DAVID L. ANDERSON (CABN 149604)
United States Attorney

HALLIE HOFFMAN (CABN 210020)
Chief, Criminal Division

ELISE LAPUNZINA (NYBN 2540730)
Assistant United States Attorney

450 Golden Gate Ave., 11th Fl.
San Francisco, California 94102-3495
Telephone: (415) 436-6878
Fax: (415) 436-7234
Email: Elise.LaPunzina@usdoj.gov

CHRISTOPHER J. SMITH (VABN 75445)
Associate Director

REBECCA A. HACISKI (DCBN 996656)
Trial Attorney

Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-2534
Fax: (202) 514-0080
Email: Rebecca.Haciski@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN THE MATTER OF THE EXTRADITION OF ALEJANDRO TOLEDO MANRIQUE	CASE NO. 3-19-71055 TSH RESPONSE TO MOTION TO DENY EXTRADITION REQUEST

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The United States of America, by the undersigned attorneys, in fulfilling its treaty obligations to Peru, respectfully submits this response to the motion filed by Alejandro Toledo Manrique ("Toledo") requesting that the Court deny Peru's request for his extradition (DE 137). As previously agreed by the parties, Toledo's brief sets forth "his challenges to all extradition issues except the determination of probable cause." *See* DE 129 at 1. Those challenges are as follows: that (1) Toledo has not been charged with the crimes for which his extradition is sought, as required under the U.S.-Peru extradition treaty (the "Treaty")[1]; (2) Peru failed to provide a copy of the relevant charging document, as required under the Treaty; and (3) Toledo cannot be extradited to stand trial on the charge of influence peddling because that offense fails to meet the Treaty's requirement of dual criminality.

As detailed herein, none of those challenges has any merit. With respect to the first two challenges, the Treaty's requirements have been met because Toledo is charged with—that is, he is unequivocally sought for prosecution on—the offenses underlying the request for his extradition, and furthermore, Peru has provided its documents containing the three charges against Toledo. Toledo's arguments to the contrary are contradicted by the Treaty's plain language and negotiation history, relevant case law, and the views of both parties to the Treaty. With respect to Toledo's third challenge, Peru's charge of influence peddling would be punishable under U.S. law, including as bribery of a public official, in violation of 18 U.S.C. § 201(b)(2), if it had been committed here. While Toledo claims that Peruvian law does not require the same intent as that required under U.S. law, courts including the Supreme Court have made clear that such an element-by-element comparison is improper. The evidence provided by Peru establishes that Toledo had the requisite intent, which is all that is required. Accordingly, the Court should deny Toledo's motion.

BACKGROUND

Peru seeks the extradition of Toledo, who served as President of Peru from 2001 to 2006, to stand trial on charges of influence peddling, in violation of Section 400 of the Peruvian Criminal Code[2];

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[1] Extradition Treaty Between the United States of America and the Republic of Peru, U.S.-Peru, July 26, 2001, S. Treaty Doc. No. 107-6 (2002).

[2] Section 400 of the Peruvian Criminal Code provides:

collusion, in violation of Section 384 of the Peruvian Criminal Code[3]; and money laundering, in violation of Article 1 of Peruvian Act No. 27765.[4] *See* Req. at 6-18.[5] Toledo was charged with those offenses via Peruvian prosecutor's decisions issued on February 3, 2017, and March 7, 2017 (collectively, the "Prosecutor's Decisions"). *See id*. at 3191-3247 (Prosecutor's Decision No. 6 to Extend Formalization and Continuation of Preliminary Investigation); *id*. at 3248-91 (Prosecutor's Decision No. 8 of Specification and Extension of Preliminary Investigation); *see also id*. at 3293 (Prosecutor's Decision No. 13, recognizing that "[a]s stated in Decisions No. 6 and 8, influence peddling, collusion and money laundering charges have been brought against defendant [Toledo]"). On February 9, 2017, the First National Preliminary Investigation Court in Peru issued an arrest warrant for Toledo, who had left Peru for California the previous month. *See id*. at 3412-3553, 5990.

On May 25, 2018, Peru submitted a request for Toledo's extradition to the United States; and on June 4, 2019, it submitted a supplement thereto. Thereafter, the United States filed a complaint pursuant to 18 U.S.C. § 3184 in this District seeking a warrant for Toledo's arrest, which the Court issued.

Whoever, invoking real or simulated influences, receives, makes someone give or promise for himself or for third parties, donations or promises or any other advantage or benefit offering to mediate before a public official or civil servant who hears, is hearing or has heard a judicial or administrative case, shall be punished by imprisonment for not less than four (4) and not more than six (6) years. If the perpetrator is an official or public servant, he shall be punished by imprisonment for not less than four (4) and not more than eight (8) years and disqualification pursuant to subsections 1 and 2 of Section 36 of the Criminal Code.

[3] Section 384 of the Peruvian Criminal Code provides:

The government officials or civil servants who, in contracts, supplies, tenders, competitive biddings, auctions or any other similar operation in which they participate by reason of their office or on a special commission, swindle the Peruvian State or State-supported bodies or entities, pursuant to law, by making arrangements with the concerned parties in agreements, adjustments, liquidations or supplies, shall be punished by imprisonment for not less than three (3) years and not more than fifteen (15) years.

[4] Article 1 of Peruvian Act No. 27765 provides:

Whoever converts or transfers money, property, instruments, or proceeds, knowing or suspecting their unlawful origin, with the intention to prevent the identification of their origin, their seizure or forfeiture, shall be punished by imprisonment for not less than eight (8) and not more than fifteen (15) years, and by a fine of one hundred and twenty (120) to three hundred fifty (350) days.

[5] Peru's extradition request, which has been manually filed with the Court, *see* DE 81, is referred to herein as "Req." with citations to the page numbers appearing at the top right of each page of the request.

Toledo was arrested pursuant to that warrant on July 16, 2019, and was placed in the custody of the U.S. Marshals Service.

After holding a detention hearing, the Court initially ordered Toledo detained for the pendency of the extradition proceedings, finding that he was a flight risk and had failed to demonstrate special circumstances warranting his release. DE 16. Toledo subsequently filed a motion for reconsideration of the detention order, which the Court denied. DE 30. Toledo then appealed to Judge Vince Chhabria, who issued an order denying Toledo's request for release on bail on March 4, 2020. DE 100. Judge Chhabria also denied Toledo's request for reconsideration of that order. DE 107. Next, Toledo filed a motion for further reconsideration of his detention based on his risk of contracting COVID-19, which this Court granted on March 19, 2020. DE 115. Judge Chhabria subsequently denied the government's appeal of the release order. DE 118. Toledo is currently released on a $1 million bond and home confinement, along with other conditions.[6] DE 120.

In addition to litigating detention, the parties have filed a couple of other substantive motions, namely, the government sought reconsideration of the appointment of counsel for Toledo based on undisclosed assets, which the Court denied on January 31, 2020, *see* DE 88; and Toledo filed a motion seeking to compel discovery, which the Court granted in part, on limited grounds, on February 6, 2020, *see* DE 92. Toledo filed the pending motion on July 10, 2020.

