy may be used to prove substantive crime even though defendant could not be prosecuted for conspiracy under doctrine of specialty); Archbold–Newball, 554 F.2d at 685 (concluding that “[n]one of the provisions of the Extradition Treaty relied on by the appellants permit the asylum state (France) to delimit the nature of the evidentiary rules to be followed in the requisitioning state (United States),” including Treaty article “which embodies the essence of the international law doctrine of specialty”).

Moreover, even assuming that proceedings in a foreign country could somehow limit the scope of proof admissible in the United States’ case, the Minister of Justice did not intend in any way to exclude the use of evidence relating to Overt Acts 23, 24, 25, and 26, as defendant contends (Def. Mot. at 22). As discussed in great detail above, the Minister of Justice specifically recognized that “the authorities in charge of the prosecution may make selection among *all available evidence* in order to prosecute the person concerned for such [facts] or such (a) charge(s), even if all the facts are identical to the set of facts used in prior proceedings.” Def. Exh. A at 14 (emphasis added). The Minister of Justice explained that, “[e]ach ‘overt act’ is nothing other than supporting evidence that, by itself or in combination with other overt acts, can help to establish the offense or offenses for which the person is being prosecuted”. Def. Exh. A at 15.⁶

⁶ Likewise as discussed above, defendant misplaces his reliance on the decision of the Chamber of the Court of First Instance of Nivelles because, while the Minister of Justice acknowledged that Court’s decision restricting the use of Overt Acts 23-26, those restrictions were not incorporated into the grant of extradition. Similarly, in rejecting defendant’s application seeking annulment of the grant of extradition, the Belgian Council of State neither recognized,

There is simply no basis for defendant’s contention that the Minister of Justice purportedly concluded that, “because these acts were [allegedly] excluded from the authorization for extradition, prosecution in the United States for the acts set forth in Overt Acts 23, 24 [sic] 25 and 26 ‘would constitute a violation of the principle of specialty as set forth in Article 15 [of the Treaty].’” Def. Mot. at 14 (citing Def. Exh. A at 14). Rather, when read in full context, the Minister of Justice stated, in the preceding sentences, that these Overt Acts “would constitute a violation of the principle of specialty” only “*if* the ‘overt acts’ were offenses for which the person sought – or could be prosecuted.” Def. Exh. A at 13 (emphasis added). The Minister of Justice further clarified that these overt acts “do not constitute the offenses for which extradition is requested.” *Id.* The Diplomatic Note also emphasizes that the Order makes “clear that the prosecution may offer facts relating to overt acts 23 through 26 in prosecuting [defendant] on the charges in the indictment.” Once again, the notable absence of pertinent, qualifying language speaks volumes of its effectiveness at directly undercutting defendant’s contention that the government is now somehow prohibited from fully prosecuting him on the Indictment.

Accordingly, because defendant does not – and cannot – dispute that he is being tried only for the offenses identified in the Indictment that was the subject of his extradition, the Kingdom of Belgium would not have grounds to, and in fact explicitly does not, object to the nature of defendant’s prosecution and, consequently, defendant likewise has no grounds to support his specialty claim.⁷

nor attempted to impose, any restrictions on the use of Overt Acts 23-26.

⁷ Similar to the discussion set forth above with respect to Article 5, defendant likewise fails to demonstrate, even assuming *arguendo* a violation of Article 6, that the particular violation is so extreme that it would warrant relief, as an exception to the Ker-Frisbie doctrine.

III. Defendant's Reliance Upon Article 6 of the Treaty To Challenge the Extradition Decision, as a Violation of Domestic Law, Is Misplaced

Finally, defendant argues that the Kingdom of Belgium somehow violated its own domestic law in granting the extradition request, and that the Indictment must be dismissed due to this alleged impropriety. Defendant specifically relies upon Article 6 of the Treaty, which provides: "Notwithstanding the provisions of the present Treaty, the executive authority of the Requested State may refuse extradition for humanitarian reasons pursuant to its domestic law." Def. Mot. at 26. Defendant further argues that the Kingdom of Belgium violated its "domestic law" and, by implication, Article 6, through its decision to extradite defendant despite an ECHR interim measure, directing the Kingdom of Belgium not to extradite him until the conclusion of ECHR proceedings addressing his challenge to the extradition request. Def. Mot. at 26-27.⁸ Defendant's baseless allegation should be rejected.

⁸ While contesting his extradition in the Belgian proceedings, defendant filed an application on December 23, 2009, with the European Court of Human Rights ("ECHR"), asserting that the extradition would violate the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). See Def. Mot. Exh. C. On December 6, 2011, the ECHR issued an interim measure, directing the Belgian government not to extradite defendant until the proceedings before the ECHR were concluded. See *Id.* at 12. Defendant was extradited while this interim measure was pending. *Id.* at 12-13. On September 4, 2014, the reviewing ECHR Chamber issued a judgment, finding that defendant's extradition to the United States violated the Convention. See *Id.* The ECHR Chamber found that because the potential life sentence that defendant faces in the United States is "irreducible," his extradition violated Article 3 of the Convention, which prohibits inhuman or degrading treatment or punishment. *Id.* at 20-33. The ECHR also found that by extraditing defendant in violation of the ECHR's interim measure, Belgium violated Article 34 of the Convention, which prohibits the hindrance of an individual's right to petition the ECHR for relief. *Id.* at 44. Under Articles 43 and 44 of the Convention, the ECHR Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the ECHR's Grand Chamber. If such a request is made, a panel of judges considers whether the case deserves further examination. In that event, the Grand Chamber hears the case and delivers a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Regardless of the finality of this ECHR judgment, however, defendant fails to demonstrate, as discussed above,