ARGUMENT

I. GENERAL PRINCIPLES OF EXTRADITION

A. Background Principles

Extradition is primarily an executive function with a specially defined role for the Court. *See, e.g.*, *United States v. Knotek*, 925 F.3d 1118, 1124 (9th Cir. 2019) ("As we have stated on many occasions, '[e]xtradition is a matter of foreign policy,' a diplomatic process over which the judiciary provides 'limited' review.") (citation omitted). The judicial role involves conducting a hearing pursuant

[6] Notwithstanding the fact that the Court ordered the bond to be fully secured, DE 115 at 3, the bond currently remains partially unsecured.

to 18 U.S.C. § 3184, at which the Court determines whether to certify to the Secretary of State that the evidence provided by the requesting country is "sufficient to sustain the charge." 18 U.S.C. § 3184.

At the hearing, the Court should consider the evidence of the requesting country and determine whether the legal requirements for certification, as defined in the relevant treaty, statutes, and case law, have been established. *See Quinn v. Robinson*, 783 F.2d 776, 786 n.3 (9th Cir. 1986) (citing *Charlton v. Kelly*, 229 U.S. 447, 461 (1913)) (analogizing extradition hearing to a preliminary hearing in a criminal case). Those requirements are as follows: (1) the judicial officer is authorized to conduct the extradition proceeding; (2) the Court has jurisdiction over the fugitive; (3) the applicable extradition treaty is in full force and effect; (4) the crimes for which surrender is requested are covered by the treaty; and (5) there is sufficient evidence to support a finding of probable cause as to each charge. *See Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008). The Court should make written findings of fact and conclusions of law as to each of the five requirements for certification, including separate findings for each offense as to which extradition is sought. *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973).

If the Court decides that the requirements have been met and "certif[ies] the same," it should forward that certification to the Department of State for disposition by the Secretary of State. *See* 18 U.S.C. §§ 3184, 3186.[7] The Secretary of State then conducts an independent review and "determines in [his] discretion whether the individual will be surrendered." *Prasoprat v. Benov*, 421 F.3d 1009, 1012 (9th Cir. 2005). "The Secretary exercises broad discretion and may properly consider myriad factors affecting both the individual defendant as well as foreign relations which an extradition magistrate may not." *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d 824, 829 (11th Cir. 1993).

B. Principles of Extradition Treaty Interpretation

"[Extradition] treaties should be . . . interpreted with a view to fulfil our just obligations to other powers." *Grin v. Shine*, 187 U.S. 181, 184 (1902). Thus, in fulfilling its function under Section 3184, the Court should liberally construe the applicable extradition treaty in order to effect its purpose,

[7] If the Court certifies the matter to the Secretary of State, the Court must commit the fugitive to the custody of the United States Marshal to await further determination by the Secretary regarding surrender to the representatives of the requesting state. *See* 18 U.S.C. § 3184.

namely, the surrender of fugitives to the requesting country. As the Supreme Court articulated in *Factor v. Laubenheimer*, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." 290 U.S. 276, 293-94 (1933); *see also, e.g.*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 14 (1936). That is, the obligation to surrender a fugitive to be tried for alleged offenses "should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." *Factor*, 290 U.S. at 298. Accordingly, *Factor* demands that ambiguities in an extradition treaty must be construed in favor of surrendering a fugitive to the requesting country. *See, e.g.*, *Martinez v. United States*, 828 F.3d 451, 463 (6th Cir. 2016) (en banc) (citing cases); *Cucuzzella v. Keliikoa*, 638 F.2d 105, 107 n.3 (9th Cir. 1981) (noting the principle that "treaties should be construed to enlarge the rights of the parties").

II. TOLEDO'S MOTION IS MERITLESS

In his motion, Toledo does not contest that three of the five requirements for certification have been met in this case. In particular, he does not contest that (1) this Court is authorized to conduct the extradition hearing in this case, *see* Crim. L.R. 7-1(b)(13) ("[T]he criminal calendar Magistrate Judge may . . . conduct proceedings for extradition[.]"); (2) the Court has jurisdiction over him, *see* DE 7 (documenting Toledo's arrest in Menlo Park, within the Northern District of California); and (3) there is an extradition treaty in full force and effect between the United States and Peru, *see* DE 81, Declaration of Katherine C. Fennell ¶¶ 2-3.[8] Toledo has reserved his challenge to probable cause for future briefing. *See* DE 129 at 1; DE 137 at 4-5 n.5. His remaining challenges to extradition are unavailing, as discussed below.

A. Toledo Has Been "Charged with" the Offenses for Which His Extradition Has Been Requested as Required Under the Treaty

Article I of the Treaty, similar to most extradition treaties, obligates the parties to extradite "persons whom the authorities in the Requesting State have charged with, found guilty of, or sentenced

[8] A more detailed discussion of these requirements appears in the government's Memorandum of Extradition Law and Request for Detention Pending Extradition Proceedings. *See* DE 8 at 20-21.

for, the commission of an extraditable offense," in accordance with the provisions of the Treaty. Toledo qualifies as such a person, and his overly narrow reading of the Treaty to the contrary should be rejected.

1. Under Its Plain Meaning, the Treaty Applies to Fugitives Like Toledo Who Are Sought for Prosecution

"The interpretation of a treaty, like the interpretation of a statute, begins with its text. . . . [A]ids to its interpretation [also include] the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations." *Medellin v. Texas*, 552 U.S. 491, 506-07 (2008).

As other courts—including the Ninth Circuit—have explained, the term "charged" in an extradition treaty is "used in the generic sense only to indicate 'accused,'" in contrast to "'convicted,'" of certain crimes, and does not implicitly impose any requirement that the fugitive be indicted, as in the U.S. legal system, or that formal "'charges' . . . [otherwise] be filed." *In re Assarsson*, 635 F.2d 1237, 1242-44 (7th Cir. 1980); *Emami v. U.S. Dist. Ct.*, 834 F.2d 1444, 1448 (9th Cir. 1987) (discussing and adopting the reasoning of *Assarsson*).[9] Such an interpretation of "charged" accounts for the fact that

[9] *See also, e.g.*, *In re Extradition of Sarellano*, 142 F. Supp. 3d 1182, 1186 n.2 (W.D. Okla. 2015) (foreign arrest warrant provided sufficient evidence that fugitive was "charged," even without evidence of the existence of a formal charging document, because the warrant "identifie[d] the offense in the [foreign] criminal code, set[] out the essential facts of the alleged crime, and detail[ed] the evidentiary basis for the charge"); *In re Extradition of Handanovic*, 829 F. Supp. 2d 979, 986 (D. Or. 2011) (rejecting fugitive's argument that he was not "charged" where "[n]o indictment has been issued by [the requesting country] formally charging [the fugitive] with any crime," despite fugitive's claim that he was "merely a suspect wanted for investigation"); *In re Extradition of Sacirbegovic*, 280 F. Supp. 2d 81, 83-84 (S.D.N.Y. 2003) (rejecting fugitive's argument that he was not "charged" where foreign court orders issuing an arrest warrant, together with the extradition request describing "good reason" the fugitive was suspected of having done the criminal act, sufficiently demonstrated an intent to prosecute him), *rev'd in part on other grounds by Sacirbey v. Guccione*, 589 F.3d 52 (2d Cir. 2009); *Borodin v. Ashcroft*, 136 F. Supp. 2d 125, 129-30 (E.D.N.Y. 2001) (rejecting fugitive's argument in defense of extradition that the requesting country "did not formally charge him with any crime, but rather rest[ed] only on a 'soupçonné,' or suspicion"); *Kaiser v. Rutherford*, 827 F. Supp. 832, 834 (D.D.C. 1993) (stating that "[t]he Treaty's requirement that a party be charged with an offense simply requires that a party must be accused of a crime and does not require any particular technical stage of foreign criminal procedure"; and finding that an arrest warrant and prosecutor's statement given before a judge detailing the prosecution's case against the fugitive "are sufficient to charge [him] for purpose of extradition under the terms of the Treaty"); *In re Extradition of Rovelli*, 977 F. Supp. 566, 568 (D. Conn. 1997) (Italian arrest warrant provided sufficient evidence that fugitive was "charged" because it "constitutes a charging document under Italian Law"); *In re Extradition of Lehming*, 951 F. Supp. 505, 510 (D. Del. 1996) (rejecting fugitive's argument that he was not "charged," where the warrant for his arrest sought his detention only "pending further investigation," given information in the warrant as well as a letter from the prosecutor indicating the requesting country's intent to prosecute him); *In re Lam*, No. 1:08-MJ-247GSA, 2009 WL 1313242, at *3 (E.D. Cal. May 12, 2009) (rejecting fugitive's argument that he

foreign countries have different procedures than the United States for instituting criminal prosecutions. *See Causbie Gullers v. Bejarano*, 293 F. App'x 488, 489 (9th Cir. 2008) ("[T]here is no requirement in the Treaty or otherwise that Mexican proceedings must be commenced by an indictment of the type commonly used in criminal proceedings in the United States."). And in any event, "it would be inappropriate to engage in . . . an inquiry into the formal procedure a country uses in instituting prosecution." *Theron v. U.S. Marshal*, 832 F.2d 492, 499-500 (9th Cir. 1987) (rejecting fugitive's argument that South Africa had improperly incorporated an indictment into a superseding indictment), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482 (1997). Construing "charged" broadly thus comports with the general reluctance of U.S. courts to delve into analyzing the requirements of foreign criminal procedure, given their lack of expertise in foreign law, and out of respect for foreign countries' sovereignty. *See, e.g.*, *Emami*, 834 F.2d at 1449; *Assarsson*, 635 F.2d at 1244; *cf. Sainez v. Venables*, 588 F.3d 713, 717 (9th Cir. 2009).

A broad definition of "charged" is reflected in the Treaty at issue in this case. The three categories of covered persons established in Article I of the Treaty—those "charged with, found guilty of, or sentenced for" an extraditable offense—are further discussed in Article VI of the Treaty, which establishes what documents are required to accompany an extradition request. In particular, Article VI(3) discusses certain documents required where the fugitive "is sought for prosecution," in contrast to Article VI(4), which discusses other documents required where the fugitive "has been found guilty of, or sentenced for" an offense. Thus, "charged" in the Treaty broadly means "sought for prosecution," in contrast to "found guilty" or "sentenced." *Cf. U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law . . . .") (cleaned up).

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was not "charged" where "although the extradition documents indicate that [he] [wa]s charged with all of these crimes, the government subsequently clarified that [he] [wa]s only wanted for questioning regarding these offenses").

This understanding of "charged" is further reflected in the Treaty's history. The Technical Analysis for the Treaty explains that "the negotiating delegations intended that 'charged' persons include those who are *sought for prosecution* for an extraditable offense based on an outstanding warrant of arrest, *regardless of whether such warrant was issued pursuant to an indictment, complaint, information, affidavit, or other lawful means for initiating an arrest for prosecution under the laws in Peru or the United States*." S. Exec. Rep. No. 107-12, at 4 (2002) (emphasis added). That is, the term "charged" does not depend on whether a formal charging document akin to a U.S. indictment has been filed in the requesting country. *Cf., e.g., In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 569 (9th Cir. 2011) (relying in part on technical analysis to interpret the U.S.-Russia mutual legal assistance treaty).

This is the same understanding of "charged" adopted by the Fifth Circuit in *Garcia-Guillern v. United States* when interpreting the predecessor to the Treaty (the "1899 treaty").[10] 450 F.2d 1189, 1191 & n.1 (5th Cir. 1971). In that case, the court rejected the argument of a fugitive from Peru that "the evidence did not warrant the conclusion that [he] was ever properly or legally charged with the alleged crime in accordance with the extradition treaty." *Id.* at 1191. The court concluded that this argument was "not appropriate for consideration" on *habeas* review, but "[i]n any event there is no merit to [it]" because "[a] provisional arrest warrant had been issued requiring the appearance of the [fugitive] before a Peruvian Court and in addition, the Supreme Court of Peru has declared that the extradition of the [fugitive] is lawful." *Id.* at 1192 n.1. The Court did not inquire into the procedures by which Peru had charged the fugitive.

Contrary to Toledo's suggestion (DE 137 at 11), the definition of "charged" does not vary depending on the documentary requirements of the applicable treaty. As a general matter, the term "charged" appears in most extradition treaties, *see* Declaration of Tom Heinemann ¶ 3 (hereinafter "State Dep't Decl."), attached hereto as Attachment 1, and it would be illogical to think that it means

[10] Treaty Between the United States and Peru, Providing for the Extradition of Criminals, U.S.-Peru, Nov. 28, 1899, 31 Stat. 1921 (1901).

one thing in a treaty that does not require that an extradition request be supported by a charging document, and another thing in a treaty that does, *cf.*, *e.g.*, *Martinez*, 828 F.3d at 460-62 (looking to other extradition treaties' provisions on "lapse of time" when interpreting that provision in the U.S.-Mexico treaty); *In re Gambino*, 421 F. Supp. 2d 283, 306 (D. Mass. 2006) (discussing "'[s]tandard' United States extradition treaty practice with respect to *non bis in idem* clauses" when interpreting the U.S.-Italy treaty). With respect to the Treaty in particular, the Technical Analysis notes that Article I contains "a standard provision" creating an obligation to extradite, without differentiating that provision from ones in any other treaty. S. Exec. Rep. No. 107-12, at 4 (2002).

Moreover, as Toledo points out (DE 137 at 17), unlike the current Treaty, the 1899 treaty did not require the production of a charging document; however, the same "charged with" language appears in Article I of both treaties. During the ratification process for the current Treaty, neither Article I nor Article VI was identified as a "[k]ey [p]rovision" for discussion, but rather officials focused on other issues, including the fact that the current Treaty updated the 1899 treaty by permitting the extradition of nationals and by introducing the dual criminality requirement. S. Exec. Rep. No. 107-12, at 1-3 (2002); *see also* Law Enforcement Treaties: Hearing Before the Comm. on Foreign Relations, 107 Cong. 721 (2002) (statement of Samuel M. Witten; prepared statement of Bruce C. Swartz). There is thus no indication that the drafters of the Treaty intended to change the meaning of "charged" in Article I by introducing a charging document requirement in Article VI. *Cf.*, *e.g.*, *Narayanan v. British Airways*, 747 F.3d 1125, 1127 n.2 (9th Cir. 2014) (noting that, to interpret a successor treaty, courts have relied on precedent interpreting the original treaty "where the equivalent provision in the [successor treaty] is substantively the same").