Courts have recognized that, given the substantial deference that must be provided to a foreign country's extradition determination, the courts of that foreign country should decide whether an executive could lawfully authorize an individual's extradition despite an alleged prohibition under domestic law. In Reyes-Vasquez v. U.S. Attorney General, for example, the United States Court of Appeals for the Third Circuit affirmed the district court's denial of defendant's petition for a writ of habeas corpus, which alleged that he was extradited to the United States from the Dominican Republic in violation of the Dominican Republic's domestic law precluding the surrender of its own citizens. 304 Fed. Appx. 33, 36 (3d Cir. 2008). The Court reasoned that the presidential decree granting the defendant's extradition was "an 'official act of a foreign sovereign'" under the act of state doctrine⁹ and that it was, therefore, "appropriate for United States federal courts to abstain from declaring it invalid under Dominican Republic domestic law." Id. The Court further explained that:

[W]hether [the] President [of the Dominican Republic] may lawfully authorize [the defendant's] extradition despite a prohibition under Dominican Republic law is a question for the courts of the Dominican Republic.

Id.; see also United States v. Knowles, 390 Fed. Appx. 915, 928 (11th Cir. 2010) (affirming district court's denial of defendant's motion to dismiss the indictment for lack of personal

how it undermines the integrity of the prosecution in the United States.

⁹ The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). As the Supreme Court has explained, while "once viewed . . . as an expression of international law, resting upon 'the highest considerations of international comity and expediency,'" the doctrine has more recently been viewed as guided by our "domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., 493 U.S. 400, 404 (1990) (citations omitted).

jurisdiction, reasoning that a determination that the Bahamian authorities had violated their own laws when they elected to authorize the defendant's extradition would, in contravention of the act of state doctrine, require a United States court “to declare invalid the official act of a foreign sovereign performed within its own territory”) (quoting W.S. Kirkpatrick & Co., 493 U.S. at 405); United States v. Merit, 962 F.2d 917, 921 (9th Cir. 1992) (“Even if the Republic did disregard its own laws in failing to issue a warrant of extradition, this court cannot question the validity of South Africa’s domestic actions.”).

Even putting aside the authority stressing that United States courts should abstain from entertaining jurisdictional claims grounded in a foreign country’s alleged violation of domestic law, defendant’s claim still must fail. On its face, Article 6 merely provides that the Kingdom of Belgium “*may*” exercise its discretion to refuse extradition under certain circumstances. In no way did this provision somehow *require* Belgium to act in a particular manner, as defendant alleges. See, e.g., United States v. Benov, 447 F.3d 1235, 1246 n.13 (9th Cir. 2006) (recognizing the “use of ‘may’ language in a treaty indicates [that] a provision constitutes a discretionary exception”); Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *6 (explaining that the reference to “may” in a treaty provision “is explicitly permissive and discretionary and confers no rights or obligations of any kind on the extraditing country, let alone on the courts of the requesting country”).

Moreover, defendant cites no authority for the proposition that an interim measure by the ECHR constitutes “domestic law” in Belgium merely because Belgium is a contracting state. See Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *6 (“The mere fact that Congress has ratified the [International Covenant on Civil and Political Rights] says nothing of its force as a matter of

domestic law.”) (citations omitted). Defendant similarly offers no persuasive authority for the proposition that the extradition somehow implicated “humanitarian” concerns as envisioned in Article 6. While defendant relies upon a September 4, 2014 ECHR judgment which raised concerns that defendant may face an “irreducible” life sentence in the United States (Def. Mot. at 27), the Minister of Justice fully considered the nature of the U.S. prosecution, including defendant’s possible sentencing exposure, and determined that extradition was appropriate. Def. Exh. A at 9-12.

Additionally, because American courts take personal jurisdiction of an extradited defendant subject to the limitations of the treaty and the extradition order of the surrendering state, “such jurisdiction may not be defeated by a claim that the surrendering state violated the treaty by turning the defendant over to the American authorities.” Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *6.

In short, defendant fails to cite any authority, much less persuasive authority, to support his extraordinary request for relief under Article 6. The Court should therefore reject defendant’s claim, consistent with the numerous courts which have rejected challenges to extradition determinations based on alleged violations of “domestic law.” See, e.g., United States v. Lira, 515 F.2d 68, 72 (2d Cir. 1975) (“The United States Government did not owe appellant any obligation to enforce his asserted right under Chilean law”); United States v. Umeh, No. 09 Cr. 524, 2011 WL 9397, at *4 (S.D.N.Y. Jan. 3, 2011) (where defendant was extradited “pursuant to a facially valid Expulsion Order issued by the Liberian Government,” the “United States is not responsible for ensuring that a foreign sovereign complies with its internal laws in issuing an extradition or expulsion.”); Salinas Doria, No. 01 Cr. 21, 2008 WL 4684229, at *6

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