While Toledo argues (DE 137 at 11) that interpreting "charged" broadly would render the charging document requirement mere surplusage, that argument is misplaced. As the Second Circuit has explained, the documentary requirements of an extradition treaty simply define "*the proof* required under the [relevant] [t]reaty to establish that an individual has been 'charged' with a crime," *Sacirbey v. Guccione*, 589 F.3d 52, 67 (2d Cir. 2009) (emphasis added); they do not alter the definition of the term

itself.[11] In this case, Article VI(3) of the Treaty requires a number of supporting documents, including, in the case of someone "sought for prosecution," a copy of an arrest warrant, a copy of the charging document, and evidence establishing probable cause. By requiring a copy of the charging document, the Treaty simply recognizes that it is important for the requesting country to identify all charges for which the fugitive's prosecution is sought. *See* State Dep't Decl. ¶ 4. In some cases—including the instant one—the arrest warrant required under Article VI(3)(a) of the Treaty may not set forth all of the charges for which the fugitive's extradition is sought. *See, e.g.*, *Hill v. United States*, 737 F.2d 950, 952 (11th Cir. 1984) (Canadian arrest warrant stated only one of the five offenses for which extradition was sought). In such cases, submission of an arrest warrant is required to prove that the requesting country has the power to bring the fugitive into custody upon return, but a separate charging document may also be required to satisfy Article VI(3)(b). *Cf. Grin*, 187 U.S. at 191 (arrest warrant demonstrates the requesting country's power to "secure the apprehension of the accused"). As discussed further below, the charging document requirement is satisfied as long as the requesting country clearly identifies all of the charges for which prosecution is sought.

Given the foregoing, Toledo's argument in his motion (DE 137 at 12-13) that a fugitive from Peru is "charged" under the Treaty only once a court has issued an Order of Prosecution (*Orden de Enjuiciamiento*) is untenable.[12] Indeed, "[j]udicial inquiry into foreign criminal procedural issues is

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[11] *Sacirbey* involved an extradition request submitted to the United States under its treaty with Bosnia and Herzegovina, which requires the requesting country to provide an arrest warrant, but not a charging document. In that case, the Bosnian court that had issued the warrant provided in support of the extradition request lost jurisdiction over the case and, therefore, could no longer enforce the warrant. Accordingly, the Second Circuit concluded that Bosnia failed to "satisfy the Treaty's requirement that Bosnia demonstrate a 'charge' by producing a valid arrest warrant." *Sacirbey*, 589 F.3d at 67. That case is distinguishable from the instant case because it involved only "an investigation of [the fugitive] in the prosecutor's office—rather than a prosecution in court." *See id.* at 68-69. Here, by contrast, criminal proceedings are pending against Toledo in Peru's courts, as evidenced by the Prosecutor's Decisions and warrant filed therein, as well as by the view of the Peruvian government, discussed below.

[12] While Toledo relies on the declarations of four Peruvian attorneys in making this argument, he fails to establish that any of these individuals is an expert in Peruvian criminal procedure or extradition. Roberto Su is an attorney representing Toledo in the underlying criminal proceedings in Peru, *see* DE 137-1; Zully Robles Apumayta claims to have expertise only in "Parliamentary and Electoral Law and Identity Registration," DE 137-3 at 2; Jose Palomino Manchego is a constitutional law professor, DE 137-4 at 2; and, although Moises Aguirre Lucero claims to have "extensive experience reviewing extradition treaties," DE 137-2 at 2, he provides no support for that claim other than his experience (for

limited in the extradition context." *Fejfar v. United States*, 724 F. App'x 621, 622 (9th Cir. 2018); *see also, e.g., Noeller v. Wojdylo*, 922 F.3d 797, 805 (7th Cir. 2019) ("[E]xtradition proceedings are not vehicles for United States federal courts to interpret and opine on foreign law."). Moreover, Toledo's narrow interpretation of "charged" conflicts with the well-established canon of interpretation articulated in *Factor*, discussed above, which requires that, to the extent the Court finds that Article I is ambiguous, it must construe the Treaty liberally so as to allow Toledo's extradition. 290 U.S. at 298. In other words, to defeat extradition based on Article I of the Treaty, Toledo must show that the Treaty unambiguously means that Peru must have filed an Order of Prosecution against him. This he has failed to do.

2. Peru Unequivocally Seeks Toledo's Extradition So that He May Be Prosecuted for the Offenses with Which He Has Been Charged

Peru's extradition request makes clear that Toledo is "charged" within the meaning of the Treaty. Peru has requested Toledo's extradition "for his prosecution on Influence Peddling, Collusion and Money Laundering charges." Req. (diplomatic note 5-3-M/43 dated May 25, 2018). As Peru explains, Toledo has been "charged" with those three offenses, and its extradition request repeatedly refers to the "charges" against Toledo. *See, e.g., id.* at 2 (requesting Toledo's extradition "so that he may be extradited . . . to respond to the pertinent court for the charges brought against him"); *id.* ("The extradition requested is aimed at bringing the person sought to trial . . . to elucidate (whether he is criminally liable for the facts and charges brought against him) the defendant's liability."); *id.* at 7-11 (stating that the "specific charges against [Toledo]" are influence peddling, collusion, and money laundering); *id.* at 22 (stating that Toledo "has been charged with influence peddling, collusion and money laundering"); *id.* at 167 (referring to Toledo as one of the "parties charged" in the action).

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an unspecified time) in various government positions, including his current position as a Consultant for the Peruvian Embassy of the People's Republic of China, and regardless, he fails to establish any expertise in Peruvian criminal procedure law. Moreover, the opinions offered by Toledo's declarants are contrary to the view of the Peruvian government on its law, as discussed below.

Moreover, the documents supporting Peru's extradition request demonstrate that Toledo does in fact stand charged in Peru. *See id*. at 3191, 3248 (Prosecutor's Decisions referring to court docket number). The case against Toledo arises out of an investigation that Peru conducted into influence peddling and money laundering, as announced in Prosecutor's Decision No. 3 on January 21, 2017. *Id*. at 3152-90. On February 3, 2017, the investigation was "extend[ed]" to Toledo, on the "charges" of influence peddling and money laundering in Prosecutor's Decision No. 6, which "formaliz[ed] and continu[ed]" the investigation into Toledo on those charges. *Id*. at 3191-3247. A warrant was then issued for Toledo's arrest and detention on those charges. *Id*. at 3412-3553. On March 7, 2017, the investigation was further "extend[ed]" to include "collusion charges" against Toledo in Prosecutor's Decision No. 8. *Id*. at 3248-91.[13] Thus, Peru has identified the charges for which Toledo's extradition is sought in the Prosecutor's Decisions, and a court in Peru has determined that Toledo's arrest and detention on those charges is warranted.

In addition, the Supreme Court of Justice of Peru (the "Peruvian Supreme Court") reviewed and approved the request for Toledo's extradition, noting that Toledo "is currently being tried for the crimes of influence peddling, collusion, and money laundering," *id*. at 5946, and that he is sought "so that he can be prosecuted and tried, i.e., in order to proceed with the purposes of the declaration criminal proceeding," *id*. at 5948-49. Toledo's Peruvian attorney—who is also one of the declarant's in support of his motion, *see* DE 137-1—had the opportunity to challenge the legality of the extradition request, and did not question the lack of an Order of Prosecution or otherwise raise any argument that Toledo was not "charged" within the meaning of the Treaty at that time. *See* Req. at 6099-6106; Req. Supp. at 29-30.[14] Accordingly, Toledo's claim now that he has not been "charged" because he is not yet subject to an Order of Prosecution should be rejected.

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[13] The charges of influence peddling and collusion were deemed to be alternative in Prosecutor's Decision No. 13 on June 5, 2017. Req. at 3292-97.

[14] On August 4, 2020, Peru submitted a supplement to its extradition request, under cover of a diplomatic note, to the U.S. Department of State, addressing various claims made by Toledo in his motion. That supplement, which is attached to the Declaration of Tom Heinemann, appears in Attachment 1 and is referred to herein as "Req. Supp." with citations to the page numbers appearing at the top right of each page of the document.

3. The Court Should Defer to the View of the U.S. Department of State—with Which Peru Concurs—that the Treaty Applies to Toledo

An independent reason the Court should construe the Treaty to apply to Toledo is that both the U.S. Department of State and the Government of Peru agree that the Treaty applies to him. "It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (internal quotation marks and citation omitted). Such deference is even more warranted when its view is consistent with that of its treaty partner. *See, e.g., Air France v. Saks*, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

In this case, the view of the U.S. Department of State, as set forth in a declaration by an Attorney Adviser in the Office of Law Enforcement and Intelligence, is that Toledo is "charged" as required under the Treaty. State Dep't Decl. ¶ 5. In accordance with the plain language of the Treaty, the State Department understands persons "charged with" crimes to include those wanted for prosecution, even if "a formal charging process akin to the one used in the United States may not have taken place." *Id.* ¶ 2. It routinely grants requests for the extradition of such persons under other extradition treaties, and applies the same interpretation of "charged" in the context of the Treaty with Peru. *Id.* ¶ 3. The Court should likewise adopt the same understanding in this case.

Although the view of the U.S. Department of State is alone sufficient to end the inquiry into the meaning of the "charged" requirement, deference to that view is particularly appropriate here for the additional reason that Peru concurs with it. In particular, as set forth in a supplement to the request for Toledo's extradition, Peru has provided its view that Toledo "has been duly charged" under the Treaty, in compliance with the requirement of Article I. Req. Supp. at 27. Peru has explained that Toledo "is currently a 'defendant' under Peruvian law" because criminal proceedings, which are initiated in Peru with the commencement of court-supervised pretrial investigation, are currently pending against him.

See id. at 14-18, 24. Namely, Peru understands Article I to apply to persons like Toledo who are being "prosecuted" for specified extraditable offenses. *Id*. at 23. This understanding is reflected in the Spanish version of the Treaty, which uses the term "procesadas" for "charged with" in Article I.[15] That language "corresponds to the term 'procesado' . . . in the [Peruvian] Code of Criminal Procedure (Legislative Decree 957) and refers to a person who is formally investigated by a prosecutor and under the control of a guarantee judge, called a pretrial investigation judge." *Id*. at 24. Because Toledo is such a person, Peru interprets Article I of the Treaty to apply to him. *See id*. at 24, 27.[16]

Given the above, the Court should refuse to question the manner by which Toledo is being prosecuted in Peru. Indeed, extradition courts generally defer to a foreign government's interpretation of its own law. *See, e.g.*, *Grin*, 187 U.S. at 190; *Basic v. Steck*, 819 F.3d 897, 901 (6th Cir. 2016); *Skaftouros v. United States*, 667 F.3d 144, 160 n.20 (2d Cir. 2011); *Sainez*, 588 F.3d at 717; *Assarsson*, 635 F.2d at 1244.[17] Such deference is commensurate with the "comity considerations that lurk beneath the surface of all extradition cases," and with due respect for foreign nations' sovereignty. *See Martinez*, 828 F.3d at 463; *see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482

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[15] The Spanish version of the Treaty is available at https://www.state.gov/wp-content/uploads/2019/04/03-825-Peru-Extradition-Treaty.pdf. This version is equally authoritative. *See* Treaty (providing that the English and Spanish texts are "equally authentic"); *Martinez*, 828 F.3d at 459 ("In this case, as in many cases involving treaty interpretation, we have not one official text but two—the English and Spanish versions of the treaty, each of which is "'equally authentic'"); *Gambino*, 421 F. Supp. 2d at 309 (presuming terms in the English and Italian versions of the relevant extradition treaty have the same meaning); Vienna Convention on the Law of Treaties, art. 33, May 23, 1969, 1155 U.N.T.S. 331 ("When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail").

[16] As Peru has explained in its supplement to the extradition request, the completion of a pretrial investigation is within the discretion of the prosecutor. Req. Supp. at 18, 20. Accordingly, Toledo's argument in these extradition proceedings (DE 137 at 8, 14) that the initial stage of the Peruvian criminal proceedings cannot be completed until a Peruvian court rules upon the motion filed by Toledo for a procedure of protection of rights is incorrect. *See* Req. Supp. at 21-22. Rather, the pretrial investigation stage will be completed no later than October 2, 2020. *Id*. at 18. This deadline was initially set for February 4, 2020, but was extended for three months at the request of the prosecution (with Toledo's concurrence) and for additional time due to the COVID-19 pandemic, "with no option for an additional extension" beyond October 2, 2020. *Id*. at 15-21.

[17] *See, also, e.g.*, *In re Extradition of Nezirovic*, No. 7:12-mc-39, 2013 WL 5202420, at *15 (W.D. Va. Sept. 16, 2013) ("It would be a grave insult for this court to presume to tell the Government of Bosnia and Herzegovina what is or is not legitimate under Bosnian law.").

U.S. 522, 546 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation."); *Sainez*, 588 F.3d at 717; *Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991); *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990). It is further supported by the prudential policy of avoiding the high risk that a U.S. court might erroneously interpret the law of a foreign country. *See Emami*, 834 F.2d at 1449; *Assarsson*, 635 F.2d at 1244.[18]

Toledo's suggestion that the Court should ignore the view of Peru when interpreting the Treaty (DE 137 at 12) is misguided. As the Supreme Court has stated, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is [still] given great weight." *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). Moreover, Toledo's citation to *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987) (DE 137 at 12), is inapposite. That case involved a request submitted by the United States to a foreign country (whereas the reverse is the case here), and the issue before the Court was whether the foreign country properly determined that the offenses at issue were extraditable under the relevant treaty. *Van Cauwenberghe*, 827 F.2d at 429. The Court ultimately "defer[red]" to the foreign country's decision that the fugitive was extraditable." *Id*. Toledo's citation to *In re Extradition of Sainez*, No. 07-MJ-0177-JMA, 2008 WL 366135, *5 (S.D. Cal. Feb. 8, 2008) (cited in DE 137 at 12), is equally inapposite. There, the court decided that it was "required to conduct an independent analysis of the appropriate statute of limitations when considering a request for extradition," where Mexico had failed to provide any explanation of the statute of limitations at issue but instead had simply asserted that the underlying arrest warrant was valid. Accordingly, in fulfilling its role of interpreting the Treaty, the Court should give deference to the view of both parties thereto.

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[18] This is particularly true where, as here, the requesting country's interpretation comports with a decision of its own courts. *See, e.g.*, *United States v. Trabelsi*, 845 F.3d 1181, 1192 (D.C. Cir. 2017) ("U.S. courts will defer to the judgment of foreign courts construing their own laws."); *U.S. ex rel. Saroop v. Garcia*, 109 F.3d 165, 169 (3d Cir. 1997) ("Under the international principle of comity [a foreign court's] judgment is entitled to recognition [by a U.S. court]."); *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991) ("[W]hen possible, the decisions of foreign tribunals should be given effect in domestic courts . . . .") (citation omitted).

The practice of the two parties further confirms that the Treaty does not require that a formal charging process akin to that in the United States have occurred in the requesting country. *See Sabatier v. Dabrowski*, 586 F.2d 866, 868 (1st Cir. 1978) (relying on the "history of the relations between the two countries," *inter alia*, to determine that an offense was extraditable under the U.S.-Canada extradition treaty); Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S 331 (requiring that treaties must be interpreted by taking into account, *inter alia*, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). *See* Req. Supp. at 26. As Peru has noted in its supplement to the extradition request, the United States has previously extradited another fugitive to it even where no formal, U.S.-style charging document had been issued. In particular, the United States extradited William Tricket ("Tricket") to Peru for prosecution on a homicide charge in 2008, while the Peruvian criminal proceedings were at a similar stage to those currently pending against Toledo. *Id*. Tricket was not subject to an Order of Prosecution but rather to an order to open investigation analogous to the Prosecutor's Decisions in Toledo's case.[19] Regardless, Peru sought, and the United States granted, extradition based on the Treaty. Likewise, here, Peru has properly sought Toledo's extradition under the Treaty even though he is not subject to a formal charging document analogous to a U.S. indictment.

B. Peru Has Complied with the Charging Document Requirement of the Treaty

Relatedly, Peru's extradition request is "supported by . . . a copy of the charging document," as required by Article VI(3)(b) of the Treaty. Peru complied with that Treaty requirement in this case by providing copies of the Prosecutor's Decisions along with its extradition request. *See* Req. at 3191-3247, 3248-91. In its extradition request, the Government of Peru stated that "[t]he general and specific charges brought against [Toledo] are listed in" these documents. *Id*. at 6.[20] As noted above, the

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[19] According to Peru, the Tricket case was filed in that country under a now repealed version of its criminal procedure code. Req. Supp. at 26. Therefore, the request for Tricket's extradition was supported with an order to open investigation, which "is equivalent to the formalization of a pretrial investigation in the current criminal procedure." *Id*.

[20] Similarly, the warrant for Toledo's arrest (which predates Prosecutor's Decision No. 8) specifies that "[t]he specific charges against [Toledo] are contained in District Attorney's Decision No. 06 dated February 03 2017," that is, "i) Influence Peddling; and, ii) Money Laundering"). Req. at 209.

documents identify Toledo and recite the "charges" of influence peddling, collusion, and money laundering against him, in addition to providing a description of the facts underlying each alleged offense. As with the "charged" requirement in Article I of the Treaty, both a plain reading of Article VI(3)(b) as well as the views of both parties to the Treaty indicate that the "charging document" requirement has been satisfied in this case.

The plain text of Article VI(3)(b) does not specify that any particular type of charging document, such as an indictment, charge sheet, or any other formal document, is required. Accordingly, as the U.S. Department of State recognizes, the drafters of the Treaty allowed for different types of documents to fulfill the requirement. *See* State Dep't Decl. ¶ 4; *cf., e.g., Assarsson*, 635 F.2d at 1243 ("If the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided."); *Emami*, 834 F.2d at 1448 ("grafting such a [formal charge] requirement as Emami proposes on to the treaty in the instant case is inadvisable").[21]

Toledo's contention (DE 137 at 15) that only an Order of Prosecution, and not the Prosecutor's Decisions, satisfies Article VI(3)(b) is thus incorrect. Indeed, the Spanish version of the Treaty does not require that specific type of document (the "*Orden de Enjuiciamiento*") but rather just the "*documento de imputación*." Contrary to Toledo's suggestion (DE 137 at 16), the requirement that the requesting country support its extradition request with "*the* charging document" rather than "*a* charging document" does not change the analysis. Any document that sets forth the criminal charges can serve as "*the* charging document," just as much as it can serve as "*a* charging document."

As Toledo notes (DE 137 at 16-17), the Treaty reflects a different approach to the documentary requirements in Article VI(4)(a), which, in the case of a person already found guilty or sentenced, requires the requesting country to provide "a copy of the judgment of conviction or, if such copy is not available, a statement by a competent judicial authority that the person has been found guilty." While Toledo argues that Article VI(4)(a) is clearly more permissive than Article VI(3)(b), that is not so. The

[21] While Toledo cites to *Assarsson* and *Emami* in support of his argument that Peru has failed to satisfy Article VI(3)(a) of the Treaty, the provisions imagined by the courts in those cases would have required a specific formal charging document, unlike the "charging document" required in this case.

fact that Article VI(4)(a) expressly permits an alternative to a copy of the judgment of conviction to suffice when the latter is not available may simply indicate that the "judgment of conviction" refers to a specific document. By contrast, the absence of similar language allowing for an alternative to the "charging document" may suggest that the documentary requirement in Article VI(3)(a) is not so rigid, such that no express provision for an alternative is necessary.

In any event, in accordance with *Factor*, courts have interpreted extradition treaties' documentary requirements broadly. 290 U.S. at 298. For example, the Supreme Court in *Grin v. Shine* established that the warrant requirement in extradition treaties must be broadly interpreted, explaining that "it can hardly be expected of us that we should become conversant with the criminal laws of [a requesting state], or with the forms of warrants of arrest used for the apprehension of criminals." 187 U.S. at 190. Accordingly, the Court held that the U.S.-Russia treaty's warrant requirement was satisfied by a document that was "evidently designed to secure the apprehension of the accused, and his production before an examining magistrate," even though it did not resemble a U.S. arrest warrant.[22] *Id.* at 190-91; *see also, e.g.*, *Basic*, 819 F.3d at 901 ("We will not second guess th[e] determination" by the Government of Bosnia that a "[d]irective to find and arrest" the fugitive "for detention and issuance of an international arrest warrant" constituted the "warrant of arrest" required under the applicable extradition treaty); *United States v. Nolan*, 651 F. Supp. 2d 784, 796 (N.D. Ill. 2009) (Costa Rican arrest warrant satisfied the relevant treaty's requirement that the requesting country provide "[a] copy of the charging document, or an equivalent document issued by a judge or judicial authority"); *cf., e.g.*, *Sainez*,

[22] The warrant requirement in the U.S.-Russia treaty (which is no longer in force) provided that when a fugitive is "merely charged with the commission of an extraditable crime or offense, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or a magistrate duly authorized to do so." *Grin*, 187 U.S. at 190. The Court described the warrant at issue in that case as "a certified copy of an order by one purporting to act as an examining magistrate, and reciting that 'having investigated the preliminary examination concerning the accusation of the Cossack, Simeon Grin,' and that 'as he is hiding under a false name, and, as is seen from his letters, is looking out for means to prevent his arrest and the finding out of his address by the authorities, his temporal place of residence being known at present,' pursuant to art. 389 of the Criminal Code of Procedure, 'he is ordered to be brought to the city of Rostov on the Don, in order to be placed at the disposition of the examining magistrate of the Taganrog circuit court.'" *Id.* at 190-91. The document did not, apparently, specify the underlying charges for which Russia sought extradition.

588 F.3d at 717 (concluding that, for the purpose of an extradition proceeding, a Mexican arrest warrant could constitute a charging document even if it was not analogous to a U.S. indictment, such that it tolls the U.S. statute of limitations, based on "established approach of giving credence to foreign proceedings").

This Court should likewise refuse to impose *sub silentio* technical requirements on the form and substance of Peru's "charging document" for purposes of the Treaty. The fact that the Prosecutor's Decisions might not adhere to all the rituals of a U.S.-style charging document is immaterial. *See, e.g.*, *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) ("It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time.").

The views of the U.S Department of State and Peru further support a finding that the Prosecutor's Decisions satisfy the Treaty's "charging document" requirement. In particular, both Treaty parties agree that Peru has satisfied the documentary requirement set forth in Article VI(3)(b). *See* State Dep't Decl. ¶ 5; Req. Supp. at 27. As the State Department concludes, the Prosecutor's Decisions constitute "the charging document" because they identify the charges for which Toledo's prosecution is sought, which is all that Article VI(3)(b) requires. *See* State Dep't Decl. ¶¶ 4-5. Peru similarly concludes that the Prosecutor's Decisions, *i.e.*, the "charging documents resulting from the Decision to Formalize the Pretrial Investigation are 06 and 08, which were submitted in the extradition request," satisfy Article VI(3)(b) of the Treaty because they "contain the charges and evidence against" Toledo. *See* Req. Supp. at 27-28. According to Peru, a document formalizing a pretrial investigation such as the Prosecutor's Decisions is "issued by a prosecutor when there is probable cause," and serves the function of informing the defendant of the factual allegations against him and the alleged violations of law, *see id*. at 24-25; the more formal Order of Prosecution is thus not required to satisfy Article VI(3)(b) of the Treaty, as Toledo claims, *see id*. at 27.[23] As explained above, the Court should defer to these views.

[23] Toledo notes that he has yet not been given an opportunity to present exculpatory evidence. DE 137 at 14. Peru explains that such an opportunity arises in its legal system following the decision to formalize the pretrial investigation. Req. Supp. at 25.

These views also accord with the conclusion of the Peruvian Supreme Court, which approved the request for Toledo's extradition. In its decision, that court refers to the Prosecutor's Decisions in a section entitled "Formal Charges or Criminal Indictment," Req. at 5980-83, and holds that "[t]he documents required by the Treaty," including "copies of the prosecution's charging documents," are "attached to th[e] extradition request," *id*. at 5980, 6096-97. Just as Toledo's Peruvian counsel declined to challenge that the "charged" requirement of Article I was met before that court, they similarly declined to challenge that the documentary requirements of Article VI were met, as Toledo does now.

Toledo's heavy reliance on the findings in *Aguasvivas v. Pompeo*, 405 F. Supp. 3d 347, 354 (D.R.I. 2019) (cited in DE 137 at 16)—which contradict the plain language of the Treaty as well as the view of the two parties thereto in this case—is misplaced. As an initial matter, the government appealed that decision, and the case currently remains pending in the First Circuit. *See Aguasvivas v. Pompeo*, No. 19-1937 (1st. Cir. Sept. 19, 2019). As of the date of this filing, that court has not yet issued its opinion in the case, and any reliance on the district court's decision as persuasive authority here is thus premature. Moreover, the issue in that case, unlike here, was whether the arrest warrant provided by the Dominican Republic in support of an extradition request satisfied not only the relevant treaty's requirement that the requesting country provide an arrest warrant but also its requirement that the requesting country provide a charging document. *Aguasvivas*, 405 F. Supp. 3d at 354. The extradition court, which first considered and certified the Dominican Republic's extradition request, had found that the warrant satisfied both requirements; but the district court, which reviewed the certification, disagreed, finding that "[b]ecause the Government's request for extradition was not supported by both a warrant and charging document, . . . the Treaty does not allow for the extradition of [the fugitive]." *Id*. at 355. Here, by contrast, Peru has provided both a warrant and charging documents.

In this case, the Peruvian Prosecutor's Decisions fulfill the function of making Toledo aware of the charges for which his extradition is sought. To require something more and find that only one specific document may contain the charges, as Toledo asks this Court to do, would improperly elevate form over substance. Accordingly, Toledo's argument that Peru's extradition request is not supported by a "charging document" under the Treaty should be rejected.

C. The Crimes Alleged by Peru Are Covered by the Treaty

Toledo's argument that the offense of influence peddling is not "extraditable" under the Treaty should similarly be rejected. Article I of the Treaty provides for the return of fugitives charged with (or found guilty of, or sentenced for) an "extraditable offense," as that term is defined under the Treaty. Article II of the Treaty defines offenses as extraditable if they meet the requirement of dual criminality, that is, if the criminal conduct is punishable under the laws of both the United States and Peru by a deprivation of liberty for a maximum period of more than one year or by a more severe penalty.

In assessing whether the conduct alleged by Peru is so criminalized both in that country and in the United States, the Court should examine the description of criminal conduct provided by Peru in support of its charges and decide whether that conduct, if it had been committed here, would be criminal under U.S. federal law, the law of the state in which the hearing is held, or the law of a preponderance of the states. *See, e.g.*, *Knotek*, 925 F.3d at 1128-29 & n.10; *Cucuzzella*, 638 F.2d at 107-08. A requesting country need not establish that its crimes are identical to ours. *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998) ("The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical."). Rather, "the court looks at whether 'the essential character of the transaction is the same, and made criminal by both statutes.'" *Knotek*, 925 F.3d at 1131 (quoting *Wright v. Henkel*, 190 U.S. 40, 62 (1903); brackets omitted). As the Supreme Court explained in *Collins v. Loisel*, the dual criminality requirement is not a technical concept involving a comparison of elements of the two countries' offenses:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the *particular act* charged is criminal in both jurisdictions.

259 U.S. 309, 312 (1922) (emphasis added).

An examination of the conduct described in the documents provided by Peru, which is detailed in the government's memorandum on extradition law and detention (DE 8 at 7-19), establishes that the offense of influence peddling in violation of Section 400 of the Peruvian Criminal Code meets the dual criminality requirement. Specifically, the conduct underlying that offense would be punishable under

U.S. law, for example, as bribery of a public official, in violation of 18 U.S.C. § 201(b)(2), if it had been committed in the United States.[24] As is relevant here, a violation of Section 201(b)(2) requires that the defendant: (1) was a public official; (2) solicited, received, or agreed to receive something of value in return for being influenced in the performance of an official act; and (3) acted corruptly, that is, intending to be influenced in the performance of an official act. *See Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, No. 8.13 (Dec. 2019).

In this case, according to Peru, when Toledo was the president of that country, he solicited a bribe in connection with the tender by Proinversion, a Peruvian state agency, for contracts to construct a highway between Peru and Brazil. *See, e.g.*, Req. at 5964-68. In particular, individuals acting on behalf of Toledo, including Avraham Dan On, Gideon Weinstein, and Sabi Saylan, told Jorge Henrique Simoes Barata ("Barata"), superintendent of Odebrecht in Peru, that the company should pay Toledo US$35 million in exchange for Toledo ensuring that the schedule for the highway project would not be delayed and that the conditions for bidding on the project would be modified, so as to facilitate Odebrecht winning the contracts. Barata agreed to pay the bribe, and informed Odebrecht's joint venture partners about the agreement. Toledo was thereafter involved in Proinversion's tender process, for example, by having the agency's board of directors hold at least one meeting in the presidential palace, attending the portion of that meeting at which the project was discussed, and inquiring about shortening the deadlines for the tender (whereafter Proinversion set an expedited schedule). In addition, Toledo signed an executive resolution exempting the project from certain assessments that would otherwise have been mandatory. Odebrecht was ultimately awarded contracts for two sections of the highway at a ceremony that Toledo attended, held at the presidential palace, after a Proinversion Committee Chairman who had

[24] Toledo does not contest dual criminality of the other two offenses for which his extradition is sought, nor is there any basis on which to do so. The conduct underlying those offenses, collusion and money laundering, would be punishable under U.S. law, respectively, for example, as conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i), or as transporting funds for the purpose of laundering, in violation of 18 U.S.C. § 1956(a)(2)(B)(i).

been appointed by Toledo dismissed last-minute concerns about the qualifications of the Odebrecht joint venture. In return, Odebrecht paid part of the agreed-upon bribe.

Such conduct is punishable under Peruvian law by up to eight years' imprisonment, *id*. at 3587, and under U.S. law by up to fifteen years' imprisonment, 18 U.S.C. § 201(b). Accordingly, the influence peddling offense is encompassed by Article II of the Treaty.

Toledo plucks a one-sentence summary of his alleged criminal conduct from the extradition request and argues that such conduct would not constitute a crime under 18 U.S.C. § 201(b)(1), without addressing subsection 2 of the same statute. DE 137 at 21-22. While he focuses on that provision simply because it is identified by Peru in its extradition request, the Court is not so limited in its analysis of U.S. law for purposes of dual criminality. *See, e.g.*, *Knotek*, 925 F.3d at 1131-32 ("What matters is that the two country's laws are directed to the same basic evil.") (citation and internal quotation marks omitted); *Bozilov v. Seifert*, 983 F.2d 140, 143 (9th Cir. 1992) (German drug trafficking charges were extraditable because the fugitive "could have been charged" with conspiracy to distribute narcotics in the United States). Here, the Peruvian statute for influence peddling, which targets a public official's act of inducing someone to give or promise an economic benefit, Req. at 3224, is more analogous to Section 201(b)(2) than to Section 201(b)(1), which focuses on reverse scenario, which targets an individual giving or promising something of value to a public official.

In addition, Toledo states incorrectly (DE 137 at 22) that dual criminality is lacking because Peru's statute lacks a "similar intent" to the U.S. statute. As an initial matter, Section 201 requires a corrupt intent, *i.e.*, an "intent to be influenced to perform an act in return for financial gain," *United States v. Leyva*, 282 F.3d 623, 626 (9th Cir. 2002), which is similar to the Peruvian statute's requirement that the defendant act "invoking real or simulated influences" to "offer[] to mediate before a government official" for a "benefit." Req. at 3587. But in any event, Toledo disregards the admonition set forth in *Collins* that the dual criminality inquiry does not involve an element-by-element comparison. As the Ninth Circuit has noted, "many courts have found two crimes to be substantially analogous [so as to satisfy dual criminality] despite differences in their required elements." *Knotek*, 925 F.3d at 1132. For example, the Supreme Court in *Collins* held that dual criminality existed where the relevant foreign

statute (for "cheating") did not contain the exact same "intent to defraud" requirement of the U.S. analogue. 259 U.S. at 311-12.[25] Evidence demonstrating Toledo's corrupt intent is apparent in the allegations underlying Peru's charge of influence peddling, *see, e.g.*, Req. at 5964-68; nothing further is required to satisfy dual criminality.

III. CONCLUSION

For the foregoing reasons, the United States requests that the Court deny Toledo's motion to deny Peru's request for his extradition.

[25] *See also, e.g.*, *Clarey*, 138 F.3d at 766 (holding that dual criminality for a Mexican charge of simple homicide was properly based on the U.S. felony murder statute); *Emami*, 834 F.2d at 1449 (rejecting fugitive's claim that "unlike the American crime [of fraud], the German crime does not require a knowing false representation of a material fact made with the intent to deceive"); *In re Extradition of Russell*, 789 F.2d 801, 803-04 (9th Cir. 1986) (rejecting fugitive's argument that dual criminality was lacking where an overt lack was not required under Australia's conspiracy law, as it is under the U.S. law, because the conduct underlying the Australian charges included evidence establishing overt acts); *In re Extradition of Fordham*, 281 F. Supp. 3d 789, 801 (D. Alaska 2017) (rejecting fugitive's argument that "differences in *mens rea* requirements between the United States and the United Kingdom . . . defeat dual criminality"); *In re Extradition of Lui*, 939 F. Supp. 934, 947 & n.11 (D. Mass. 1996) (rejecting fugitive's argument that "dual criminality [for bribery charges] is not satisfied because United States law imposes a stricter standard of intent than Hong Kong law"); *Trifonov v. Fox*, No. 14-0366, 2014 WL 3735419, at *14 (W.D. Wash. July 28, 2014) (rejecting fugitive's claim that dual criminality was not satisfied because the U.S. laws "require a greater *mens rea* than is required to find a violation of [the foreign law]"); *In re Extradition of Ritzo*, No. 2:09-MJ-189, 2010 WL 1542543, at *4 (D.N.D. Apr. 15, 2010) (dual criminality established even though the foreign statute did not include the same specific intent as the U.S. statute); *Causbie Gullers v. Bejarano*, No. 06CV1659 JM (AJB), 2007 WL 9771356, at *4 (S.D. Cal. Jan. 8, 2007), *aff'd in part and remanded on other grounds*, 293 F. App'x 488 (9th Cir. 2008) (rejecting fugitive's argument that "dual criminality is not satisfied here because a successful fraud prosecution in the United States requires proof of specific intent to deceive, whereas such proof is not required for a criminal fraud conviction under Mexican law"); *cf. United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993) (in a U.S. criminal case involving a defendant extradited from Pakistan, no dual criminality where there was no sufficiently analogous foreign crime that would cover the alleged conduct).

DATED: August 7, 2020

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

Rebecca Haciski

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ELISE LAPUNZINA
Assistant United States Attorney
CHRISTOPHER J. SMITH
Associate Director
REBECCA HACISKI
Trial Attorney
Office of International Affairs